Matter of Pantino
2018 NY Slip Op 31118(U)
February 20, 2018
Surrogate's Court, Nassau County
Docket Number: 2015-385379
Judge: Margaret C. Reilly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
--x
In the Matter of Proving the Last Will and Testament of **DECISION**

File No. 2015-385379
ELAINE PANTINO, **Dec. No. 33542**

Deceased.

--x
PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion, Affirmation & Exhibits. 1
Affirmation in Opposition & Exhibits. 2
Reply Affirmation.. 3
Memorandum of Law 4

Before the court in this contested probate proceeding is a motion which seeks the following: an order, pursuant to CPLR §3212, (a) granting petitioner summary judgment dismissing the objections herein in their entirety; (b) admitting the last will and testament of Elaine Pantino, dated July 11, 2014, to probate; (c) issuing letters testamentary to the petitioner; and (d) granting such other and further relief as to the court may seem just and proper. The petitioner is Jennifer Westfall, the nominated executor. The motion is opposed.

The decedent, Elaine Pantino, died on June 22, 2015 as a result of injuries she sustained when hit by a car. She was survived by two sons: Duane Pantino (objectant) and David Pantino.[1] The decedent's last will and testament dated July 11, 2014 has been offered for probate. Article SECOND of the purported will provides the following:

---

[1] A temporary guardian ad litem was appointed to investigate whether the appointment of a guardian ad litem for David Pantino was required. The temporary guardian ad litem reported and recommended that David Pantino was fully able to represent himself in this proceeding.

> "RESIDUARY CLAUSE. I give, devise and bequeath the remainder of my estate, both real and personal property, not otherwise effectively transferred herein to my friend JENNIFER MARIE WESTFALL whom I consider to be a daughter-in-law and who is the mother of my grand daughter, residing in Lindenhurst, New York. If JENNIFER MARIE WESTFALL predeceases me I give, devise and bequest (sic) my estate to her daughter, my grand daughter, SAMANTHA ROSE PANTINO. If any beneficiary is less than twenty-one (21) years of age, such beneficiary's share of the property shall be placed in TRUST in accordance with Article THIRD below. . . I have specifically omitted my two (2) sons, DAVID PANTINO and DUANE PANTINO, in this my Last Will and Testament. I have done so intentionally for reasons known but to me with full knowledge and direction that they are not to receive any distribution from my estate under any circumstances."

On May 2, 2016, Duane Pantino filed objections to the probate of the decedent's will. His objections are that the will was not duly executed; that the decedent lacked testamentary capacity; and that will was obtained by fraud and undue influence practiced upon the decedent by the proponent and the beneficiaries named in the will or by some other person acting in concert or privity with them.

Summary Judgment

"[Th]e 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, 323 [1986]). Without making a prima facie showing a denial of the motion, regardless of the sufficiency of the opposing papers is warranted (*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 a contestant 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]).

The objectant argues that summary judgment is premature as the depositions of Kathleen Westfall (mother of the petitioner) and David Pantino (son of the decedent) have not taken place. The petition to probate the decedent's will was filed in July of 2015. A demand to examine the attorney drafter and attesting witnesses was made in August of 2015. In May of 2016, Duane Pantino filed objections to the probate of the will. The petitioner moved in January of 2017 to compel the deposition testimony of Duane Pantino and David Pantino. Duane Pantino was duly deposed in March of 2017. The petitioner subsequently made the instant motion for summary judgment. Over two years elapsed since the filing of the will and the instant motion. The objectant had ample opportunity in the two years from the filing of the probate petition to depose additional witnesses. In the instant proceeding, the objectant may not assert his need for additional disclosure as a bar to summary judgment (*Witte v Inc. Vil. Of Port Washington N.,* 114 AD2d 359 [2d Dept 1985]).

Due Execution

The proponent of a summary judgment motion must meet her burden of establishing that the purported will was duly executed (*Matter of Rosen,* 291 AD2d 562 [2d Dept 2002]). Estates, Powers and Trust Law § 3-2.1 sets forth the following with regard to the formal execution of a will:

> "It shall be signed at the end thereof by the testator. . . The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction. . .The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will. There shall be at least two attesting witnesses. . ." (EPTL § 3-2.1 [a] [1] [2] [3] [4]).

The supervision of a will's execution by an attorney will give rise to a "presumption of regularity that the will was properly executed in all respects" (*Matter of Finocchio*, 270 AD2d 418, 418 [2d Dept 2000]). The presence of an attestation clause and a self-proving affidavit also gives rise to a presumption that the statutory requirements were satisfied (*Matter of Malan,* 56 AD3d 479 [2d Dept 2008]).

The decedent was a fifty-nine year old woman employed as a legal secretary for a New York City law firm. She died unexpectedly after being hit by an automobile when she was a pedestrian. She was referred to Robert Wagner, Esq., the attorney who drafted her will, by a friend. The decedent consulted with Mr. Wagner on June 13, 2014. Mr. Wagner prepared a draft of her will pursuant to her instructions, sent her the draft and oversaw the execution of the will on July 11, 2014 at his office. Mr. Wagner was the subject of disciplinary proceedings and resigned on July 1, 2014.

