

**Matter of Peragine**

2023 NY Slip Op 32347(U)

July 12, 2023

Surrogate's Court, New York County

Docket Number: File No. 2020-838/B

Judge: Hilary Gingold

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

July 12th 2023

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

-----X

Probate Proceeding, Will of

**DECISION**

Joseph Thomas Peragine,

File No. 2020-838/B

Deceased.

-----X

G I N G O L D, S.

The following papers numbered 1 through 10 were read in determining the unopposed motion for summary judgment (CPLR 3212) made by proponent in this contested probate proceeding in the estate of Joseph Thomas Peragine:

Papers Considered

Papers Numbered

Notice of Motion - Petitioner's Memorandum of Law - Affidavit - Affirmation - Objections <sup>1</sup> - Proofs of Service	1-7
---	-----

Proponent moves, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing the objections to probate filed by objectant, one of decedent's daughters. Objectant alleges lack of testamentary capacity, lack of due execution, undue influence, and fraud.

<sup>1</sup>Although proponent included a copy of the probate petition as an exhibit to her motion papers, she did not include a copy of the objections to probate. However, the court notes that it is objectant's own document, it was filed electronically, and is available to the parties and the court (see e.g. *Galpern v Air Chiefs, L.L.C.*, 180 AD3d 501, 502 [1<sup>st</sup> Dept 2020] ["motion court providently exercised its discretion under CPLR 2001 to disregard [movant's] failure to submit the pleadings because the record was substantially complete and otherwise available to the court and parties on the New York State Courts Electronic Filing docket"] [internal quotation marks omitted], citing *Studio A Showroom, LLC v Yoon*, 99 AD3d 632 [1<sup>st</sup> Dept 2012].)

Objectant is self-represented, having dispensed with the services of two attorneys who had previously appeared on her behalf. The affirmation of service filed with the court shows that objectant was served with a copy of the motion papers. Although the Notice of Motion she received specifically provided that opposition papers had to be served seven days before the return date of June 6, 2023, objectant did not file and/or serve opposition to the motion.

#### **UNDISPUTED FACTS**

Decedent died on February 21, 2020, survived by two daughters, objectant and by another daughter who waived process and consented to probate of the propounded instrument. The propounded instrument was executed on February 28, 2005, approximately 15 years prior to decedent's death. By the instrument's terms, each of decedent's daughters receives a bequest of \$5,000. Proponent, decedent's long-time fiancé, receives the residuary estate and is the nominated executor. The instrument contains an attestation clause. The witnesses to its execution also signed an affidavit of subscribing witnesses at the time of execution. The instrument's execution was supervised by an attorney, who also acted as one of the witnesses.

#### **STANDARD FOR SUMMARY JUDGMENT**

The standard for granting a motion for summary judgment is well settled. Summary judgment may be granted only if the movant

makes 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 Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make such a showing requires denial of the motion, regardless of the sufficiency of opposition papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). Only if movant satisfies this burden must the party opposing summary judgment come forward with evidentiary proof establishing a genuine issue of material fact (see e.g. *S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]). Even when a motion for summary judgment is unopposed, before the court can admit a will to probate, the court must examine the record and be satisfied that the will is genuine and its execution was valid (SCPA 1408[1]; see e.g. *Matter of Halpern*, 76 AD3d 429, 431 [1<sup>st</sup> Dept 2010], *affd* 16 NY3d 777 [2011]).

#### **TESTAMENTARY CAPACITY**

On the issue of testamentary capacity, proponent, as movant, must make a prima facie showing that decedent was competent to make a will, that is, he: (1) understood the nature and consequences of executing a will; (2) understood the nature and extent of his assets; and (3) knew those who would be considered the natural objects of his bounty and his relations with them (*Matter of Kumstar*, 66 NY2d 691, 692 [1985] [citations omitted], *appeal denied* 67 NY2d 647 [1986]). A self-proving affidavit

creates a presumption of testamentary capacity (*Matter of Leach*, 3 AD3d 763, 764-765 [3d Dept 2004]; see also *Matter of Johnson*, 6 AD3d 859, 860 [3d Dept 2004]). The presumption provides a basis upon which to establish a prima facie case for testamentary capacity (*Matter of Bogen*, NYLJ, Nov. 13, 2014, at 22, col 3 [Sur Ct, NY County 2014] [citation omitted]). Further, testamentary capacity and sanity are generally presumed (see *Matter of McCarthy*, 269 AD 145, 152-153 [1<sup>st</sup> Dept 1945], *affd* 296 NY 987 [1947]).

