

Matter of Goldstein

2018 NY Slip Op 34558(U)

January 22, 2018

Surrogate's Court, Richmond County

Docket Number: File No. 2015-814

Judge: Robert J. Gigante

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

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In the Matter of the Estate of

SELMA GOLDSTEIN

File No. 2015-814

Deceased.

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Selma Goldstein (hereinafter "Decedent"), died on August 7, 2015 a domiciliary of Richmond County. In this contested probate proceeding of a will dated September 22, 2010, Decedent's daughters Joanne Dillon and Ellen Goldfarb (hereinafter "Proponents"), move for summary judgment dismissing the objections filed by the Decedent's son, William Goldstein (hereinafter "Objectant"). The objections allege lack of due execution, lack of testamentary capacity, fraud and undue influence.

Summary judgment should be granted only where it is clear that no triable issue of fact exists (Matter of Goldberg, 180 AD2d 528 [App Div 1st Dept 1992]). It is necessary for the movant to make a prima facie showing that he or she is entitled to summary judgment as a matter of law (Zuckerman v City of New York, 49 NY2d 557 [1980]). The objectant opposing summary judgment must then present affirmative proof that their claims are real and capable of being established at trial (Stainless, Inc. v. Employers Fire Ins., 69 AD2d 27 [1979]). If there is any doubt as to the existence of a triable issue, the motion for summary judgment must be denied (Hantz v. Fishman, 155 AD2d 415 [App Div 2d Dept 1989]).

Due Execution

The proponent has the burden of proving the due execution of the will (Matter of Kumstar, 66 NY2d 691 [1985]). Due execution requires that the testamentary instrument be signed by the testator, that such signature shall be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge to each witness that the signature affixed on the instrument was affixed by him or at his direction, that the testator publish to the attesting witnesses that the testamentary instrument is his will, and that at least two attesting witnesses attest the testator's signature, sign their names and affix their residences at the end of the will (EPTL 3-2.1).

Where, as here, the execution is supervised by an attorney, there is a presumption of proper execution of the instrument (Matter of Hedges, 100 AD2d 586 [2d Dept. 1984]). A review of the transcripts of the drafting attorney and the two attesting witnesses reveal that the formalities required for due execution were observed on September 22, 2010, when the Decedent's will was executed. In addition, both witnesses signed the self-proving affidavit, which accompanies the propounded instrument.

Based upon the foregoing, Proponents have established a prima facie case that the propounded instrument was duly executed, thereby shifting the burden to the Objectant to offer proof to the contrary. Objectant has failed to provide any proof that the propounded instrument was not executed in conformity with applicable law.

Accordingly, the due execution objection is hereby dismissed.

Fraud

To establish fraud, it must be shown that a false statement of fact was made to the testator, and that such statement altered the testamentary disposition that would have been made in the absence of such a statement (Matter of Paigo, 53 AD3d 836 [3d Dept. 2008]). This burden, as well as the burden of showing that a decedent relied on any such false statements in executing the will, rest on an objectant (Matter of Coniglio, 242 AD2d 901 [4th Dept 1997]). Here, Objectant failed to present any evidence of a knowingly false statement made by the

Petitioners or any other person involved in the drafting or execution of the will. Therefore, the fraud objection is hereby dismissed.

Testamentary Capacity

The Proponent has the burden of establishing, by a preponderance of the credible evidence, that the testator possessed testamentary capacity when a will was executed (Matter of Slade, 106 AD2d 914 [4th Dept 1984]), by demonstrating that the decedent understood the nature and consequences of executing a will, the nature and extent of his properties, and the natural objects of his bounty (Matter of Kumstar, supra). The statements of a subscribing witness serve to establish a prima facie case of testamentary capacity (Matter of Dietrich, 271 AD2d 894 [3d Dept 2000]), and a presumption of testamentary capacity exists until the contrary is established (Matter of Beneway, 272 App Div 463 [3d Dept 1947]). The court must carefully review this issue, while bearing in mind that where the testator suffers from physical infirmities, old age, and even progressive dementia, the courts do not necessarily conclude that the testator was without testamentary capacity (Estate of

Medrano, 5/17/04 NYLJ 41 (col. 5); Estate of Josephine Mocilan, 1/21/10 NYLJ 43 (col. 6); see also Estate of Buchanan, 245 AD2d 642 [3d Dept 1997]).

The testimony of the attorney-draftsman and the other attesting witnesses to the will establish that the Decedent was of sound mind and memory when she executed the will. The drafting attorney stated at his deposition that the Decedent reviewed the will prior to signing it. Further, he stated that his typical will execution procedure, which he followed in this instance, was to engage the testator in some trivial conversation in front of the attesting witnesses to ensure the testator is lucid and responsive. Both witnesses to the Decedent's will are attorneys and stated at their respective depositions that they would not have signed the affidavit of attesting witness if they felt the Decedent lacked capacity. They cited the fact that they could not recall the specifics of the will execution as supporting their belief that the Decedent had capacity on the date of the will's execution. At this point, the burden shifts to the Objectant to present proof to create a triable issue of fact with respect to testamentary capacity.

