

Matter of Stylianou
2018 NY Slip Op 33145(U)
December 10, 2018
Surrogate's Court, New York County
Docket Number: 2017-598
Judge: Nora S. Anderson
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SURROGATE'S COURT : NEW YORK COUNTY

New York County Surrogate's Court

December 10, 2018

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 In the Matter of the Petition to Admit
 Will into Probate in the Estate of

ATHENA STYLIANOU,

File No. 2017-598

Deceased.

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 ANDERSON, S.

In this contested probate proceeding in the estate of Athena Stylianou ("decedent"), four of decedent's nieces filed objections to the petition to probate an instrument dated May 12, 1993. The proponent moves to dismiss the objections.

Decedent died on December 21, 2016, at age 93, leaving an estate worth about \$70,000. She was survived by her sister (herein, "proponent") and ten nieces and nephews, children of her three predeceased siblings. The parties do not dispute that, under the propounded instrument, decedent bequeathed her estate in equal shares, per stirpes, to her four siblings. Proponent, the nominated executor, received preliminary letters on January 12, 2017.

Decedent's four nieces, the children of her predeceased sister, Maria, appeared pro se and filed objections grounded in fraud, duress and undue influence. Their objections allege misconduct by decedent and proponent, including claims that, more than twenty years ago, the two women had "conspired to steal funds" from Maria's bank account and that, for several years prior to Maria's death in 1994, decedent had "cashed out" Maria's social security checks. Objectants contend that "the alleged will was fraudulent: the funds belonged to our mother . . .," and that proponent "was instrumental and a witness to this fraudulent will." They argue that proponent is unfit to be executor and that "the alleged will and funds of the alleged will were obtained through coercion, duress and undue influence."

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In support of her motion to dismiss, proponent argues that objectants' allegations of misconduct as to property are not relevant to the validity of the propounded instrument. In opposition, objectants submit an affidavit which merely provides a few more details regarding their allegations of misconduct by decedent and proponent. They do not, however, provide any additional allegations regarding the validity of the propounded instrument.

While objectants do not allege lack of due execution or of testamentary capacity, the court has reviewed the instrument and is satisfied that all the legal requirements have been met (*see* SCPA 1408; *Matter of Falk*, 47 AD3d 21, 26 [1st Dept 2007]; *lv denied* 10 NY3d 702 [2008]; *Matter of Thiele*, NYLJ, Dec. 7, 2015, at 33, col 3 [Sur Ct, Suffolk County 2015]). The propounded instrument contains an attestation clause signed by two witnesses, one of whom was the attorney-drafter. Moreover, in the contemporaneous affidavit annexed to the instrument, the witnesses attested that decedent was "of sound mind, memory and understanding and not . . . incompetent," further strengthening the presumption that decedent had the requisite capacity when she executed the instrument (*see Matter of Korn*, 25 AD3d 379 [1st Dept 2006]; *Matter of Clapper*, 279 AD2d 730 [3rd Dept 2001]).

Legal Standard on a Motion to Dismiss

Proponent's motion to dismiss does not specify the statutory provisions upon which she relies. However, in view of the substance of her arguments, the court will consider her motion as one based upon objectants' failure to state a valid objection upon which relief can be granted (CPLR 3211[a][7]). It is well settled that, on a motion to dismiss, the facts alleged in the challenged pleading must be deemed to be true, and the party opposing the motion must be afforded "the benefit of every favorable inference" (*Matter of Mercer*, NYLJ, June 17, 2015, at 27, col 6 [Sur Ct, Suffolk County] *quoting Matter of Lee*, 96 AD3d 941, 942 [2nd Dept 2012];

Matter of Shay, NYLJ, Dec. 9, 2011 at 26, col 1 [Sur Ct, Bronx County]; *see generally Leon v Martinez*, 84 NY2d 84, 87-88 [1994]). The court must construe the pleading liberally (*see* CPLR § 3026), and its role “is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Matter of Mercer, supra; Leon v Martinez, supra*).

