

<b>Estate of Menchini</b>
2019 NY Slip Op 30670(U)
March 18, 2019
Surrogate's Court, New York County
Docket Number: 2016-2135
Judge: Rita M. Mella
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SURROGATE’S COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
Probate Proceeding, Estate of

STEPHEN JOHN MENCHINI,

Decedent.  
-----X

DECISION and ORDER

File No.: 2016-2135

New York County Surrogate’s Court

Date: March 18, 2019

M E L L A, S.:

The following papers were considered in determining this motion for summary determination and to dispense with the testimony of a witness:

PAPERS:

NUMBERED

Petitioner’s Amended Notice of Motion for Summary Judgment and To Dispense with Examination of Attesting Witness, with Affidavit of Brian Eskenazi, Affirmation in Support of William Roth, Esq., with Exhibits, and Memorandum of Law in Support of Motion.....	1-4
Affidavit in Opposition by August Menchini, with Affirmation in Opposition by Vincent Vitale, Esq.....	5-6
Affirmation in Further Support by William Roth, Esq., with Exhibit.....	7
Affirmation in Opposition by Victor S. Vitale, Esq., with Exhibit .....	8
Supplemental Affirmation in Opposition by Victor S. Vitale, Esq., with Exhibits.....	9

In this contested probate proceeding in the estate of Stephen John Menchini (“decedent”), Brian Eskenazi (“proponent”) offered for probate a testamentary instrument dated February 12, 2014. Decedent’s brother, August Menchini, objected to the probate of the propounded instrument on the grounds of lack of due execution and fraud. Before the court, on November 20, 2018, was proponent’s motion for summary determination (CPLR 3212) of the probate petition and dismissal of the objections and for an order dispensing with the testimony of one of the attesting witnesses pursuant to SCPA 1405.

*Relevant Background*

Decedent died on May 13, 2016, at the age of 68, survived by objectant, his brother, as his sole distributee. The record establishes that decedent had a law degree from St. John's University, but it appears that he never practiced law.

According to proponent, he met decedent in 1977, when they lived in the same apartment building, and they remained friends until decedent's death. In the 1990s, decedent was diagnosed with cancer and, in the years that followed, became, gradually, unable to work. By all accounts, decedent was often "in need of funds." Proponent avers that he lent decedent money for rent on more than one occasion and that, when decedent's mother was relocated to a senior facility on Long Island, proponent would drive decedent out to visit her.

Objectant claims that he was very close to decedent and spoke with him almost every day. Objectant alleges that, over the years, he made frequent gifts of money to decedent and that, starting in 2010, when decedent had completely stopped working, he gave decedent money on a monthly basis, as well as gifts of clothing and shoes. According to objectant, he and his family even cleaned decedent's apartment, which he claims was in a deplorable condition. Furthermore, objectant avers that he and his family always included decedent at holiday gatherings.

In the few years before his death, decedent came into a sum of money through inheritance and bequests after the deaths of family members and a friend, Robert Paparella. At the time of his death, decedent left an estate valued at approximately \$200,000.

*Execution of the Propounded Instrument*

Decedent was a long-time member of St. Peter's Church on 54th Street and Lexington in Manhattan. Proponent's proof establishes that, on February 12, 2014, decedent called Kathryn Burt, who worked at St. Peter's Church and was friendly with decedent, and asked her to notarize

his will. Burt testified at her deposition that she agreed because decedent was a frequent (if not daily) visitor to the church. On the morning the instrument was executed, decedent's friend, Stephen Shearer (who was in New York for a visit, but who lived in Minnesota), was at the church. Burt and Shearer testified at their depositions that, after decedent arrived at the church, Burt, Shearer, Rolando Mallari (another acquaintance who worked at the church) and decedent went to Reverend Amandus Derr's office where decedent executed a will which was witnessed by Shearer and Mallari. The witnesses then signed a self-proving affidavit. The signatures were notarized by Burt. According to Reverend Derr, he kept custody of the original will in his office at the request of decedent. Proponent surmises that decedent may have drafted the 2014 instrument himself. In any event, there is no evidence on the record that the propounded instrument was drafted, nor its execution supervised, by a practicing attorney.

In the 2014 instrument, decedent names his friend Robert Paparella (who was a lawyer and died after the instrument was executed) as executor, and proponent as alternate executor. There are pre-residuary bequests of \$10,000 payable to each of proponent, Paparella, decedent's two nephews, St. Peter's Church, and another friend, Janet Copland. Decedent leaves shares of an income fund (valued at \$5,000) to objectant. The residuary is left to Copland.