At his deposition pursuant to SCPA § 1404, Mr. Wagner, the attorney draftsman, reported that the decedent was referred to him by a coworker of the decedent. He thereafter set up an appointment with the decedent for June 13, 2014 and kept notes of his meeting. Mr. Wagner reported that his independent recollection was that the decedent had two sons and a grandchild. He spent approximately thirty to sixty minutes with the decedent; reviewed her property; and reviewed her family. Mr. Wagner stated that he had prepared "several hundred to a thousand wills" over a 25 year period of time. He

described the decedent as "lucent, levelheaded, there was no smell of alcohol, she just walked in like a regular client." She did not appear to be under the influence of alcohol, did not smell of alcohol, and did not slur her speech. The decedent told Mr. Wagner that she was divorced and had two sons; one of whom was disabled. She told him that her son, Duane, abused her mentally over a period of years and "she wanted to make sure Duane did not get anything." In furtherance of this goal, the decedent told Mr. Wagner to provide in her will that all of her furnishings go to Jennifer "cause she didn't want either of the boys to get, and she didn't want them to come in and say 'No, this is my couch' or 'This is my chair.'" In Mr. Wagner's notes, he wrote "[t]here's not to be a distribution to David or Duane under any circumstances." According to Mr. Wagner, the decedent was sure that she did not want her sons to get anything and had an in terrorem clause inserted.

With regard to why she left everything to Jennifer, Mr. Wagner testified that the decedent "had a relationship with Jennifer and trusted her and Jennifer was going to take care of her granddaughter and I told her just because she's leaving everything to Jennifer doesn't mean it's going to your granddaughter." The decedent specifically mentioned omitting her two sons from the will because she wanted them to know and be aware that it was not an oversight. In answer to a question of whether he had any question about her capacity, Mr. Wagner answered no.

At his examination pursuant to SCPA § 1404, Mr. Wagner did not recall the exact circumstances of the execution of the decedent's will. He did, however, testify that he had a procedure in place that he followed every time he supervised the execution of a will. His procedure is as follows: "I will ask the person – show them the will that they're about to sign as the witnesses are present, ask them if that's their will, if they've read it and understood it, if it disposes of their property as they intend it to be disposed. And if they say yes to all three items, I have them sign it in the presence of all three witnesses,

and then the witnesses sign and acknowledge that the person has acknowledged it's their will, and they sign as witnesses."

Denise L. Neider, an attesting witness, reported that she does not recall the specifics of the execution of the decedent's will. She testified that she is employed as a legal secretary for Robert Schneps, the attorney for the petitioner. She types approximately fifty wills per year. She has acted as a witness for approximately 800 wills or more. She recognized her signature and the other attesting witness's signature on the decedent's will. She further signed the affidavit of attesting witness. She has known Mr. Wagner for about 26 years and acted as a witness to wills he was supervising around ten times per year for him. According to Ms. Neider, Mr. Wagner always followed the same procedure at will execution ceremonies. He introduces the client, asks the client what the document is and if she or he has read it, asks the client if he or she understands that it disposes of his or her property in accordance with his or her wishes. If the client answers affirmatively, Mr. Wagner asks the witnesses to act as witnesses, asks the testator to sign the will in front of the witnesses and then asks the witnesses to sign both the signature page and the affidavit of attesting witnesses. Ms. Neider stated that she would never act as a witness to a will execution unless the aforementioned procedure was followed. Ms. Neider signed both an attestation clause and self-proving affidavit.

Erin Biener, the other attesting witness, was examined pursuant to SCPA § 1404. At her examination, Ms. Biener stated that she did not recall the circumstances of the will execution. She is employed as a legal assistant for Robert Curry, Esq. and has worked with him since 2008. She has acted as a witness to approximately ten to fifty wills. She recognized her signature on both the will and the affidavit of attesting witness. She also recognized the signature of the other attesting witness, Denise Neider. Although she had no recollection of the specific will execution, she reported that she would not have acted

as a witness unless the usual procedure, as described hereafter, was followed. The procedure that Ms. Biener was accustomed to was the following: the attorney asked the testator if the document was her will; if it disposed of her property in accordance with her wishes; is she doing it of her own free will; and if she wanted these people to act as witnesses. When the questions are answered in the affirmative, she would witness the testator signing the will. Ms. Biener signed both an attestation clause and self-proving affidavit

The objectant argues that due execution has not been established and argues the following: the attorney who drafted and supervised the will was convicted of a felony and is serving a prison sentence of one to three years for stealing from clients; on the day the will was executed, Mr. Wagner was no longer an attorney as he had resigned and was subsequently disbarred; the will contains facial irregularities in that the decedent wanted to provide for her granddaughter but left everything instead to Jennifer Westfall; the witnesses did not engage in any conversation with the decedent; and the attorney did not explore the options of setting up a supplemental needs trust for the benefit of her disabled son.