Here, proponent has made a prima facie showing that decedent had testamentary capacity at the time he executed the instrument based on the attestation clause, the self-proving affidavit, which includes a statement that decedent was of "sound mind", executed by the witnesses, one of whom is the attorney-draftsman, and the testimony of both witnesses at their SCPA 1404 examinations.

#### **DUE EXECUTION**

To prevail on a motion for summary judgment on the issue of due execution, movant must make a prima facie showing that the propounded instrument was duly executed in accordance with the formalities of EPTL 3-2.1. Except for nuncupative and holographic wills, for a will to be valid, it must be in writing and executed in accordance with the following statutory requirements: (1) the testator must sign the will at the end and in the presence of at least two attesting witnesses or acknowledge his signature to at least two attesting witnesses; (2) the testator must declare or

make known to the witnesses that the instrument is his will; (3) the two witnesses, within 30 days of each other, must attest to the testator's signature as affixed in their presence; and (4) the two witnesses must sign their names at the end of the will at the request of the testator (EPTL 3-2.1; *Matter of Memeh*, NYLJ, Nov. 9, 2020, at 21, col 5 [Sur Ct, NY County 2020]). There is a rebuttable presumption of due execution when an attorney supervised the will's execution (see e.g. *Halpern*, 79 AD3d at 431; see also *Matter of Moskoff*, 41 AD3d 481, 482 [2d Dept 2007] [citations omitted]). Further, an attestation clause and self-proving affidavit create the presumption of compliance with all the statutory requirements of due execution (see e.g. *Matter of Collins*, 60 NY2d 466, 471 [1983] [citations omitted]).

Here, execution of the propounded instrument was supervised by an attorney. The instrument contains an attestation clause. The witnesses' self-proving affidavit and their testimony taken at the SCPA 1404 examinations all confirm that the statutory formalities of due execution were met. There is nothing in the record that belies these findings.

The court finds that proponent has submitted sufficient prima facie evidence that the propounded instrument was duly executed.

#### **FRAUD**

Fraud requires a showing that proponent or those acting in concert with her knowingly made a false representation of a

material fact to decedent causing him to make a will disposing of his property differently than he would have if that statement had not been made (*Matter of Ryan*, 34 AD3d 212, 215 [1<sup>st</sup> Dept 2006], citing *Matter of Evanchuck*, 145 AD2d 559, 560 [2d Dept 1988]).

Here, proponent makes her prima facie case for summary judgment by demonstrating that there is no evidence of any fraudulent statements or misrepresentations by proponent or anyone else that caused the propounded instrument to be executed.

#### **UNDUE INFLUENCE**

Objectant also alleges that the propounded instrument is the result of undue influence by proponent or others working in concert with her. Undue influence requires a showing that the instrument resulted from influence exercised that amounted to a "moral coercion" that restrained the testator's ability to act freely and independently and, instead, "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" (*Children's Aid Soc. v Loveridge*, 70 NY 387, 394 [1877]; see also *Matter of Walther*, 6 NY2d 49, 53 [1959]).

Here, proponent establishes prima facie that the propounded instrument is the expression of decedent's wishes with the submission of the witnesses' SCPA 1404 examination testimony.

**CONCLUSION**

Based on the foregoing, it is

ORDERED, that proponent's motion for summary judgement is granted in its entirety; and it is further

ORDERED, that proponent shall settle a probate decree accordingly.

The Clerk of the court is directed to email a copy of this decision, which constitutes the order of the court, to proponent's attorney and to objectant at the email addresses below.

Dated: July 12, 2023

  
S U R R O G A T E

Alan Scott: [alan@alanscottlawoffice.com](mailto:alan@alanscottlawoffice.com)

Regina Peragine: [Rpgina@outlook.com](mailto:Rpgina@outlook.com)