Here, while each party asserts their opinion as to the state of the Decedent's health and mental status, neither have submitted an affidavit from her treating doctor(s) to support their version of the Decedent's mental health. Both parties refer to a single medical evaluation conducted approximately one year prior to the execution of the will in question, on November 18, 2009, conducted by Doctor Moeen U. Din at New York Epilepsy and Neurology, that diagnosed the Decedent with memory impairment/mild dementia, yet stated that the Decedent "can function." Dr. Din ordered a CT scan of the head and started the Decedent on

5 mg of Aricept daily. No additional medical proof closer in date or past the date of the will's execution has been provided.

Based on the foregoing, the allegations by the Objectant are not sufficient to defeat this application for summary judgment as to the claim that the Decedent lacked the mental capacity to execute her will.

Accordingly, the testamentary capacity objection is hereby dismissed.

Undue Influence

The burden of establishing undue influence is always upon the person seeking to establish it (Matter of Weather, 6 NY2d 49 [1959]). The influence exerted must amount to a moral coercion which restrained the Decedent's independent action and destroyed his free agency, or which constrained him to do something against his wishes (Matter of Walther, 6 NY2d 49 [1959]). "It is impossible to define or describe with precision and exactness what is undue influence; what the quality and extent of the power of one mind over another must be to make it undue, in the sense of the law, when exerted in making a will" (Rollwagen v Rollwagen, 63 NY 504 [1876]). Factors the courts are obliged to examine in determining whether a testator was subjected to undue influence include his physical and mental condition (see Matter of O'Brien, 182 AD2d 1135 [4th Dept 1992]). Also relevant in making such a determination is whether there was an alteration of a prior testamentary plan (Matter of O'Donnell, 91 AD2d 698 [3d Dept 1982]).

To support the Objectant's allegation that decedent was constrained to act against her own free will, Objectant argues that Proponent Joanne Dillon was the Decedent's primary caregiver and that she heavily relied on her for assistance with

daily living. In addition, the Objectant alleges the making of the Decedent's will was not an independent process.

While the deposition of Proponent Joanne Dillon establishes that the Decedent lived with her for 21 years prior to her death, no further proof of her dependence or reliance on Joanne Dillon or Ellen Goldfarb has been provided.

More concerning, however is the deposition testimony regarding the will execution, in that it establishes that the Decedent was referred to the drafting attorney through Proponent Ellen Goldfarb's husband, who shared office space with him. In addition, Joanne Dillon's daughter worked in the same legal office. Joanne Dillon drove the Decedent to the attorney's office and remained in the office, spending time with her daughter, until the completion of the will's execution. The drafting attorney stated at his deposition that he was unsure who first contacted him regarding the will, he was unsure if anyone else was present when he met with the Decedent regarding her will, and he said that he spoke with the Decedent's son-in-law, husband of Proponent Ellen Goldstein, prior to the will's execution. He was also unsure whether anyone other than the testator saw a copy of the will prior to its execution. Further, the drafting attorney stated that he based his drafting of the Decedent's September 22, 2010 will upon a page of handwritten instructions that were making changes to a prior will, however he was not certain if the Decedent authored the instructions on the page or not. He never specifically asked her about the content of the instructions and the resulting implications in contrast to the prior will.

Undue influence is a subtle concept and the question remains as to whether the propounded instrument was the result of the exercise of undue influence, which

can only be resolved by proof as to the credibility of various witnesses and evidence, which by its nature is circumstantial.

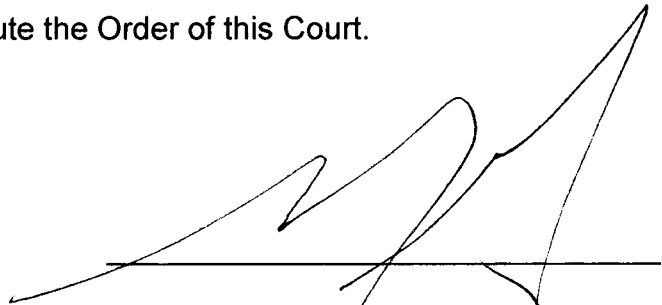
Accordingly, the motion to dismiss the objection as to undue influence is denied.

It is therefore ORDERED that Proponent's motion for summary judgment is granted with respect to the objections alleging lack of due execution, lack of testamentary capacity and fraud, and denied with respect to the objection alleging undue influence.

All counsel are directed to appear at the Court's calendar of **January 31, 2018 at 9:30 a.m.** for control purposes.

This decision shall constitute the Order of this Court.

Dated: January 22, 2018



ROBERT J. GIGANTE, Surrogate