Matter of Dorris
2021 NY Slip Op 31980(U)
July 13, 2021
Surrogate's Court, New York County
Docket Number: 2017-3673/A
Judge: Rita M. Mella

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

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Probate Proceeding, Estate of

E. LOWELL DORRIS,

Deceased.

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DECISION
File No.: 2017-3673/A

M E L L A, S.:

The court considered the following submissions in determining the instant motion for summary determination:

	Date Filed
1. Respondent's Notice of Motion	December 29, 2020
2. Affidavit of Luis Freddy Molano in Support	December 29, 2020
3. Memorandum of Law in Support	December 29, 2020
4. Affirmation of Andrew M. Krisel, Esq., in Support with Exhibits	December 29, 2020
5. Memorandum of Law in Opposition	February 16, 2021
6. Affirmation of Anthony L. Tersigni, Esq., in Opposition, with Exhibits	February 16, 2021

In the estate of decedent E. Lowell Dorris, Luis Freddy Molano, respondent in a proceeding to probate an August 19, 2015 instrument under which he is sole beneficiary, has moved for summary dismissal of the single probate objection, an allegation of undue influence (*see* CPLR 3212). The instrument has been propounded by Benjamin Robinson (Petitioner), the nominated executor and the attorney who drafted it and supervised its execution.[1]

Decedent died on May 21, 2017, at age 86, survived by four nieces and a nephew, leaving a probate estate of approximately $350,000. The sole probate asset was a 50% interest in a co-operative apartment. The other 50% interest had been owned by Rudolph Boerboom, who predeceased decedent on November 16, 2013.

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[1] Petitioner has filed no response to the motion but his counsel indicated during the oral argument that he joined in the motion.

On August 29, 2018, decedent's four nieces objected to probate, contending that the propounded instrument was the product of undue influence exercised by Molano and that, at the time the instrument was executed, Molano was in a "confidential and fiduciary relationship" with decedent.

Legal Standards, Motion for Summary Determination and Undue Influence

Summary determination is a "drastic remedy" available only if the absence of any dispute as to a material fact is certain (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012], citing *Alvarez v Prospect Hosp.*, 68 NY2 320, 324 [1986]; *Nesbitt v Nimmich*, 34 AD2d 958, 959 [2d Dept 1970]). On a motion for summary determination, movant "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'" to be tried (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73[2]-74 [2020], citing *Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Movant must make this showing without relying on evidence which would be barred by CPLR 4519 (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 313 [1972] ["Emphatically, evidence excludable under the Dead [Person]'s Statute should not be used to support summary judgment"]).

If the movant makes a prima facie showing, it is then incumbent upon the party opposing summary determination "to lay bare his proof" (*Christian Rupert of New York, Inc. v Mallinckrodt*, 110 AD2d 548, 549 [1st Dept 1985], *appeal dismissed* 66 NY2d 613 [1985]) in

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[2] Petitioner has filed no response to the motion but his counsel indicated during the oral argument that he joined in the motion.

order "'to establish the existence of material issues of fact which require a trial'" (*Trustees of Columbia Univ.*, 36 NY3d at 74 [2020], quoting *Vega v Restani Constr. Corp.*, 18 NY3d at 503). The court must view the facts in the light most favorable to the party opposing summary determination (*see Hewitt v Palmer Veterinary Clinic, PC*, 35 NY3d 541, 549 [2020]). Additionally, the non-moving party must be accorded "the benefit of every reasonable inference" (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Nevertheless, "bald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment" (*Stonehill Capital Mgt. LLC v. Bank of the West*, 28 NY3d 439, 448 [2016], quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

In order to make a prima facie showing in this case, movant must establish, through evidence not barred by CPLR 4519, that the propounded instrument was a "natural" will, *i.e.*, one that makes dispositions that seem natural in light of the testator's circumstances. To defeat summary judgment, objectants must provide evidence of undue influence (*Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]), including motive, opportunity, and actual exercise of undue influence (*Matter of Walther*, 6 NY2d 49 [1959]), sufficient to raise a material issue of fact requiring a trial. It is well settled that, to be undue, influence must amount to:

> "moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear."

