Matter of Nemes
2017 NY Slip Op 32858(U)
September 25, 2017
Surrogate's Court, Nassau County
Docket Number: 2011-366400
Judge: Margaret C. Reilly

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

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Probate Proceeding, Will of

KATHRYN NEMES
a/k/a KATHRYN AGNES NEMES,

Deceased.

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DECISION
File No. 2011-366400
Dec. No. 31825

PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

In this contested probate proceeding, the proponent Alan Geraci moves the court for an order granting him summary judgment dismissing the objections and admitting to probate

as the the will of decedent Kathryn Nemes an instrument dated July 19, 2010. The two objectants oppose the proponent's motion and have separately cross-moved for summary judgment dismissing the probate proceeding.

The decedent Kathryn Nemes died on May 23, 2011 at the age of 96 survived by six first cousins, once removed, as her only distributees. Two of those cousins, Doris Havlicek and Agnes McLellan, have separately filed objections to probate alleging that the decedent lacked testamentary capacity on the date the will was executed, that it was not executed in accordance with all the requisite statutory formalities, and that its execution was the result of fraud and undue influence having been exerted upon her by the sole beneficiary, Louis Geraci, who has been described by one of the attesting witnesses as the decedent's longtime driver and the doorman in her building.

Louis Geraci filed a probate petition on August 8, 2011 seeking to admit the propounded instrument to probate and for the issuance to him of letters testamentary. Thereafter, he filed an amended probate petition on January 4, 2012. On February 14, 2012, while the proceeding was still pending, Louis Geraci died. Louis Geraci's will was admitted to probate by this court and letters testamentary in his estate issued to his son Alan L. Geraci on March 20, 2012. In his capacity as executor of the estate of the sole beneficiary in the will of Kathryn Nemes, Alan L. Geraci filed a second amended probate petition in the estate of Kathryn Nemes seeking the admission to probate of the instrument dated July 19, 2010 and the issuance to him of letters of administration, c.t.a.

Among the other exhibits attached to the moving papers are complete or partial deposition transcripts of: Lucy F. Titone, Esq., the attorney who drafted the will; David

Koppele and Elsa Ruiz, the attesting witnesses; and the objectant Agnes McLellan.

PROCEDURAL ISSUES

Counsel for both objectants note that the proponent failed to include copies of all the pleadings with his motion for summary judgment and argue that the motion should be denied on those grounds. CPLR 3212 (b) provides, in part, that "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, and by other proof, such as depositions and written admissions." It has been held that "[i]t is well settled that the failure to attach all of the pleadings is a fatal procedural defect requiring denial of a motion for summary judgment" (*Weinstein v Gindi,* 92 AD3d 526, 527 [1st Dept 2012]; *see also Hamilton v City of New York,* 262 AD2d 283 [2d Dept 1999]). It has also been held, however, that "CPLR 2001 permits a court, at any stage of an action, to disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (*Avalon Gardens Rehabilitation & Health Care Ctr., LLC v Morsello,* 97 AD3d 611 [2d Dept 2012][internal quotation marks and citation omitted]). Where, as here, the missing pleadings are contained in another party's moving papers and the court is satisfied that the record is sufficiently complete and that the failure of the movant to include them in his papers did not prejudice a substantial right of another party, the omission may be overlooked (*Lombardi v Lombardi,* 127 AD3d 1038, 1040 [2d Dept 2015]). On this record the court will therefore reject the argument that the proponent's failure to include all of the pleading in his moving papers constitutes a fatal defect and will consider the proponent's motion on the merits.

As Havlicek's attorney points out, the proponent's motion for summary judgment and opposition to the cross motion are not supported by the affidavit of a party with personal

knowledge of the facts, but rather are supported solely by the affirmations of the proponent's attorney, who was not the drafting attorney and has no personal knowledge of the facts asserted. The bare affirmation of an attorney without personal knowledge of the facts asserted is of no evidentiary value (*Winter v Black,* 95 AD3d 1208 [2d Dept 2012]). Here, however, the facts alleged in the affirmation of movant's attorney that are pertinent to the issues to be decided on the motion and cross motions cite to the deposition testimony of those persons with personal knowledge and the deposition transcripts are attached to counsel's affirmation in admissible form. Proof of facts on a summary judgment motion may be submitted to the court not only by the affidavit of a party with personal knowledge, but also by an attorney's affidavit that is supported by and presents the deposition testimony of parties with personal knowledge (*Olan v Farrell Lines, Inc.,* 64 NY2d 1092 [1985]; *Gezelter v Pecora,* 129 AD3d 1021 [2d Dept 2015]).

