Matter of Singer
2018 NY Slip Op 30076(U)
January 17, 2018
Surrogate's Court, New York County
Docket Number: 2013-1950/B
Judge: Rita M. Mella

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

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Probate Proceeding, Will of

CAROL SINGER,

Deceased.

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DECISION and ORDER
File No.: 2013–1950/B

M E L L A , S.:

The following papers were considered (CPLR 2219[a]) in deciding this motion for summary determination in a contested probate proceeding:

Papers	Numbered
Edward T. Mazzola's Notice of Motion for Summary Judgment, Affirmation of Jeffrey W. Varcadipane, Esq., with Exhibits A through K, and Memorandum of Law	1, 2, 3
Affirmation of Todd A. Fishlin, Esq., in Opposition to Motion, with Exhibits A through Q, and Memorandum of Law in Opposition	4, 5
Memorandum in Reply to Objectants' Opposition	6

Presently before the court are competing petitions to probate instruments dated April 24, 2013 and April 29, 2013, as the Last Will and Testament of Carol Singer. After the conclusion of extensive discovery, Edward T. Mazzola, the nominated executor under the later dated instrument (the "April 29th instrument"), has moved for summary judgment dismissing the objections to probate filed by decedent's nephew, Richard E. Naumann,[1] and decedent's sisters, Jennifer Naumann and Patricia Singer Miller ("Objectants"), who are adversely affected by probate of the April 29th instrument.

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[1]Richard, the nominated executor under the April 24th instrument, was appointed Preliminary Executor by order of this court issued on May 17, 2013, just prior to the filing of Mazzola's cross-petition. Richard is still serving in this capacity.

The Verified Objections to probate allege that, prior to its execution, decedent had not read the April 29th instrument and did not know its contents, that the instrument was not duly executed, that decedent lacked testamentary capacity, and that the instrument was the product of fraud, duress and undue influence on the part of Robert Pellegrini ("Pellegrini"), decedent's neighbor, long-time friend, employer and business partner.[2]

Background

Decedent Carol Singer died on May 14, 2013, after a short battle with cancer. She was 60 years old. Her gross estate is valued at $1.7 million. She was survived by her two sisters and several nieces and nephews. Decedent was unmarried and had no children natural or adopted. Although decedent was retired at the time of her death, the record reflects that she had worked for over 20 years as a Director for Pellegrini & Associates, Inc., a graphic design and printing company owned and operated by Pellegrini.

In 2008, decedent and Pellegrini formed Commit LLC, a company which was a profit sharing plan that had been funded entirely by Pellegrini with 50% of the net profits of Pellegrini & Associates, Inc. As an employee, decedent also participated in Pellegrini & Associates' 401K retirement plan, for which Pellegrini served as trustee.

It is clear from the record that decedent and Pellegrini were close friends in addition to colleagues. That much is evidenced by a letter written by Pellegrini in September 1996 to the board of directors of a cooperative corporation from which decedent wanted to purchase an apartment, and it is also evidenced by Pellegrini's loan to decedent of $140,000 toward that

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[2] Objectants pray that the April 29th instrument not be admitted to probate. In the alternative, they request that Articles SECOND, FIFTH and SEVENTH of the instrument be stricken as a result of their being procured by duress, fraud and undue influence.

purchase. Pellegrini and decedent spent a lot of time together and he often visited decedent's apartment, to which he had a key, sometimes several times a day. Decedent sustained a fall and broke her hip in January 2012. Her mobility being limited after that, decedent rarely left her apartment and relied on Pellegrini for assistance with paying bills, banking, making medical appointments and even opening her mail.

The record reflects that, at some point in December 2012, decedent was diagnosed with cancer. Regarding decedent's medical history, records from Senior Bridge, an agency that provides home health care services, reveal that decedent also suffered from alcoholism, deep vein thrombosis, depression and hypertension. Decedent's rehabilitation potential was described as poor. Her health proxy and emergency contact was her nephew, objectant Richard Naumann.

The April 24th Instrument

At some point in April 2013, decedent was taken to Memorial Sloan Kettering Cancer Center. At the time of her admission, decedent was physically in "bad shape." While hospitalized, decedent executed the April 24th instrument, under the supervision of Todd A. Fishlin, Esq. Mr. Fishlin had been recommended by an attorney to whom decedent had been referred by her nail stylist. The attorney who recommended Mr. Fishlin concentrated his practice in immigration law and could not assist decedent with the drafting of her will.