#### *Summary Judgment Standard*

In a motion for summary judgment, it is incumbent on the movant to "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 Hospital*, 68 NY2d 320, 324 [1986]). Once this showing is made, the burden shifts to the opponent to produce proof sufficient to establish the existence of a material issue that requires a trial (*id.*; CPLR 3212 [b]). Summary judgment may be granted only where it is clear that no triable issue of material fact

exists (*Alvarez*, 68 NY2d 320; *Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; see *Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County]).

*Discussion*

As a preliminary matter, at the call of the calendar of November 20, 2018, the court granted proponent's motion to dispense with the examination of Rolando Mallari, one of the two attesting witnesses who, despite a diligent search on behalf of both proponent and objectant, could not be found (SCPA 1405).

The court also granted proponent's motion for summary determination of his probate petition and dismissal of the objections. Proponent made a prima facie showing of decedent's testamentary capacity at the time of the will's execution, through the contemporaneous affidavit of the attesting witnesses and their attestation clause, as well as through the deposition testimony of witness Shearer and notary Burt, which all indicate that decedent was of sound mind on the day of the will's execution (see *Matter of Schlaeger*, 74 AD3d 405, 406 [1st Dept 2010]). Objectant did not object expressly on the ground of lack of capacity but avers in his pleading and in the affidavit in opposition to the present motion, that the multiple typographical errors and spelling inconsistencies in the propounded instrument establish decedent's impaired or confused state of mind at the time of its execution. The court concluded that objectant's averments were conclusory, based on speculation and did not create an issue of fact.

Proponent also made a prima facie showing of due execution, by means of the attestation clause, the self-proving affidavit of attesting witnesses Shearer and Mallari, and the deposition testimony of Shearer and of the notary who was present during the execution (*Matter of West*, 147 AD3d 592 [1st Dept 2017]). Through this proof, proponent established that: the instrument was signed at the end by decedent, who signed in front of the witnesses or acknowledged his

signature to them; that decedent declared the instrument to be his will; and that there were two witnesses to the execution of the will who attested to decedent's signature and who signed their names at the end of the instrument. The fact that the witnesses did not write their full residence addresses does not affect the validity of the instrument (EPTL 3-2.1 [a][4]).

In further opposition to the motion, objectant points to several facts, including that the instrument was unstapled, that the date of the expiration of the notary's commission was wrong, that there was an unexplained white-out on the blank portion of the witnesses' affidavit, that the execution was not supervised by an attorney, and that the recollection of the witnesses differed as to the exact place within the pastor's office at which the execution took place. These facts are either immaterial or fail to raise a question about the validity of the will or its due execution that would require a trial. Objectant also points to Shearer's testimony that he could not recall whether decedent signed the instrument in front of Shearer or whether decedent executed it in advance. This does not create an issue of fact either. Shearer's testimony makes clear that decedent asked him to act as witness to the will on February 12, 2014, and that decedent actively participated in the meeting during which it was discussed that the witnesses were signing decedent's will. An acknowledgment by the testator to the witnesses that he signed his will at a prior time satisfies the due execution requirements of the statute (EPTL 3-2.1 [a][4]).

The testator's failure to use the word "declare" during the execution ceremony does not defeat the publication requirement, since what must be shown is that there was a "meeting of the minds between the testator and the attesting witnesses that the instrument they were being asked to sign as witnesses was testamentary in character" (*see Matter of Falk*, 47 AD3d 21, 26-27 [1st Dept 2007], quoting *Matter of Roberts*, 215 AD2d 666 [2d Dept 1995]). Here, witness Shearer testified that he knew that the document he was signing was decedent's will. Finally, the

“numerous minor errors” in the propounded instrument pointed out by objectant do not provide a basis for denying its probate (*Matter of Hartofilis*, 151 AD3d 499 [1st Dept 2017]).

Objectant’s fraud claim is based on his allegation of forgery, namely that page two of the will, the page that contains most of the dispositive provisions as well as most of the typographical errors pointed out by objectant, may have been substituted in place of the original. Other than surmise and speculation, however, objectant provided no basis for the court to conclude that page two of the propounded instrument is not the original page. Proponent has provided the affidavit of Reverend Derr, who indicates that, after the instrument was executed, decedent asked him to retain it for safekeeping. After being informed of decedent’s death, Reverend Derr gave the original instrument to proponent but first unstapled it and made copies. Objectant has failed to present any evidence in support of his claim of fraud or forgery to require a trial on this issue.


The fact that objectant was only left a small bequest under decedent’s will despite their close relationship does not create an issue of fact requiring a trial in light of the evidence on this record that decedent was of sound mind and was under no restraint.

In examining all the evidence, the court determined that the February 12, 2014 instrument is valid and genuine and should be admitted to probate (SCPA 1408).

This decision, together with the transcript of the November 20, 2018 proceedings, constitutes the order of the court.

Settle probate decree.

Dated: March 18, 2019

  
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SURROGATE