Matter of Leeds
2015 NY Slip Op 31237(U)
June 30, 2015
Surrogate's Court, Nassau County
Docket Number: 2013-374115
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

RAYMOND LEEDS,

Deceased.

File No. 2013-374115

Dec. No. 30694

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In this contested probate proceeding, the petitioner has moved for an order pursuant to CPLR 3212 granting summary judgment dismissing the objections and admitting the will to probate. As explained below, the motion is granted in part and denied in part.

The decedent, Raymond Leeds, died on January 9, 2013, leaving a purported will dated September 25, 2012 which has been offered for probate by Arleen Leeds, his daughter. The decedent was survived by his daughter, Arleen, and by two grandchildren, Deborah Leeds and Robert Leeds, the children of the decedent's pre-deceased son, Ronald. The decedent was 97 years old at the time of his death. The purported will leaves the decedent's entire estate to Arleen. Objections were filed by Deborah and Robert on the basis of: (i)lack of due execution; (ii) lack of testamentary capacity; (iii) fraud; and (iv) undue influence. Depositions were conducted of the parties, the attorney-draftsman, the attesting witnesses and the notary public.

The will was drafted by the Arleen's friend who was a New York attorney living in Florida, Michael Sansevero. Mr. Sansevero became acquainted with Arleen through the Hofstra alumni association, and became friendly with her family as well, including the decedent. In mid-September 2012, Mr. Sansevero visited the decedent at his home where Arleen also lived. According to Mr. Sansevero, the decedent told him that he was "not comfortable with the will" he had which left bequests to the decedent's wife and son, both of whom predeceased him. He

asked Mr. Sansevero to prepare a simple will that left everything to Arleen and which named Arleen as executor. One week after that meeting, the decedent called Mr. Sansevero regarding the status of the will. Mr. Sansevero said he would prepare the will and, since he was in Florida, would send the will to New York. Since neither the decedent nor Arleen had a computer, Mr. Sansevero agreed to e-mail the will and a checklist of instructions for the execution to a mutual friend, Jeffrey Casale, with further directions to give the documents to Arleen. Mr. Sansevero e-mailed the will in pdf format and an instruction checklist to Mr. Casale. That same afternoon, another friend, Anne Sunshine, was near Mr. Casale's home and as a favor agreed to pick up the will and instructions and bring them to decedent's home.

Ms. Sunshine arrived at the decedent's home. The decedent, Ms. Sunshine, a neighbor Rosalia Andriano, and John Budnick, another friend of Arleen's who was a notary, all gathered around the decedent's dining room table. Ms. Sunshine and Ms. Andriano acted as witnesses. Mr. Budnick, an attorney whose license had been suspended, acted as the notary. The attorney-draftsman was not present, but advised that he would be available by phone if necessary.

Mr. Budnick testified that he asked the decedent generic questions to insure that the decedent was competent. Mr. Budnick further testified that he had experience in determining competency because from 1977 through 1982, he was in charge of all competency hearings at the Nassau County District Attorney's Office. Mr. Budnick testified that he believed that the decedent was competent. The decedent read Mr. Sansevero's instructions and read the will out loud. Mr. Budnick also read the will out loud. He asked the decedent if he knew that he was signing his will and he answered yes. The decedent also asked Ms. Sunshine and Ms. Andriano to act as witnesses. They replied yes. The decedent signed the will and initialed every page and

the attesting witnesses each signed the will in the presence of the decedent and each other.

The testimony also showed that the decedent owned a picture framing business, where he worked until shortly before his death. The decedent's granddaughter, Deborah Leeds, admittedly had not seen or spoken to her grandfather in 11 years. Robert Leeds, the decedent's grandson, had a relationship with the decedent. He was considered a "favored" grandchild and, according to Mr. Sansevero, the decedent was thankful to Arleen for caring for her mother and helping him with the business so he left her his entire estate, but that he trusted that Arleen, although receiving the estate under the purported will, would take care of "Robbie."

The evidence also showed that the decedent had prostate cancer. He also saw a cardiologist, Dr. Steven Galler, who testified that he saw the decedent on July 30, 2012, and that he "never had a concern about his mental ability." Robert testified that the decedent called him by his father's name after the purported will was executed. Robert also testified that the decedent told him "when I die I'm going to promise you a lot of money in my will."