Under the April 24th instrument, decedent left all personal property (other than cash) to her two sisters, made specific cash bequests to nieces and nephews, Pellegrini and his wife, and Mary Dillon (decedent's housekeeper, dog-walker and long-time friend), and directed that any gifts to a minor be held in trust. The instrument also directs that the residuary be distributed in equal shares to decedent's sisters.

The April 29th Instrument

According to Dillon's deposition testimony, on April 26th, after arriving home from the hospital, decedent told her that she was "not happy" with the will that she had executed while hospitalized. Dillon further testified that decedent told her that she was "not satisfied with it," as she had left out "Sam, the doorman, and the dogs." Decedent also told Dillon that she intended to execute another will but other than adding these beneficiaries, she did not say to Dillon that she wanted to make any changes to the terms of the April 24th instrument.

Michael Rodi, Esq., the attorney who drafted the April 29th instrument and supervised its execution, was deposed pursuant to SCPA 1404, as were the attesting witnesses, Dr. Gail Monaco and Tacy Shawn Young. Monaco and Young were decedent's neighbors and acquaintances. Rodi testified that, on April 25th or 26th, he had received a call from movant Mazzola, who informed him that he had a friend who was very ill and wanted to execute a will. Mazzola also told Rodi that this friend had executed a will a few days prior, but that, "she wasn't happy. . . she wasn't sure what she signed" and wanted to execute another will. Mazzola gave Rodi decedent's telephone number but also Pellegrini's telephone number, and instructed Rodi to contact Pellegrini to make arrangements for visiting decedent when it was time to execute the instrument. It is not clear from the record whether decedent herself contacted Mazzola, who was described by Dillon as a closer friend to Pellegrini than to decedent, to ask him to find a lawyer who could draft a new will.

Rodi further testified that, on the same day that he spoke with Mazzola or the day after, he called decedent and she stated that she had signed a will while she was hospitalized and

heavily medicated, and that she wanted to execute another will to make sure that certain individuals received bequests. Rodi testified that, during their telephone conversation, decedent told him that she wanted Mazzola to be the executor, and she gave him—and spelled—the names of the persons to whom she wanted to leave her property and specified the amounts that would go to each. Rodi also testified that he made notes, while speaking with decedent, and the details in those notes are reflected in the April 29th instrument.

Under that instrument, decedent gives her most valuable asset, her cooperative apartment–which was valued at $1,150,000–to Pellegrini and his wife. She makes specific cash bequests to nieces and nephews, a doorman in her building, and Dillon.[3] In addition, decedent leaves her tangible personal property to her sisters, to share equally. The entire residuary estate is left to the "Carin [sic] Terrier Society of America." Rodi testified that he suggested to decedent that she also consider executing a living will, a power of attorney and a health care proxy. Decedent informed him that she had a health care proxy and was happy with it. However, she did want to execute a living will and a power of attorney.

As to the execution ceremony, Rodi testified that, on April 29, 2013, he arrived at decedent's apartment in the late afternoon or early evening. He was greeted in the lobby by Pellegrini, who showed him into decedent's apartment. Rodi further testified that he did not have a conversation with Pellegrini about decedent's estate plan either before or after the execution ceremony. Rodi also testified that, on the day of execution, Pellegrini was not present during any discussions about the instrument or during its execution.

[3] Dillon receives $50,000 under the April 24th instrument as well as the April 29th instrument.

Upon entering decedent's apartment, Rodi testified that he introduced himself to decedent and that he and decedent sat down on the couch to go over the instrument, which he asked decedent to read very carefully. He also presented decedent with the living will. Decedent told him, however, that she was not going to sign the living will that day. Rodi further testified that decedent took approximately 10 to 15 minutes to review the instrument. He described her as "alert" and "pleasant."

Rodi was asked on cross-examination what he did immediately after decedent reviewed the instrument and Rodi stated, "I did almost an allocution, a criminal court plea allocution, because I was concerned. I knew she was near death, so I wanted to make sure she was– she understood what was going on. She said 'yes'. Again, she was very direct." According to Rodi, at that point, Pellegrini brought the attesting witnesses, Monaco and Young, into decedent's apartment and then left at Rodi's request.