Counsel for the objectant Havlicek also argues that the proponent's opposition to the Havlicek cross motion for summary judgment was untimely and should therefore not be considered by the court. The court's record indicates that the return date of the motion was originally May 18, 2015, but was adjourned to afford counsel sufficient time to file a reply to the proponent's opposition papers. The objectant cannot argue that she was prejudiced by the proponent's untimely filing of his opposition papers given that the court extended the return date for the purpose of affording her that opportunity. The court therefore rejects the argument that the proponent's opposition papers to the cross motion should be ignored (*Sanchez v Steele,* 149 AD3d 458 [1st Dept 2017][holding that the motion court providently exercised its discretion in accepting untimely opposition papers where, as here, the movant

did not demonstrate any prejudice and the movant was able to submit reply papers on the motion]).

SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment in contested probate proceedings is appropriate where the objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, 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]).

TESTAMENTARY CAPACITY

The proponent of a will offered for probate has the burden of proving, by a fair preponderance of the credible evidence, that the instrument was properly executed. The elements of due execution are that the testator's signature should be at the end of the will, the attesting witnesses must know that the signature is the testator's, the attesting witnesses must know that it is the testator's will and the attesting witnesses must sign within a thirty-day

period (EPTL § 3-2.1). All of these requirements may presume to have been met where the execution of the will was supervised by an attorney (*see e.g. Matter of Moskoff,* 41 AD3d 481 [2d Dept 2007]; *Matter of Finocchio*, 270 AD2d 418 [2d Dept 2000]). Furthermore, the presence of an attestation clause and self-proving affidavits also give rise to a presumption that the will was duly executed (*Matter of Selvaggio,* 146 AD3d 891 [2d Dept 2017]). These presumptions may be rebutted by positive proof that the statutory requirements were not met (*Matter of Pilon,* 9 AD3d 771 [3d Dept 2004]).

The deposition testimony of the attesting witness David Koppele is that he did not read the will and therefore could not have read the attestation clause that was a part of it, nor did he read the self-proving affidavit that he signed. The attesting witness Elsa Ruiz testified that she does not read or write in English. As a consequence, the attestation clause cannot carry with it any presumption of due execution (*Matter of Costello,* 136 AD3d 1028 [2d Dept 2016]). For the same reason, the court declines to attach any presumption to the self-proving affidavit.

However, the will's execution was supervised by an attorney, giving rise to the rebuttable presumption of due execution (*Matter of James,* 17 AD3d 366 [2d Dept 2005]) which, coupled with the deposition testimony of the two attesting witnesses, neither of whom was a beneficiary, establishes the proponent's prima facie entitlement to judgment as a matter of law on the issue of due execution.

In an affidavit in opposition, the objectant McLellan avers that she is familiar with the decedent's handwriting and posits that the signature on the instrument is not that of the decedent. Her own deposition testimony reveals however, that she had not seen nor received

correspondence from the decedent for at least several years prior to the date of the will's execution. The decedent's mark on the will, which is merely her initials, was explained by both the drafting attorney, who testified that the decedent had difficulty with her motor skills, and by attesting witness David Kopelle, who knew the decedent for many years and ascribed her inability to write clearly to the carpal tunnel syndrome and arthritis that she suffered from and her physical deterioration over the last several years of her life. The testimony of the drafting attorney is that she saw the decedent place her mark on the signature line of the will and that the attesting witnesses were also in the room at that time. The court is therefore satisfied that the mark used as the decedent's signature on the will was placed there by the decedent.

The objectants also argue that the testimony of the attesting witnesses establishes that the decedent never declared the instrument she was signing to be her will and therefore the required element of publication is lacking. The drafting attorney testified that she inquired of the decedent whether the document was her will, whether she had read it and understood it and that it reflected her wishes. Also, both attesting witnesses clearly testified they knew they were there to act as witnesses to the decedent's will. Where, as here, the attorney drafter conveys to the attesting witnesses that the decedent was executing her will, the publication requirement is met (*Matter of Frank,* 249 AD2d 893 [4th Dept 1998], *lv denied* 92 NY2d 807 [1998]). Finally, although the decedent herself may not have expressly requested the witnesses to attest to her will as such, such a request may be inferred from her conduct and from the circumstances surrounding the execution of the will (*Matter of Buckten,* 178 AD2d 981[4th Dept 1991]).

Accordingly, the proponent's motion for summary judgment on the issue of due execution is **GRANTED** and the objectants' separate cross motions for summary judgment on the issue of due execution are **DENIED**.

