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

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Probate Proceeding, Will of

IRVING LUBLIN,

Deceased.

File No. 2010-362873

Dec. No. 30812

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In this contested probate proceeding, petitioner Seth Lublin moves for an order granting summary judgment pursuant to CPLR 3212 dismissing the objections filed by objectant Debra Rosa. Ms. Rosa opposes the motion. For the reasons set forth below, the motion is granted.

The decedent Irving Lublin died on September 11, 2010. He was survived by his wife, Roselyn, and two children, Seth Lublin, the petitioner, and Debra Rosa, the objectant.

The petitioner has offered for probate a document dated February 7, 1997 as the decedent's last will and testament. The will provides, in pertinent part, for the disposition of the estate to the decedent's wife and son. Debra Rosa's children are contingent residuary beneficiaries. The will contains an in terrorem clause. Ms. Rosa filed objections to the propounded instrument and alleges that the will was not the decedent's; that the will was not duly executed; that the decedent was not of sound mind and memory; and that the will was obtained by the fraud and undue influence of Roselyn Lublin and Seth Lublin or persons acting in concert with them.

Attached to the motion for summary judgment are copies of the testimony taken of the following: Seth Lublin (proponent); Debra Rosa (objectant); Martin Semel (decedent's attorney and draftsperson); Kenneth Klein (attorney/witness); Nancy McCabe (witness); Jerry Broder (decedent's brother-in-law); Stuart Broder (nephew); Michael Broder (nephew); and Kelli

Galbraith (niece). Also included in support and in opposition to the motion are various affirmations/ affidavits as well as certified copies of the decedent's medical records.

It is uncontroverted that the decedent executed three last wills and testaments in a three-year period. Pursuant to the terms of the first will, dated March 29, 1994, the decedent's wife is devised all the real property and Seth Lublin is the contingent beneficiary of the real property. The decedent's shares in Mid Island Department Store are bequeathed to Seth Lublin. Trusts are established for the benefit of the decedent's spouse and upon her death further trusts are established for the benefit of Seth Lublin and Debra Rosa. The trust provisions for Debra Rosa differ depending on whether or not she is married to Howard Rosa. The second will is dated October 31, 1996. It provides, in pertinent part, for the deletion of the bequest of the Mid Island Department Store shares to Seth Lublin as the business was liquidated in 1994. Debra Rosa is also removed and her children are named as contingent beneficiaries. The third and propounded will dated February 7, 1997, echoes the 1996 will with some minor changes.

Gleaned from the deposition testimony of the various witnesses, the following events occurred during this three-year period. At some time prior to 1996, the decedent and his wife set up brokerage accounts for Debra Rosa's three children. With regard to these transactions, Roselyn Lublin sent a letter to her daughter, Debra, which set off a series of events. In response to the letter, Debra Rosa's lawyer sent a letter dated February 29, 1996, in which he questioned the mental health of Roselyn Lublin and advised her that Debra was "currently evaluating what options are available to her in order to ascertain the current state of your psychological well-being." Debra Rosa testified to being estranged from her parents for a period of approximately two years (1996 to 1998 time period). She further testified that her parents did not come to a

bnai mitzvah planned for two of her children because of a disagreement regarding the part her brother would play in the celebrations. Roselyn Lublin's psychiatrist also sent Debra Rosa a letter in which he supported Roselyn's decision not to attend the bnai mitvah.

The attorney/draftsperson, Martin Semel, and the witnesses to the propounded instrument, Kenneth Klein and Nancy McCabe were examined pursuant to SCPA 1404.

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]). The papers submitted in connection with a motion for summary judgment are always viewed in the light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 610 [2d Dept 1990]). 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 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]).

In a probate contest, the proponent has the burden of proof on the issue of due execution (*Matter of Stegner*, 253 App Div 282, 284 [2d Dept 1938], citing *Delafield v Parish*, 25 NY 9, 29, 34 [1862]). The principal statutory requirements are: the testator must sign at the end of the instrument in the presence of at least two attesting witnesses, or his signature must be acknowledged by him to each of the witnesses; the testator must declare to the witnesses that the instrument to which his signature is affixed is his will and that he wishes them to act as witnesses to its execution; and the attesting witnesses must, within one thirty-day period, both attest the testator's signature, as signed or acknowledged before them and at the request of the testator sign their names and affix their residence addresses at the end of the will (EPTL 3-2.1). The supervision of a will's execution by an attorney gives rise to an inference of due execution (*see e.g. Matter of Finocchio*, 270 AD2d 418, 419 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586, 587 [2d Dept 1984]). Additionally, a validly executed attestation clause serves as prima facie evidence that the instrument was properly executed (*Matter of Collins*, 60 NY2d 466, 471 [1983]).