Rodi testified that he informed Monaco and Young that they had been summoned to decedent's apartment to witness her sign her will. Decedent was asked by Rodi, in the presence of Monaco and Young, whether she had read the document that was in front of her entitled Last Will and Testament and if the same reflected her wishes. Decedent answered "yes" to both questions. Decedent signed the April 29th instrument in the presence of the attesting witnesses, who signed their names immediately thereafter. Monaco and Young also executed the joint attesting-witness Affidavit on April 29th. Decedent engaged in small talk with Monaco and Young, who then left the apartment.

Since Rodi had forgotten to bring the power of attorney to decedent's apartment on the day of execution, he returned on May 2nd, and decedent executed the power of attorney which

named Pellegrini as her attorney-in-fact, and Mazzola as the successor to Pellegrini. Approximately two weeks later, decedent passed away.

The Testimony of Decedent's Home Health Aide

Decedent had been discharged home from Memorial Sloan Kettering Cancer Center on April 26th with a very poor prognosis. Arrangements were made for hospice services to be provided to decedent at home, including the presence of home health aides 24 hours a day. One of those aides, Velouse Esprit Saint, testified at her deposition that, after decedent arrived home from the hospital, she overheard Pellegrini tell decedent, on more than one occasion, that her family "did nothing for her," did not even come to visit her, and that Pellegrini was the only one who took care of her and her affairs. According to Esprit Saint these conversations happened when Pellegrini and decedent were discussing decedent's finances and assets.

Esprit Saint also testified that decedent's sister, Jennifer Naumann, called often to check on decedent's health and that decedent's nephew, Richard Naumann, would come to visit decedent.

Pellegrini and decedent told Esprit Saint that a lawyer was going to come to the apartment to meet with decedent.

Objectant Richard Naumann's Testimony

By all accounts, decedent was very fond of her family. She shared a particularly close relationship with her nephew Richard, whom she nominated as her health care proxy twice: once, according to Richard, when she was admitted to Beth Israel Hospital for a hip fracture, and the other during her last hospitalization at Memorial Sloan Kettering Cancer Center. Richard testified that when decedent was hospitalized, he, his mother and his aunt (decedent's sisters)

would visit often. Sometimes, Richard would visit decedent twice a day at the hospital. Pellegrini would visit decedent as well and, sometimes, the hospital staff would be confused as to who were the members of decedent's family.

According to Richard, while hospitalized at Beth Israel at the beginning of 2012, decedent made a point of waiting for Pellegrini to leave before executing a health care form nominating Richard as her proxy.

Decedent had mentioned to Richard her intention to execute a will and that she had asked her nail stylist for a referral to a lawyer. Then, during her hospitalization at Memorial Sloan Kettering Cancer Center in April 2013, decedent informed Richard that she had executed a will. Richard testified that, at the time, he had never met Fishlin, the attorney-drafter of the April 24th instrument, and that it was later that he learned that he was the nominated executor under that instrument.

Richard testified that decedent confided in his mom (decedent's sister) that decedent asked her nail stylist for a referral to an attorney because she wanted a lawyer who was not connected to Pellegrini.[4]

DISCUSSION

Summary Judgment Standard

On a motion for summary judgment, the court must determine whether the movant has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient

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[4] This testimony is hearsay. Hearsay may be relied upon to defeat summary judgment as long as it is not the only evidence submitted in opposition (*Rugova v Davis*, 112 AD3d 404 [1st Dept 2013]). Similarly, evidence that is excludable under CPLR 4519 may be considered in opposition to a summary judgment motion so long as it is not the sole proof in opposition to the motion (*see Marszal v Anderson*, 9 AD3d 711 [3d Dept 2004]).

evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212). Once this showing has been made, the burden shifts to the party opposing the motion to produce proof in admissible form sufficient to establish the existence of material factual issues (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In determining whether summary judgment is appropriate, the court "should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). Allegations by the party opposing the motion must be "specific and detailed, substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]), and speculation cannot serve as a substitute for evidence.

For the reasons set forth more fully below, Mazzola's motion for summary judgment is granted in part and denied in part.