(*Children's Aid Soc. v Loveridge*, 70 NY 387, 394 [1877]). Undue influence may be established through circumstantial rather than direct evidence (*Matter of Walther*, 6 NY2d at 54). However, such evidence must be specific and detailed. Mere conclusory assertions or speculation will not suffice (*Matter of Korn*, 25 AD3d 379, 379-380 [1st Dept 2006]; *Matter of Cianci*, 165 AD3d 655, 657-658 [2d Dept 2018]).

Courts have considered the following factors, among others, in determining whether undue influence has been exercised: the mental condition of the testator (*Children's Aid Soc. v Loveridge*, 70 NY at 407; *Matter of Woodward*, 167 NY 28, 30 [1901]; whether the attorney who drafted the propounded instrument was associated with a beneficiary or was the testator's attorney (*Matter of Rosen*, 296 AD2d 504, 505-506 [2d Dept 2002]; *Matter of Elmore*, 42 AD2d 240, 241 [3d Dept 1973]; *Matter of Ruef*, 180 AD 203, 207 [2d Dept 1917]); whether the provisions of the propounded instrument deviate from the testator's prior testamentary plan (*Matter of White*, 121 NY 406, 410-411 [1890]; whether the person who allegedly exercised undue influence was in a position of trust (*Matter of Henderson*, 80 NY2d 388, 394 [1992]); and whether, at the time of the will's execution, the testator was isolated from the objects of his natural affection (*Matter of Anna*, 248 NY 421 [1928]; *Matter of Kaufman*, 20 AD2d 464, 483 [1st Dept 1964], *affd* 15 NY2d 825 [1965]).

DISCUSSION

The proof provided by movant includes the testimony of Petitioner Robinson, the attorney who drafted the propounded instrument and several other prior purported testamentary instruments of decedent and who knew decedent for more than 30 years. At his SCPA 1404 deposition, Robinson testified: "I knew for a fact [decedent] knew what he was doing given [his]

mental state of health, his ability to express himself without qualification, he was able to express himself," and also: "[I]n my mind it was my belief that Lowell Dorris was fully capable [,] mentally alert to answer, to suggest whatever he wanted in his will."[3]

There is also evidence that decedent was not isolated from his family. The record is clear that Ms. O'Neill and the two objectants who lived in New York City (their sister, the fourth objectant, lived in Hong Kong, from 1995 until October 2017) enjoyed loving, caring relationships with their uncle, the decedent, and visited him regularly and often, especially during the final years of decedent's life.

Movant also contends that the propounded instrument is a "natural" will when viewed in the context of decedent's six prior wills, also drafted by Petitioner and executed over a period of 19 years, in each of which movant was named as a beneficiary. By contrast, only one of decedent's nieces was named as a beneficiary in any of those six prior instruments, and she was named only in one, and then only as a contingent beneficiary.

In support of his contention, movant has presented the court with copies of decedent's six prior wills executed by decedent during the period from December 8, 1995 through April 8, 2014. Each of the four earliest instruments, dated December 8, 1995, April 27, 1999, June 11, 2003, October 16, 2007, respectively, contains two dispositive provisions: a pre-residuary bequest to movant — in three of the instruments, a bequest of $15,000, and in the April 27, 1999 instrument, a bequest of $40,000 — and the residuary to Mr. Boerboom

On August 25, 2011, decedent and Mr. Boerboom executed instruments which were

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[3] Petitioner's entitlement to commissions as executor of decedent's will does not make him an interested party under CPLR 4519 (*Matter of Johnson*, 7 AD3 959 [3d Dept 2004]).

reciprocal with respect to the disposition of the proceeds from the sale of the co-operative apartment and the contents of the apartment and the residuary. Each bequeathed one-half of the net proceeds from the sale of the co-operative apartment and the contents of the apartment, upon the death of the other or the sale of the co-operative apartment by the other, to Mr. Boerboom's niece, Gerarda Maria Henrica Lodders. Each of decedent and Mr. Boerboom bequeathed the residuary to the other and named Ms. Lodders as contingent remainder beneficiary.[4] Decedent, however (unlike Mr. Boerboom), also included in his August 25, 2011 will a pre-residuary bequest of $15,000 to Molano.