Mr. Semel testified at his SCPA 1404 examination that the decedent was a long time client of his and that he had represented the decedent and his family in connection with their commercial matters. Specifically, Mr. Semel testified that he was counsel to Mid Island

Department Stores from the late 1970s until the business ended. Mr. Semel drafted and executed wills for the decedent and the decedent's wife. Mr. Semel's recollection was that he had not drafted any wills for the decedent prior to 1994 but he could not be certain as most of his files were destroyed on September 11, 2001.

With regard to the execution of the propounded instrument, Mr. Semel testified that the decedent and his wife came to his office on February 7, 1997. Mr. Semel went over the will with the decedent paragraph by paragraph and answered any questions that the decedent asked. Although Mr. Semel did not recall the exact value of the decedent's estate, he produced a document entitled "Lublin Family Assets" which was provided to him on or before February 7, 1997. Mr. Semel testified that he asked Mr. Klein and Ms. McCabe to come into the conference room to act as witnesses. He then testified " I asked Irving if this was his Last Will and Testament? He answered yes. I asked him if he understood the provisions? He answered yes. I asked him if he was signing of his own free will? He answered yes. I asked him if he was asking myself, Mr. Klein and Ms. McCabe to act as witnesses? He answered yes. Then he signed and inserted the date."

The testimony of Kenneth Klein, an attorney who acted as a witness to the decedent's will, was taken. He testified that the decedent declared the document to be his last will and testament. The decedent then asked the three of them (Mr. Semel, Ms. McCabe and Mr. Klein) to be witnesses. Mr. Klein saw the decedent sign the document and he affixed his signature as a witness. Ms. McCabe, the third witness, testified that she knew the decedent, that Mr. Semel oversaw the execution of the will and that she was a witness to the same.

Mr. Semel's presence at the execution ceremony gives rise to an inference of due execution (*see e.g. Matter of Finocchio*, 270 AD2d 418, 419 [2d Dept 2000]; *Matter of Hedges*, 100 AD2d 586, 587 [2d Dept 1984]). Based upon the record, the court is satisfied that the will was executed in conformance with the statutory requirements of EPTL 3-2.1. The court finds that Seth Lublin has made a prima facie showing of entitlement to summary judgment on the issue of due execution of the propounded instrument. The court has searched the record, and finds that it is devoid of any evidence that the instrument was not properly executed. Because all of the statutory requirements were met and no issues of fact requiring a trial exist, the petitioner's motion for summary judgment is granted regarding due execution.

The proponent also bears the burden of proving that the testator possessed testamentary capacity (*Matter of Kumstar,* 66 NY2d 691, 692 [1985]). The court looks at these factors: "(1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them" (*id.*). Moreover, sanity and testamentary capacity are presumed unless there is evidence to the contrary, the presumption being that "a mind once sound continues" to be so (*Matter of McCarthy*, 269 App Div 145, 152 [1st Dept 1945], *affd* 296 NY 987 [1947]). As a general rule and until the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [citations omitted]).

Mr. Semel, the decedent's long time attorney, testified that he had no concerns at all about the decedent's capacity and that the decedent did not appear confused. He testified "he

[the decedent] knew everything. He knew what his assets were. He understood what he was doing in his will. We talked about it. I had no concerns." According to Mr. Semel, the decedent did not have any problems communicating and was never confused. Mr. Semel noted that the illnesses that affected the decedent did not occur until several years after he had executed his will. He further stated that there was nothing to indicate that the decedent was coerced into signing his will. The copies of certified medical records which are attached to the motion, note that in April and June of 1998, over a year after the execution of the decedent's will, the decedent was alert and oriented times three, that his speech was clear and his behavior calm and cooperative.

Based upon the record, the court finds that Seth Lublin has met his burden of proving that the decedent possessed testamentary capacity on the date he executed his will. In opposition, the objectant points to the testimony of the decedent's brother-in-law and nephews. A review of the testimony, however, shows that the relatives saw the decedent several times a year and in the time period in question noted a mild cognitive decline in the decedent. All noted that the decedent's dementia became pronounced after his illnesses which started in the late 1990s (after the execution of the will) and resulted, ultimately, in his death in 2010. Thus, although the objectant alleges that the decedent was mentally incapacitated, she has not introduced any evidence that creates a triable issue of fact. Accordingly, the petitioner's motion for summary judgment on the issue of testamentary capacity is granted.

The objectant has the burden of proof on the issue of undue influence (*Matter of Bustanoby,* 262 AD2d 407, 408 [2d Dept 1999]). The three elements of undue influence have been described as motive, opportunity, and the actual exercise of undue influence (*see Matter of*

*Fiumara,* 47 NY2d 845, 846 [1979]). This classic formulation about what constitutes undue influence still resonates in the case law:

> "[i]t must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear" (*Children's Aid Socy. v Loveridge,* 70 NY 387, 394 [1877]; *see also Matter of Kumstar,* 66 NY2d 691, 693 [1985]).