Fraud

An objection to probate based on fraud requires a showing that a knowingly false statement caused a decedent to execute a will significantly different from the will she would have executed in the absence of such statement (*see Matter of Ryan*, 34 AD3d 212, 215 [1st Dept 2006]). Moreover, any allegations of fraud must satisfy the requirements of CPLR 3016(b), which provides that the circumstances of the alleged fraud must be stated in detail (*see Matter of Gentilcore*, NYLJ, Feb. 3, 2011 at 34, col 2 [Sur Ct, Kings County 2011]). Objectants’ pleading is devoid of any allegation giving rise to a claim of fraud upon decedent when she executed the propounded instrument.

Undue Influence and Duress

While claims of undue influence and duress are distinct from one another, they share the common premise that a decedent’s execution of an instrument resulted from someone else’s volition rather than her own (*Matter of Martin*, NYLJ, Oct. 26, 2015 at 26 [Sur Ct, NY County 2015]). A claim of undue influence rests upon an allegation that a wrongdoer abused the testator’s trust by causing her to execute a testamentary instrument contrary to what she would have executed of her own free will. A claim of duress, by contrast, rests upon an allegation that a wrongdoer coerced a testator to execute a will by physical force or by threatening harm (*id.*; *see also Matter of Rosasco*, 31 Misc 3d 1214[A] [Sur Ct, NY County 2011], *quoting* Restatement [Third] of Property: Wills and Other Donative Transfers, § 8.3).

The elements of undue influence or duress are: (i) motive; (ii) opportunity; and (iii) the actual exercise of undue influence or duress over the testator (*Matter of Walther*, 6 NY2d 49 [1959]; *Matter of Young*, NYLJ, Mar. 22, 2017 at 22, col 5 [Sur Ct, NY County 2017]). Any objection of undue influence requires that the circumstances constituting the wrongful conduct be stated in detail (*see* CPLR 3016[b]). Objectants' pleading fails to identify the person or persons who unduly influenced or coerced decedent, much less the circumstances under which the influence was exercised.

Fiduciary's Fitness to Serve

Pursuant to SCPA § 707(1)(e), a nominated fiduciary is ineligible to serve if he or she is "unfit for the execution of the office." Here, objectants claim that the nominated executor is dishonest and therefore unfit to serve.

It is well-settled that a testator's choice of a fiduciary is not to be lightly disregarded and should be nullified only when grounds for disqualification are clearly established (*see Matter of Duke*, 87 NY2d 465, 473 [1996]; *Matter of Leland*, 219 NY 387 [1916]; *Matter of Mullen*, NYLJ, Dec. 27, 2012, at 18, col 4 [Sur Ct, Bronx County]). Objectants bear the burden of demonstrating proponent's unfitness (*see Matter of Krom*, 86 AD2d 689 [3rd Dept 1982]; *Matter of Mullen, supra*).

In support of their objection to proponent's appointment, objectants allege, "upon information and belief," that proponent improperly withdrew \$30,000 from a bank account which had been "left for us, the objectants." They further allege that, after their mother's death in 1994, proponent asked them for documents pertaining to their mother's union membership in order to "become [the] beneficiary and therefore collect [their mother's] union checks." Such vague and

speculative allegations do not state a cognizable claim for disqualification (*see generally, Matter of Gottlieb*, 75 AD3d 99, 107 [1st Dept 2010]).

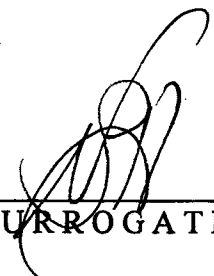
The objectants have failed to plead the elements of fraud, duress or undue influence that would warrant invalidating the propounded instrument. They have likewise failed to set forth a basis for disqualification of the nominated fiduciary prior to the issuance of permanent letters.

Accordingly, proponent's motion to dismiss is granted in its entirety.

This decision constitutes the order of the court.

Dated:

December 10, 2018



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