Decedent's penultimate purported will was executed on April 8, 2014, following Mr. Boerboom's November 16, 2013 death. It contains a bequest of one-half of the net proceeds from the sale of the co-operative apartment and the contents of the apartment to Ms. Lodders, and the residuary to movant. Decedent's niece, Maurie O'Neill, is named as contingent residuary beneficiary.

The propounded instrument contains a single dispositive provision: The entire estate is bequeathed to movant, and the contingent beneficiary is Carmen Della Cruz.

Thus, the evolution of decedent's testamentary plan, as narrated by seven instruments executed over almost two decades, appears to culminate logically, or "naturally," in the propounded instrument (*see Matter of MacGuigan*, 2015 NY Misc LEXIS 5820 [Sur Ct, NY County] *affd* 140 AD3d 625 [1st Dept 2016]; *Matter of Rosenberg*, NYLJ, Apr. 9, 1998, at 30, col 3 [Sur Ct, NY County]).

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[4] On November 26, 2019, six years after Mr. Boerboom's death, his August 25, 2011 will was admitted to probate by this court.

Through the evidence just described, movant has made a prima facie showing of entitlement to judgment as a matter of law.

Objectants, in an effort to create a genuine question as to material facts, offer several discrete pieces of evidence. Their proofs consist of: (1) the contrast between the dispostive scheme of the propounded instrument, which favors movant alone, and that of decedent's prior testamentary instruments; (2) movant's purported admission — an assertion in an affidavit, "I do not deny that my relationship with E. Lowell Dorris was one of trust and confidence" which, according to objectants establishes that movant had a "confidential relationship" with decedent; (3) the deposition testimony of Ms. O'Neill, and, specifically, her description of the relationship between decedent and movant. Ms. O'Neill testified that the two men had known each other for "between 30 and 40 years, maybe. Maybe not quite 40," and that "The basis of their relationship was largely keeping [movant] not angry,"[5] and further that, towards the end of decedent's life: "My uncle needed someone to help him desperately for his medical care," and feared angering movant, lest movant abandon him; and (4) documents, including bank statements and copies of canceled checks, which, according to objectants, support the conclusion that movant exercised control over decedent's financial matters. Objectants assert that these pieces of evidence, taken together: a) establish that movant had a confidential relationship with decedent; and b) are sufficient to create issues of fact concerning whether the provisions of the propounded instrument

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[5] Ms. O'Neill testified that, during "their entire long, long" relationship, decedent and movant

> " . . . were on and off friends. There were times when [movant] would get so angry that my uncle would call me up and say that I haven't heard from him in four weeks now, he has his angry [sic], he is going through his anger thing, he is punishing me. Yes, that was before he was taking care of my uncle."

are the product of movant's undue influence.

To support their contention that decedent was dependent on movant for his medical care, objectants note that movant was described in hospital records, in connection with decedent's February 2016 hospitalization, five months after the execution of the propounded instrument, as decedent's "close friend who [was] both his health care proxy and . . . his power of attorney," who "had been assisting [decedent] with activities of daily living including meal preparation," and who had participated actively in planning decedent's post-discharge rehabilitative care. Without a doubt, this evidence establishes that movant "was the person in the position of ensuring that Decedent received the care he needed as his health progressively deteriorated after 2013," as objectants contend. But they have produced no evidence that decedent's naming movant, a long-time friend with a medical background,[6] as his healthcare proxy — as decedent had informed objectant O'Neill he would — was anything other than a natural choice or, more importantly, that movant abused his position.

As for financial matters, objectants show that although movant had resigned on July 25, 2013 as original trustee of decedent's inter vivos trust, the "E. Lowell Dorris Irrevocable Trust, dated April 20, 2013," the records of the brokerage firm at which the trust account was maintained were not changed to reflect movant's resignation until after decedent's death. The fact that the address to which the brokerage firm sent the statements during that entire period was decedent's address, however, calls into question objectants' assertion that movant continued to have complete control of that account after his resignation as trustee. Additionally, the record

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[6] Molano testified at his deposition that he graduated from a medical school in the Dominican Republic, which enables him to practice medicine without a license in the Dominican Republic, but he is not licensed to practice medicine in any jurisdiction.