Due Execution

The testimony of Rodi, the attorney-drafter who oversaw the will execution, as well as that of attesting witnesses Monaco and Young establishes that the execution ceremony substantially complied with all the requirements of EPTL 3-2.1 (*Matter of Frank*, 249 AD2d 893, 894 [4th Dept 1998], *lv denied*, 92 NY2d 807 [1998]; *see Matter of Thier*, 2012 NYLJ 1545 [Sur Ct, NY County, Oct. 19, 2012]). Moreover, the instrument contains an attestation clause and is supported by a contemporaneous self-proving affidavit. And, since the execution was supervised by an attorney, there is a presumption of regularity (*Matter of Kindberg*, 207 NY 220 [1912]; *Matter of Spinello*, 291 AD2d 406 [2d Dept 2002]). Under these circumstances, the court finds

that Mazzola has made a prima facie showing that the April 29th instrument was duly executed (*see Matter of Conti*, 5 Misc 3d 1026[A] [Sur Ct, Bronx County 2004]).

Objectants' papers in opposition to this motion are silent as to due execution, and their counsel confirmed at oral argument that his clients did not wish to pursue this objection. Objectants having failed to raise a question of material fact as to due execution, summary judgment is granted dismissing that objection.

Testamentary Capacity

To execute a valid will, the testator, at the time of execution, must understand, in a general way: (1) the nature and extent of her property, (2) who are the natural objects of her bounty, and (3) the consequences of executing the instrument (*see Matter of Kumstar*, 66 NY2d 691, 691 [1985], *rearg denied* 67 NY2d 647 [1986]). The capacity needed to execute a will is less than that required to execute other contracts (*see Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], *affd* 307 NY 181 [1954]), is measured at the time of the propounded instrument's execution (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]), and is not disproved merely by a showing of testator's advanced age or affliction with fatal disease (*McGowan v Underhill*, 115 App Div 638, 640 [2d Dept 1906]; 3 Warren's Heaton on Surrogate's Court § 42.06 [7th ed 2017]).

Here, Mazzola has made a prima facie showing that decedent had capacity to execute the April 29th instrument. Mazzola is assisted in this regard by the presumption in favor of capacity created by the attesting witnesses' affidavit (*Matter of Leach*, 3 AD3d 763 [3d Dept 2004]; *see also Matter of Young*, NYLJ, Mar. 22, 2017, at 22, col 5 [Sur Ct, NY County]), and by the additional presumption that a "mind once sound continues" to be that (*see Matter of McCarthy*,

269 App Div 145, 152 [1st Dept 1945], *affd* 296 NY 987 [1947]).

Moreover, Rodi and Dillon, both disinterested witnesses, testified that decedent had told them that she wanted to execute a new will. Several witnesses, including Objectant Richard Naumann, decedent's home health aide Esprit Saint, and Dillon testified that decedent was fine, "normal" and alert on the days leading to April 29th and on that day. Senior Bridge's medical records for decedent corroborate these observations.

Finally, there is evidence on the record to establish that decedent understood the importance of executing a will and that she was aware of those persons or entities to whom she wanted to bestow a financial gift. Mazzola has thus establish a prima facie case as to testamentary capacity. The burden now shifts to Objectants to raise a genuine issue of fact.

Objectants do not address the motion to dismiss the testamentary capacity objection in their opposition papers. In their argument concerning undue influence, however, they claim that decedent was taking Lorazepam, a sedative, and Hydromorphone, a powerful pain medication, just days before, or even possibly the day of, the execution ceremony and that her mental acuity was affected as a result. Objectants rely on the testimony of Esprit Saint to establish that decedent was medicated on a daily basis. Contrary to Objectants' contention, however, when asked whether she noticed how the medication affected decedent, Esprit Saint testified that the medication had no negative effect on decedent's ability to recognize those around her or understand what was going on.

Objectants' allegation of decedent's diminished mental capacity is further belied by the testimony of attesting witness Monaco, a Psychotherapist trained to treat people who suffer from depression and substance abuse, who stated that, on April 29th, the day of execution, decedent

made small talk, reminisced about certain events involving their respective pets, and was "articulate." Based on Monaco's observation of her neighbor, decedent was "well aware" of what was going on. Attesting witness Young testified similarly.

