Matter of Moses-Pisacano
2015 NY Slip Op 32464(U)
December 29, 2015
Surrogate's Court, Nassau County
Docket Number: 2013-374799/A
Judge: Edward W. McCarty III

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

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Probate Proceeding, Will of

ISABELLE MOSES-PISACANO
a/k/a ISABELLE MOSES,

Deceased.

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File No. 2013-374799/A

Dec. No. 31292

In this contested probate proceeding, petitioner moves for summary judgment dismissing the filed objections and granting the petition for probate. The application is opposed by the objectant who is self-represented.

Decedent died on April 8, 2013 at age 95, survived by her two sons: Stuart Moses, the petitioner, who is also a beneficiary and the nominated executor under the will offered for probate dated May 26, 2011, and Dr. Jay D. Moses who has filed verified objections. Those objections are lack of proper execution, lack of testamentary capacity, undue influence and fraud. Under Article FOURTH of the will decedent specifically disinherited her son, Jay. An earlier will executed nine years (9) prior likewise had a similar provision.

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]).

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/her 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 a self-proving affidavit and attestation clause accompany the instrument they also give rise to a presumption that the statutory requirements have been met (*Matter of Farrell*, 84 AD3d 1374 [2d Dept 2011]).

Beyond the applicable presumptions as aforesaid, the detailed affidavit of the attorney draftsman is also submitted on this motion tracking and consistent with his SCPA 1404 examination as to the execution of the will.

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 her will, the nature and condition of her property, and her relation to the persons who ordinarily would be the objects of her bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although she need not have precise knowledge of her assets, she 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]).

At bar as both witnesses to the will attested that to the best of their knowledge decedent was of sound mind, there is a presumption that that was the case (*Matter of Leach*, 3 AD3d 763 [3d Dept 2004]). Again beyond the presumptions, there is every indication from the affidavit of the attorney-draftsman that Ms. Moses-Pisacano, although of advanced age and some physical aliments, was sufficiently competent to make a will and more than sufficiently cognizant of her assets and the natural objects of her bounty [*see* ¶¶ 4through 10].

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 her to execute a will that disposed of her property in a manner contrary to that

in which she 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]).

Petitioner has met his burden on both due execution and testamentary capacity. There is nothing proffered by objectant that controverts that showing. Parenthetically, the court observes that objectant has heretofore been advised by its staff of the requirements of the form of papers submitted to the court. Nevertheless, both his objection to this motion dated November 3, 2014 and the addendum thereto dated November 21, 2014 are not affidavits/sworn statements. Similarly, various e-mails attached to Dr. Moses's submissions as well as the copy of the Ruth Seidman undated letter are of no value. In short, nothing submitted by objectant is in admissible evidentiary form and for that reason alone the motion should be granted.

Beyond the foregoing, other than words and phrases like "sham," "Kafkaesque," (sic) "Kabuki Dance," "ghost-written gobbledy-gook" and "pusillanimous behavior" sprinkled in more than 75 paragraphs of meandering accusations and family history, and accusing Messrs. Kraut and Honigman [respectively petitioner's attorney in the probate proceeding and the attorney-draftsman] of perjury and unethical conduct, objectant offers nothing of substance. His submission thus neither raises a material issue of fact on execution and capacity nor provides a prima facie showing on 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: December 29, 2015

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

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