reflects that, in May of 2013, movant, as trustee, authorized the brokerage firm to make and send payments of principal and dividends directly to decedent. Such authorization may be evidence that movant was ceding control of the matters related to the trust to decedent but objectants conclude instead that "it was Dr. Molano, and only Dr. Molano, who controlled the trust and pursuant to whose authorization [the brokerage firm] sent payments to Decedent . . . . If Dr. Molano were to have withdrawn that authorization, the payments to Decedent would have ceased." Objectants, however, make no showing that movant ever attempted, threatened, or even contemplated, withdrawal of such authorization.[7]

Objectants' contend that Harold Bollaci, the lawyer who drafted the trust instrument and who currently represents Petitioner, "must have acted as attorney for Decedent, the settlor of the trust, or Dr. Molano, the named trustee, or both," and that: "This is an additional circumstance that has not been explained, but must be, to dispel any inference of undue influence." Other than their speculation, however, objectants offer no support for the conclusion that Bollaci "must have" been acting as movant's lawyer.

Objectants further argue that movant's act of depositing checks — drawn from the trust account, payable to the order of decedent and mailed to decedent — into decedent's checking account to which movant's name had been added in May of 2016, and movant's retention of the balance of the checking account following decedent's death "illustrate the degree of control and influence that Dr. Molano possessed and actually utilized over the entire period from and after 2013 to the date of Decedent's death in 2017." That decedent gave to movant a degree of control

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[7] In any event, it is unclear whether, in light of his resignation as trustee, Molano would have had the power to withdraw the authorization after July 2013.

over decedent's finances and that movant exercised such control is undisputed. Objectants, however, make no showing that movant obtained such control through undue influence. And objectants offer no support for their speculation that "Dr. Molano may be found to have engaged in self-dealing with respect to the [checking] account." In any event, all the transactions to which objectants refer took place months if not more than a year after the execution of the propounded instrument and at a time in which, according to his medical records, decedent's physical health was declining and he required more assistance with his affairs.

Much is made by objectants of movant's statement that he does not deny that his relationship with decedent was one of "trust and confidence." They assert that the existence of a confidential relationship here has been conceded by movant. "Confidential relationship" is a term of art. As explained by the Appellate Division, in *Matter of Kotsones* (185 AD3d 1473 [4th Dept 2020], *leave to appeal granted* 36 NY3d 902 [2020]), a confidential relationship is one of "'inequality or a controlling interest'" (*id.* at 1475, quoting *Matter of Nurse*, 160 AD3d 745, 748 [2d Dept 2018]). In light of Petitioner's testimony that decedent knew what he was doing and was clear about his wishes, movant's averral may be a reference to the trust and confidence that exists between friends.

Assuming for the sake of argument that movant had been in a confidential relationship with decedent at the time decedent executed the propounded instrument, the combination of a confidential relationship and evidence of its exploitation — here, the magnitude of the bequest to movant — may permit an inference of undue influence which would obligate movant to explain

the bequest (*see* PJI 7:56.1; *Matter of Katz*, 15 Misc 3d 1104 [A] [Sur Ct, NY County 2007]).[8] The increase in the size of the bequest to movant in this case can be explained by a change in decedent's circumstances: the November 16, 2013 death of Mr. Boerboom, the primary object of decedent's bounty under prior testamentary instruments. As to why, in the propounded instrument, decedent substituted movant for Mr. Boerboom's niece as the beneficiary of one-half of the net proceeds from the sale of the co-operative apartment, the July 27, 2013 amendment to decedent's irrevocable trust — in which decedent appears to have increased the interest of Mr. Boerboom's niece in the trust remainder — may shed a clarifying light on the matter.[9]

Finally, it is undisputed that, at the time decedent executed the propounded instrument, he was in full possession of his mental faculties. Objectants make no showing that movant compelled decedent to do anything that decedent himself did not want to do (*see Maisannes v Ryan*, 34 AD3d 212, 214 [1st Dept 2006]).

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[8] By contrast, the more stringent standard enunciated in *Sepulveda v Aviles* (308 AD2d 1, 7-8 [1st Dept 2003]), on which objectants rely, has been applied to inter vivos transfers.