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 her will, the nature and condition of her property and her relation to the persons who ordinarily would be the natural objects of her bounty (*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 (*Matter of Coddington*, 281 App Div 143 [3d 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 (*Matter of Fiumara*, 47 NY2d 845 [1979]; *Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]), as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*Matter of Hedges*, 100 AD2d 586). "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[1985]).

A presumption of testamentary capacity arises where an attorney drafts a will and supervises its execution (*Matter of Nofal,* 35 AD3d 1132 [3d Dept 2006]).

Here, from the testimony of the drafting attorney Lucy Titone and the attesting witness David Koppele, it is clear that the decedent understood clearly that by the terms of her will her entire estate was being left to Louis Geraci. Ms. Titone testified that the decedent was

adamant that her entire estate be left to Mr. Geraci and that there be no alternate beneficiary. Mr. Kopelle, the decedent's friend of some eighteen years, testified that when he became aware that the decedent was leaving her entire estate to Mr. Geraci, he attempted to dissuade her from that dispositive plan because he believed it was disrespectful to the decedent's family to disinherit them.

The difficulty in this case arises with the evidence of the decedent's knowledge of the nature and extent of her property. Although she received monthly dividend checks and reviewed her mail on a regular basis is some evidence that she should have been aware of the extent of her assets, she told Ms.Titone that her assets consisted primarily of her apartment and a few bank accounts. In fact, she owned a portfolio of stocks and mutual funds valued at a sum in excess of $2 million. Although the decedent might very well have been aware of the extent of her assets and simply chose not to reveal that to the drafting attorney, where "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 [1985]).

Therefore, a question of fact exists regarding the decedent's awareness of the nature and extent of her property; the proponent's motion and the objectants' cross motions for summary judgment on the issue of testamentary capacity are **DENIED**.

FRAUD

The objectants bear the burden of proof on the issue of fraud (*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 testatrix that induced her to make a will disposing of her property differently than she would have if she had not heard the fraudulent statement (*Matter of Zirinsky,* 43 AD3d 946 [2d Dept 2007]). There is simply no evidence adduced that the will was the product of fraudulent conduct nor have the objectants even opposed the proponent's motion on that issue and, therefore, the proponent's motion for summary judgment dismissing the objection of fraud is **GRANTED**.

UNDUE INFLUENCE

The burden of proof on the issue of undue influence is on the objectants. 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 her will, her family relations, the condition of her health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* PJI 7:55). It is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a maker 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 (*Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman,* 289 AD2d 239 [2d Dept 2001]).

In this case, the court finds sufficient extant circumstances as to preclude the granting

of summary judgment for either the proponent or the objectants. Although there is no direct evidence of Louis Geraci having exerted undue influence on the decedent, David Koppele testified that the decedent had significantly reduced her activities for some time prior to the execution of the will and had engaged in somewhat reclusive behavior. Her physical health deteriorated and she became increasingly dependent upon Louis Geraci for transportation and other needs. He was also her attorney-in-fact who tended to her finances and was responsible for hiring and firing the home healthcare aides that the decedent increasingly relied on in the last years of her life. He also took the decedent for overnight visits to Atlantic City, kissed her and called her "Sweetie."

The objectants allege that Louis Geraci was in a confidential relationship with the decedent. "The burden of establishing the existence of a confidential relationship rests with the party asserting it. A confidential relationship may be inferred if one party has disparate power over the other . . . " (*Matter of Engstrom [Leonard B. Harmon 2003 Trust]*, 47 Misc 3d 1212 [A] [Sur Ct, Suffolk County 2014][citations omitted]). Where a confidential relationship between a testator or donor and a beneficiary has been established, an inference of undue influence may arise, shifting the burden to the beneficiary to prove that the bequest to the beneficiary was not the result of undue influence (*Ten Eyck v Whitbeck,* 156 NY 341 [1898]; *Gordon v Bialystoker Center & Bikur Cholim, Inc.,* 45 NY2d 692 [1978]). Whether the existence of a confidential relationship has been established and, if so, whether the beneficiary's explanation of the circumstances of the gift are sufficient are generally held to be questions for the trier of fact to determine (*Matter of Panebianco*, 50 Misc 3d 1203[A][Sur Ct, Westchester County 2015]; *Matter of Gary,* 37 Misc 3d 1208[A] [Sur Ct,

Bronx County 2012]).

Accordingly, the proponent's motion and the objectants' cross motions for summary judgment on the issue of undue influence are **DENIED**.

This matter will appear on the court's conference calendar on November 1, 2017 at 10:00 a.m. for a certification conference.

This constitutes the decision and order of the court.

Dated: September 25, 2017
Mineola, New York

E N T E R:

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HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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