The presumption that the will was duly executed ordinarily applies "where the execution had been under the supervision of a lawyer or any person fully conversant with the statute requirements on the subject . . ." (*Matter of Kindberg,* 207 NY 220, 228 [1912]; *see also Matter of Sanger,* 45 Misc 3d 246 [Sur Ct, Nassau County 2014]). Where the presumption does not apply, the petitioner must establish each of the elements required by EPTL § 3-2.1 for due execution of the decedent's will (*Matter of Estabrook,* NYLJ, Sep. 17, 2013 at 27, col 5 [Sur Ct, Suffolk County]).

In the instant proceeding, the Mr. Wagner, a former attorney, had overseen the execution of multiple wills and both attesting witnesses, employees of law firms, had

acted as witnesses in will signing ceremonies on multiple occasions. Although their recollection was incomplete, they testified that they would have signed their names as witnesses only if the testator had acknowledged it was her will, asked them to act as witnesses and signed the will in their presence. The signature of the decedent is at the end of the document. The witnesses signed thereafter. They recognized their own signatures as well as each other's signatures. They both signed an attestation clause and self proving affidavit. The petitioner has established a prima facie case for due execution and the objectant has failed to raise a triable issue of fact on the issue of due execution.

Summary judgment dismissing the objection as to due execution is accordingly **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 (*Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Less mental faculty is required to execute a will than any other instrument (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from physical infirmity is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845 [1979]) 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 586 [2d Dept 1984]). "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] [internal citations omitted]).

The decedent was working full time for a law firm at the time of her death. Her 2014 annual review showed that the decedent fully met expectations and her employer noted, "Elaine is motivated, result oriented, and she maintains a level of productivity that is consistent in quantity and quality." Mr. Wagner reported that on the day the decedent executed the will, she appeared normal and lucid and did not appear impaired or inebriated.

The petitioner has therefore met her burden of proving that the decedent possessed testamentary capacity on the date decedent executed her will. The objectant argues that the decedent had a history of alcoholism and was taking medications which would impair her ability to make a will. He has offered no proof whatsoever that the decedent's health conditions or alleged alcoholism in any way impeded the decedent's ability to make a will. The court, therefore, finds that there are no issues of fact as to the decedent's testamentary capacity at the time of the will's execution. Accordingly, the petitioner's motion for summary judgment dismissing the objection of lack of capacity is **GRANTED.**

Fraud and Undue Influence

The objectant bears the burden of proof on the separate issues of fraud and undue influence (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). To prove fraud, the objectant 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 (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]).

The objectant alleges that the petitioner's financial situation was not good; that she visited the decedent in excess of 70 times over four years; she maintained steady contact via text messages; and if the decedent had wanted to protect and care for her

granddaughter, she would have set up a trust for her or left the money to her granddaughter. The objectant argues that the will was a departure from a prior instrument, and that given the decedent's history of mental illness, use of alcohol and prescription medications, gives rise to the "possibility that she did not have the capacity to resist the undue influence being exerted upon her to change her will".

In order to defeat a proponent's summary judgment motion on the issue of fraud, the objectant must submit evidence, beyond conclusory allegations and mere possibility, that fraudulent statements were made to the decedent, that the petitioner knew they were false, and that they caused the decedent to change his will (*Matter of Eastman,* 63 AD3d 738 [2d Dept 2009] [internal citations omitted]). The objectant has offered nothing but conjecture to prove fraud. Therefore, the petitioner's motion for summary judgment dismissing the objection on the issue of fraud is **GRANTED.**

To prove undue influence, the objectant must "demonstrate that decedent was actually constrained to act against her own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Matter of Murray*, 49 AD3d 1003, 1005-1006 [3d Dept 2008] [citations omitted]). Undue influence 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 the opportunity and motive to exert such influence existed is insufficient" (*Matter of Chiurazzi*, 296 AD2d 406, 407 [2d Dept 2002]).

In this case, the court finds no evidence of undue influence. The decedent was a fifty-nine year old woman who was fully and gainfully employed. She was clear in her independent instructions to Mr. Wagner that she did not want to leave anything to her two

sons. The objectant has offered nothing beyond pure conjecture to show that the petitioner unduly influenced his mother into changing her will. Accordingly, the petitioner's motion for summary judgment dismissing the objection of undue influence is **GRANTED.**

In conclusion, the petitioner's motion for summary judgment dismissing the objections in their entirety is **GRANTED**.

This constitutes the decision of the court.

Settle decree**.**

Dated: February 20, 2018
Mineola, New York

E N T E R:

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

cc: Robert L. Schneps, Esq.
Kurre Schneps, LLP
Attorney for Petitioner
1615 Northern Boulevard
Manhasset, New York 11030

Richard Johannesen, Esq.
Johannesen & Johannesen, PLLC
Attorney for Objectant
544 Route 25A
Rocky Point, New York 11778