Simply because the April 29th instrument was executed by decedent during her last illness, at which time she was taking prescribed medication to alleviate her symptoms, does not, standing alone, demonstrate that testamentary capacity was lacking and Objectants have failed to proffer any evidence of actual impairment of decedent's capacity (*see Matter of MacGuigan*, NYLJ, Apr. 20, 2015 [Sur Ct, NY County], *affd* 140 AD3d 625 [1st Dept 2016]). The court concludes that Objectants have failed to raise a question of fact as to decedent's testamentary capacity. Summary judgment is granted dismissing that objection.

Undue Influence

Mazzola has met his initial burden of making a prima facie showing that the April 29th instrument is a "natural will." The testimony of attorney-drafter Rodi and Dillon establishes that decedent wished to execute a new will after she came home from the hospital. In addition, the dispositions under the April 29th instrument appear to be natural: decedent made gifts to her friends and family while leaving her most valuable asset to Pellegrini, her close and dear friend.

Both Monaco, one of the witnesses to the execution of the April 29th instrument, and Objectant Richard Naumann testified that decedent's relationship with Pellegrini was somewhat challenging to characterize. Both testified, however, that decedent and Pellegrini were very close to each other. To illustrate, Monaco testified that when Pellegrini became ill years before, decedent was extremely upset and subsequently devoted herself to ensuring that Pellegrini made a full recovery, which he did. Monaco also recalled decedent's being elated when the Pellegrinis

purchased an apartment in her building. According to Monaco, decedent discussed with her the renovations being made to the Pellegrinis' new apartment and decedent invited Monaco to see the finished product since decedent had a key. Richard also testified about the close relationship decedent and Pellegrini shared. Richard, who knew Pellegrini for over 20 years, recalled that he, his family, and decedent were invited to the Pellegrinis' Long Island home to spend Thanksgiving. The Pellegrinis also spent a Thanksgiving with the decedent at the Naumann family's home near Philadelphia.

Mazzola notes that the record is clear as to decedent's mental condition at the time the April 29th instrument was executed. While decedent was noticeably frail and very ill for several weeks leading up to her death, including on April 29th, Monaco described decedent as "well aware." When asked whether decedent appeared unfocused or tired, Monaco stated, "No, not at all."

In order to resist summary dismissal, Objectants must raise an issue of fact by proffering evidence of the elements of undue influence: motive, opportunity, and actual exercise of undue influence (*Matter of Walther*, 6 NY2d 49 [1959]; *see also Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). The influence must amount 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" (*Children's Aid Soc'y of City of N.Y. v Loveridge*, 70 NY 387, 394 [1877]). Objectants are correct that undue influence may be proved by circumstantial rather than direct evidence (*Matter of Walther*, 6 NY2d at 54). Such evidence must be specific and detailed. Mere conclusory assertions will not suffice (*Matter of O'Hara*, 85 AD2d at 671;

see also Zuckerman, 49 NY2d at 562).

Objectants point to the record which contains the testimony of several witnesses describing Pellegrini as "tough," "difficult," "mean" or "rude," and having an overpowering personality, the type of personality that could intimidate another. The records of Senior Bridge, for instance, reflect that Pellegrini complained at least twice about the home health aides who were assigned to care for decedent and that he expressed concern about the cost of the services. Esprit Saint testified that she and one other aide found Pellegrini hard to interact with.

Objectants also point to evidence of Pellegrini's involvement in the preparation of the April 29th instrument: it was Mazzola, Pellegrini's close friend, who called Rodi, an attorney who had drafted Mazzola's will, concerning the drafting of a new will for decedent; Mazzola told Rodi to contact Pellegrini to make arrangements for the execution of the instrument; and Pellegrini secured the witnesses to the will.

Most importantly, Objectants rely on the testimony of home health aide Esprit Saint, a witness who has no interest under either will, and who testified unequivocally about the several occasions in which Pellegrini told decedent, when speaking about her finances, that her family did nothing for her while Pellegrini "did everything for her." These conversations took place, according to Esprit Saint after decedent came home from the hospital which is around the same time that the April 29th instrument was executed.

Objectants also assert that Pellegrini stood in a confidential relationship with decedent at the time of the execution of the April 29th instrument and thus, at trial, would have to prove that any gift to him was free and clear of undue influence. In support of their assertion, Objectants point out that Pellegrini was decedent's former employer, mortgagor (by virtue of having lent

money to decedent to buy her apartment), attorney-in-fact,[5] the trustee of decedent's 401K plan, and business partner viz-a-viz Commit, LLC.