Undue influence is rarely proven by direct evidence; rather, it is usually proven by circumstantial evidence (*Matter of Walther,* 6 NY2d 49, 54 [1959]; *Children's Aid Socy. v Loveridge,* 70 NY 387, 395 [1877]*; Matter of Burke,* 82 AD2d 260, 269 [2d Dept 1981] ). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28, 31 [1901]; *Children's Aid Socy. v Loveridge,* 70 NY 387, 395 [1877]; *Matter of Callahan,* 155 AD2d 454, 454 [2d Dept 1989]; (2) whether the attorney who drafted the will was the testator's attorney (*Matter of Lamerdin*, 250 App Div 133, 135 [2d Dept 1937]; Matter *of Elmore,* 42 AD2d 240, 241 [3d Dept 1973] ); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v Loveridge,* 70 NY 387, 402 [1877]; *Matter of Kruszelnicki,* 23 AD2d 622, 622 [4th Dept 1965]); (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]) and (5) whether the testator was isolated from the

natural objects of his affection (*Matter of Burke,* 82 AD2d 260, 273 [1981]; *see Matter of Kaufman,* 20 AD2d 464, 474 [1st Dept 1964], *affd* 15 NY2d 825 [1965]). With this in mind, it is also important to remember that in order to defeat a motion for summary judgment, the objectant must demonstrate that there is a genuine triable issue by allegations that are specific and detailed and substantiated by admissible evidence in the record. Mere conclusory assertions will not suffice (*Matter of O'Hara,* 85 AD2d 669, 671 [2d Dept 1981] ).

The objectant has offered the following in support of the claim for undue influence. Debra Rosa testified that her brother yelled at their parents to get his way. The other witnesses also testified that the proponent had a temper and had been heard yelling at his parents over the years. Debra Rosa testified that whenever she wanted to visit her parents, her brother would yell at her mother and her mother would then call her and ask her to cancel the trip. The decedent's nephew Michael Broder testified that the decedent would not have changed his will without discussing it with him and that Seth Lublin was "running the show." Although there are allegations that Seth Lublin was helping his parents with their finances, he was neither an attorney-in-fact for his parents at that time, nor was any evidence produced which showed that he affirmatively assisted them in any way with their finances.

The testimony reveals that the decedent was a businessman with definite views. Mr. Semel testified that the decedent asked him to change his will to omit Debra Rosa. The decedent told his attorney that Debra Rosa had engaged in a course of conduct which resulted in the decedent being unable to see his grandchildren. When queried about this, Debra Rosa admitted to being estranged from her parents but denied that she interfered with access to her children. When all of the events are taken together during this time period, it is clear that the decedent and

Debra Rosa were estranged and her omission from the will was due to this and not the product of fraud, undue influence or lack of testamentary capacity. The objectant has failed to show that the decedent's will was the product of undue influence. Accordingly, the petitioner's motion for summary judgment on the issue of undue influence is granted.

The objectant also bears the burden of proving fraud (*Matter of Schillinger*, 258 NY 186, 190 [1932]; *Matter of Beneway*, 272 AD 463, 468 [3d Dept 1947]). It must be shown that "the proponent knowingly made a false statement that caused decedent to execute a will that disposed of [her] property in a manner different from the disposition [she] would have made in the absence of that statement" (*Matter of Clapper,* 279 AD2d 730, 732 [3d Dept 2001]). Moreover, a finding of fraud must be supported by clear and convincing evidence (*Simcusky v Saeli*, 44 NY2d 442, 452 [1978]). In order to defeat the motion for summary judgment on the issue of fraud, the objectant must come forward with more than "mere conclusory allegations and speculation" (*Matter of Seelig*, 13 AD3d 776, 777 [3d Dept 2004]). To defeat a motion for summary judgment, the objectant must produce sufficient evidence to show that there is an issue of fact to the effect that the proponent made a false statement or statements to the decedent to induce her to make this will, that the decedent believed the statement, and that without such statement or statements, the propounded will would not have been executed (NY PJI 7:60). A showing of motive and opportunity to mislead is insufficient; evidence of actual misrepresentation is necessary (*Matter of Gross*, 242 AD2d 333, 334 [2d Dept 1997]).

The objectant has failed to demonstrate that a question of triable fact exists with respect to fraud; the record is devoid of any evidence that fraud was perpetrated upon the decedent in the

making or execution of the propounded instrument. Accordingly, the petitioner's motion for summary judgment is granted regarding fraud.

For the above-stated reasons, the motion for summary judgment is granted, and the objections to the probate of the propounded instrument are dismissed.

Settle decree.

Dated: June 2, 2015

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