Matter of Noetzel
2015 NY Slip Op 30659(U)
March 12, 2015
Sur Ct, Nassau County
Docket Number: 2012-372330
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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Probate Proceeding, Will of BARBARA NOETZEL, Deceased.

File No. 2012-372330

Dec. No. 30499

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In a decision and order dated February 28, 2014 denying petitioners' motion for summary judgment based upon the application of CPLR 3212 (f), this court granted leave to renew the motion after the completion of discovery. In that opinion the court wrote:

> In this contested probate proceeding, the petitioners, Robert and Paul Noetzel, nominated co-executors and two of decedent's four surviving children, move * * * [to] admit the proffered instrument dated March 31, 2010 to probate and dismissing the objections filed by decedent's other son, John W. Noetzel, Jr. Decedent's spouse John W. Noetzel and her remaining child, daughter Christy A. Kleeman, also survive.
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> The decedent died on July 17, 2012. She was 83 years old. An instrument purported to be decedent's last will and testament, dated as aforesaid, and naming the petitioners as co-executors, has been submitted for probate. The propounded instrument leaves the decedent's entire residuary estate to a revocable trust of the same date created by decedent and her surviving spouse as co-grantors. To one degree or another, all three sons have a remainder beneficial interest in the trust.
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> Respondent has filed objections to probate alleging that: (1) the propounded instrument was not freely or voluntarily made or executed by the decedent, but was procured by fraud or undue influence or duress; (2) decedent lacked testamentary capacity; (3) she was unaware of the objects of her bounty; and she did not know the extent or value of her assets.
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> 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 or her 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 an objectant fails to raise any issues of fact regarding testamentary capacity, execution of the will, 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]).

At the outset it must be observed that objectant's attorney's affirmation in opposition to this motion consists almost in its entirety of argument that in one way or another discovery in this matter is not yet complete and for that reason summary judgment remains premature. There is no

merit to this argument and it is rejected.

Four (4) conferences were held with counsel for the parties including the one on March 12, 2014 mandated by the February 28, 2014 order. Petitioners had come forward with sworn responses that they did not have certain documents in their possession or control. Two additional witnesses were deposed by respondent. Petitioners' offered to make Paul Noetzel available for examination, as had been requested by respondent, with the reasonable condition that it be after business hours because of his new employment which counsel for objectant rejected. Notes by a member of the Law Department from the last conference on June 25, 2014 indicate that respondent would move if he was so advised to determine alleged open discovery items. He never did so.

Due execution is not an issue in the case as it was never raised as an objection.

The petitioner has the burden of proving testamentary capacity. From an overall perspective on the question of testamentary capacity, it is essential that the testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property, and his relation to the persons who ordinarily would be the objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although he need not have precise knowledge of his assets, he must be able to 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]).

There is evidence presented in this case of the decedent and her husband meeting with

experienced and well regarded members of the Long Island trust and estates bar and the preparation and execution of the decedent's will as well as other estate planning documents. They witnessed the will and executed the self-proving affidavit. As both witnesses attested that to the best of their knowledge Barbara Noetzel was of sound mind, there is a presumption that that was the case (*Matter of Leach*, 3 AD3d 763 [3d Dept 2004]; *Matter of Mooney*, *supra*). Beyond presumptions, there is every indication from sworn statements and testimony by them and others that decedent was sufficiently competent to make a will and more than sufficiently cognizant of her assets and the natural objects of he bounty.

There is nothing to controvert that showing. The objectant's argument that the testamentary scheme is "illogical" and that the testator had short term memory issues are insufficient to raise a triable question of fact.

The burden of proof on the separate issue of undue influence and fraud lies with respondent.

In order to prove undue influence, the objectant 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 his will, his family relations, the condition of his 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]). Lastly, it remains an essential element of an undue influence case to prove that undue influence was actually exerted on decedent (*Matter of Fiumara*, 47 NY2d 845 [1979]).

To prevail upon a claim of fraud, rather than a preponderance of the evidence the higher standard of proof of clear and convincing evidence applies (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) and objectants must show that the proponent knowingly made false statements to the decedent to induce him to execute a will that disposed of his property in a manner contrary to that in which he would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]).

Not a shred of evidence has been proffered by objectant to meet his burdens on either undue influence or fraud.

The proponent's motion for summary judgment dismissing the objections and admitting the will to probate is therefore granted.

Settle decree on notice.

Dated: March 12, 2015

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