Objectants have submitted the affidavit of James Klein, Esq., an attorney who represented the executor of the estate of Ronald Leeds, the decedent's son. According to Mr. Klein, Robert told him that in March 2013 Arlene approached him and asked him to come to the bank and have a waiver signed and notarized. Robert claimed he was not shown the waiver or the will, but was told by his aunt that if he signed it, she would give him something, perhaps a thousand dollars. Mr. Klein also affirms that he spoke with Mr. Sansevero who told him that he received a call from Arleen and that he drafted the will off a computer software program and sent it to the house. According to Mr. Klein, Mr. Sansevero stated regarding his phone conversation about the will that he thought the decedent "was in the background and, perhaps, he got on the phone briefly."

Petitioner argues that Mr. Klein's affidavit was submitted solely to create an issue of fact, but that it is simply hearsay inadmissible to defeat summary judgment.

Summary Judgment

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 of entitlement 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, the due 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]).

Due Execution

The proponent of a will offered for probate has the burden of proving that the instrument was properly executed. Due execution requires that the testator's signature be affixed at the end of the will in the presence of witnesses, that the testator publish to the witnesses that the instrument is his will, the attesting witnesses must know that the signature is that of the testator, and at least two of the attesting witnesses must attest to the testator's signature and sign their names and affix their residences within a thirty-day period (EPTL 3-2.1). 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]). Further, as in the case at bar, if an attestation clause accompanies the instrument, that also gives rise to a presumption that the statutory requirements have been met (*Matter of Farrell*, 84 AD3d 1374 [2d Dept 2011], and cases cited therein).

As indicated above, based upon the testimony of the two attesting witnesses and the notary Mr. Budnick, the proponent has made out a prima facie case for summary judgment on the issue of due execution and the objectants have failed to raise a triable issue of fact. Accordingly, the branch of the motion seeking to dismiss the objection on due execution is granted.

Testamentary Capacity

The proponent also has the burden of proving testamentary capacity. It is essential that a 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 natural objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691[1985]; *Matter of Bustanoby,* 262 AD2d 407 [2d Dept 1999]). A testator 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 [3rd 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 does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845, 847 [1979]; *Matter of Hedges*, 100 AD2d 846 [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 846 [2d Dept 1984]). "When there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the jury" (*Matter of Kumstar*, 66 NY2d 691, 692 [1985]). "One may be able to make a valid will though afflicted with a fatal disease, or possessing an imperfect mind or memory. A will may not be rejected simply because the testator does not make it until near death, or because he is ill or weak" (3 Warren's Heaton on Surrogate's Court Practice §42.06 [1], at 42-93 [7th ed]).

In this case, the record establishes that the decedent was 97 years old, had prostate cancer and had heart issues. The decedent also suffered from a urinary tract obstruction around the time

the purported will was executed. The testimony of the attesting witnesses is that the decedent was of sound mind and memory on the date of the will's execution. The testimony also is that the decedent continued working in his framing business. The court is satisfied that the proponent has made out a prima facie case for summary judgment on the issue of testamentary capacity and the objectants have failed to raise a triable issue of fact. Accordingly, the branch of the motion to dismiss the objection for lack of testamentary capacity is also granted.

Fraud and Undue Influence

The objectants bear the burden of proof on the separate issues of fraud and undue influence (*see Matter of Gross,* 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). To prove fraud, the contestants must show by clear and convincing evidence that a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the fraudulent statement (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1997]). There is simply no evidence adduced that the will was the product of fraudulent conduct and, therefore, the branch of the proponent's motion for summary judgment dismissing the objection of fraud is granted.

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 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 (*cf., 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 NY PJI 7:55). It is

seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a testator 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]).

Here, Arleen had both motive and opportunity given that she resided with the decedent. What is missing is evidence that undue influence was actually exerted on the decedent, other than the fact of the will itself. However, "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 whether the proffered explanation is adequate" (*Matter of Moles*, 90 AD3d 473, 474 [1st Dept], quoting *Matter of Elmore*, 42 AD2d 240, 241 [3d Dept 1973], *see also Matter of Gerdjikian*, 8 AD3d 277 [2d Dept 2004]). While the court does not read these cases to preclude a grant of summary judgment in every case where the attorney who drafted the will had been retained by the proponent, here Mr. Sansevero was admittedly a close friend of Arleen and they had a social relationship. On these facts, the court would not direct a verdict in favor of the proponent and therefore cannot grant a motion for summary judgment in her favor (CPLR 3212 [b]; Carmody Wait 2d § 39:144).

Accordingly, the branch of the motion seeking summary judgment on the issue of undue influence is denied and the matter will proceed to a trial on that issue only. This matter will appear on the court's calendar for conference on July 29, 2015 at 9:30 a.m. to schedule a trial date.

Settle order.

Dated: June 30, 2015

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