[9] The July 27, 2013 amendment to "The E. Lowell Dorris Irrevocable Trust, dated April 20, 2013," reads, in pertinent part:

> "WHEREAS the Settlor wishes to amend the Trust to remove Paragraph Fourth, Section (G) (2) (b), in its entirety from the terms of the Trust and replace it with the following:
>
> "(b) The remaining 50% percent [sic] shall also go to the niece of Rudolf Boerboom, Ms. Geraldine Lodders. In the event that Ms. Lodders predeceases the Settlor, her share shall be distributed to her issue, then living. This shall also apply to paragraph (a) of Paragraph Fourth, (G) (2).
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> "Therefore, Paragraph Eighth, Section (A) and Paragraph Fourth, Section (G) (2) (b), of the Boerboom [sic] Dorris 2013 Irrevocable Trust is amended as provided hereinabove."

In a further attempt to raise an issue of fact, objectants question movant's credibility. In this regard, objectants note inconsistencies between, on the one hand, movant's testimony at his August 12, 2020 deposition and, on the other hand, his affidavit in support of the instant motion filed on December 29, 2020. For example, movant's deposition testimony regarding the August 19, 2015 execution of the propounded instrument was unequivocal: On that day, decedent had gone to his lawyer's office, where he executed the propounded instrument, and, although fully ambulatory, decedent nevertheless asked movant to meet him at the lawyer's office for the purpose of walking decedent back to decedent's home, which movant did.

By contrast, movant averred in his affidavit:

> "I had nothing to do with Lowell's execution of his August 19, 2015 will. . . . I was not present at the will execution nor did I even know about it. In my deposition I indicated I meet [sic] Lowell after he signed his will and walked home with him that day. This was a mistake and I confused that appointment with a pervious [sic] appointment Lowell had with his lawyer in 2014. In 2015 Lowell was using a walker to help him walk and we obviously did not walk the twenty plus blocks back to his apartment when he was using his walker." [10]

In addition, movant testified at his deposition that he had learned of the substance of the propounded instrument during decedent's lifetime. Yet, movant's affidavit reads:

> "I never even had a discussion with [decedent] about writing a new will nor did I know at the time that he was going to sign a new will. . . . I never saw or reviewed Lowell's will. I believe the first time I ever saw Lowell's will was after he died and his attorney contacted me."
>
> And:
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> "I did not even know he was going to write and sign the will in questions [sic] until long after it had been executed."

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[10] Petitioner Robinson testified at his deposition that, while he had no specific recollection of the will execution ceremony, at the time decedent would have come to his office to execute the propounded instrument, "he definitely was in a walker."

The Court of Appeals has stated: "It is not the court's function on a motion for summary judgment to assess credibility" (*Ferrante v American Lung Ass'n*, 90 NY2d 623, 631[1997]). Instead, the court's role is to determine whether a material fact is in dispute. Here, objectants have pointed to no inconsistency — and the court has found none — material to the question of whether the content of the propounded instrument resulted from movant's design and importuning rather than from decedent's wishes.

The crux of this dispute seems to be not credibility but incredulity, objectants' incredulity that their beloved uncle would have disinherited them.[11] What objectants overlook is that, under the penultimate purported will — the only one of the seven purported wills under which any family member had an interest and which Ms. O'Neill doubted, according to her deposition testimony, was the product of undue influence — Ms. O'Neill's interest was contingent on decedent's surviving movant, a condition which did not occur. As a result, even under the penultimate instrument, she — and the other objectants — would have been disinherited as well.

CONCLUSION

Movant has made a prima facie showing that the propounded instrument is not the product of undue influence. And objectants have failed to identify any material issue of fact to be tried as to whether movant exercised an influence over decedent which "constrained the testator to do that which was against his free will and desire, but which he was unable to refuse

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[11] All four objectants testified at their depositions that they did not believe that decedent would have left all of them out of his will. Also, in an affidavit dated March 28, 2019, which is part of the record before the court in this motion, Ms. O'Neill averred: "Ms. Della Cruz was a part-time cleaning lady for my uncle's apartment that was brought in by Molano in the last couple of years of my uncle's life. It is beyond belief that my uncle, with whom I and my sisters were very close to the very end of his life, would have included such a provision in his will, to our exclusion, unless he was subject to undue influence by Molano."

or too week to resist" (*Children's Aid Soc. v Loveridge*, 70 NY at 394). Accordingly, the motion for summary dismissal of the objection to probate is granted.

Settle probate decree.

Clerk to notify.

Dated: July 13, 2021

S U R R O G A T E