Objectants correctly argue that decedent and Pellegrini were inextricably tied to each other financially as a result of their shared business interests, and that there is some evidence on the record—especially Esprit Saint's testimony— that Pellegrini exercised some degree of control over decedent, a fact from which a trier of fact could conclude that Pellegrini had "disparate power and control" over her (*Matter of Zirinsky*, 10 Misc 3d 1052[A] [Sur Ct, Nassau County 2005]).

The evidence on which Objectants rely raises issues of material fact that require a trial. This evidence shows that Pellegrini had motive (his desire to receive a larger gift under decedent's will) and opportunity (he had unlimited access to decedent and spent a significant amount of time with her, and she relied on him for assistance with important matters) to exercise undue influence on decedent. It also shows that Pellegrini may have actually exercised such influence (through the control that he allegedly had over her and his statements to decedent about her family's inattentiveness at a time in which he knew that decedent had executed a will that left most of her estate to her sisters).

To be sure, there is also evidence on this record that contradicts this proof. For instance, several witnesses testified that they never observed Pellegrini forcing or coercing decedent to do something and described decedent as "independent" and "strong willed." The role of the court in the context of a summary judgment motion, however, is not to determine factual disputes but to

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[5] The power of attorney was executed by decedent on May 2, 2013, three days after the April 29th instrument was executed. Therefore, Objectants cannot rely on it to establish the existence of a confidential relationship.

find them (*Sillman v Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

The court also concludes that, on this record, whether decedent "relied exclusively upon" Pellegrini's "knowledge and judgment in the conduct of [her] financial affairs, . . . was dependent upon [him] and subject to [his] control" (PJI2d 7:56.1) and thus was in a confidential relationship with him should be decided by the trier of fact.

After a trial, the evidence might very well establish that this was a case, at worst, of "lawful influence" or importunity on the part of Pellegrini but not of undue influence (*see Children's Aid Soc'y of City of N.Y. v Loveridge*, 70 NY at 395). But in the end, in view of the significant differences between the two instruments which were executed five days apart within the last three weeks of decedent's life, a trier of fact should decide whether the April 29th instrument reflects decedent's wishes or is the product of Pellegrini's influence which overcame the free will of decedent (*Children's Aid Soc'y of City of N.Y. v Loveridge*, 70 NY at 394).

Accordingly, Mazzola's motion for summary determination concerning the objection relating to undue influence is denied.

Fraud

Mazzola has met his initial burden of showing prima facie, as he did with the objection of undue influence, that the propounded instrument is a natural will and not the product of fraud. In order to raise an issue of fact, Objectants must provide evidence that Pellegrini made a false statement to decedent which caused her to execute a will materially different from one that she would have executed in the absence of such misrepresentation (*Matter of Katz*, 192 AD2d 327 [1st Dept 1993]; *Matter of Young*, 289 AD2d 725 [3d Dept 2001]). In their opposition to this summary judgment motion, however, Objectants do not address the affirmative fraud objection

and instead discuss at length undue influence and its related concept, constructive fraud. The affirmative fraud objection is thus deemed abandoned (*Wilmington Trust Co. v Burger King Corp.*, 10 Misc 3d 1053[A] [Sup Ct, NY County 2005] [claim deemed abandoned when plaintiff failed to address it in opposition to defendant's motion for summary judgment]).

Duress

Finally, Objectants allege that the April 29th instrument was procured by duress but their papers in opposition to the instant motion are silent as to this objection and present no evidence to support their allegation. In the absence of such evidence in opposition, the court concludes that Objectants have also abandoned their objection based on duress.

CONCLUSION

Based on the foregoing, Mazzola's motion for summary judgment dismissing the objections to probate filed by Richard E. Naumann, Jennifer Naumann and Patricia Singer Miller on grounds of lack of due execution, lack of testamentary capacity, fraud, and duress, is granted. To the extent the motion seeks dismissal of the objection alleging that the April 29th instrument was the product of undue influence, it is denied.

This decision constitutes the order of the court.

Clerk to notify.

Date: January 17, 2018

SURROGATE