Estate of Salazar
2020 NY Slip Op 34492(U)
March 6, 2020
Surrogate's Court, Bronx County
Docket Number: 2016-2549
Judge: Nelida Malave-Gonzalez
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SURROGATE'S COURT, BRONX COUNTY

March 6, 2020

ESTATE OF MIGUEL SALAZAR, Deceased
File No.: 2016-2549

In this highly contentious probate proceeding, the preliminary executor, the decedent's granddaughter, the nominated executor of an instrument dated August 13, 2012, moves for summary judgment pursuant to CPLR 3212 and admission of the purported will to probate. In support of the motion, the petitioner relies on the testimony of the attorney drafter and two attesting witnesses who indicate the decedent was competent to make a will, free of duress and undue influence and which complies with the testamentary formalities of EPTL 3-2.1 were complied with prior to the decedent executing the instrument. Further, the petitioner argues, in substance, the relatively small size of the estate warrants granting the application. The guardian ad litem appointed for a grandson under a disability, a one-twelfth remainder devisee of two real estate parcels in which the decedent's daughter and a son are given a life estate, submits an affirmation in support of the motion as his ward would have no interest in this estate if the will is denied probate. In addition, opposition to the motion was

filed by the objectants, a son and daughter of the decedent.

The decedent died on July 16, 2016 at the age of 88 survived by four children. Under the instrument, a daughter is permitted to reside in realty for life in Florida and a son is given a life estate in realty in Brooklyn, with the remainder of both parcels is left to each of twelve grandchildren; and the residuary is left to the objectant daughter - the mother of the petitioner - and another daughter. The instrument was executed the same day the decedent signed an irrevocable inter vivos trust, power of attorney and health care proxy which appointed the petitioner as agent. Thereafter, a Mental Hygiene Law article 81 proceeding was commenced in Supreme Court, Bronx County seeking the appointment of an Article 81 guardian for the decedent. That proceeding was contested, and after a hearing before Justice Sharon A. M. Aarons, that court found by clear and convincing evidence that the "appointment of a family member would be improvident, given the allegations of neglect, financial improprieties and exploitation of the A.I.P [the decedent] by family members" (Matter of Miguel Salazar, an A.I.P., Sup Ct. Bronx County, July 18, 2014, Aarons, J., index No. 91798/14). Further, Justice Aarons vacated the executed Power of Attorney, Health Care Proxy and the irrevocable trust finding that the decedent was incapacitated on the date that the documents were signed (Matter of Miguel Salazar, id.).

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see Phillips v Joseph Kantor & Co., 31

NY2d 307 [1972]; Glick & Dolleck, Inc. v Tri-Pac Export Corp., 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to judgment as matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals, Inc. v Associated Fur Mfrs. Inc., 46 NY2d 1065 [1979]). When the movant has made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Of course, summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion, but must await the trial (see F. Garofalo Elec. Co. v New York Univ., 300 AD2d 186 [1st Dept 2002]).

Assuming arguendo the petitioner met her burden for summary judgment, under the circumstances in this matter and based upon the supreme court's invalidation of the power of attorney, health care proxy and the irrevocable trust, clearly there exists a question of fact as to whether the decedent was competent to execute the propounded instrument. Although it is so well established that less capacity is necessary for one to validly execute a will than necessary to enter into a contract (see Matter of Coddington, 281 AD 143 [3rd Dept 1952] affd 307 NY 181 [1954]), that does not give rise to the automatic probate of the instrument on summary

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judgment.

Accordingly this decision constitutes the order of the court denying the motion in all respects. Insofar as the petitioner has not submitted an order framing issues, she is directed to do so forthwith.

Proceed accordingly.

HON. NELIDA MALAVE-GONZALEZ
SURROGATE