| **Padilla v Estate of Larmett** |
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| 2023 NY Slip Op 33611(U) |
| October 16, 2023 |
| Surrogate's Court, New York County |
| Docket Number: File No. 2021-1152/B |
| Judge: Hilary Gingold |
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New York County Surrogate's Court
Date: October 16th 2023

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
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JOSE RAFAEL PADILLA,

File No.: 2021-1152/B

PLAINTIFF,

v.

THE ESTATE OF JAMES CLAYTON LARMETT
Deceased,

DEFENDANT.

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G I N G O L D, S .

In this proceeding to enforce a claim against the estate the following papers were read:

| | PAPERS NUMBERED |
|---|---|
| Plaintiff's Notice of Motion | 1 |
| Affrm-Exhibits | 2-3 |
| Memorandum of Law | 4 |
| Affirmation of Service | 5 |
| Defendant's Notice of Motion | 6 |
| Affrm-Exhibits | 7-8 |
| Memorandum of Law | 9 |
| Affirmation of Service | 10 |
| Affidvt in Support of Defendant's Motion | 11 |
| Affirmation of Service | 12 |
| Memo of Law in Opposition to Defendant's Motion | 13 |
| Affirmation of Service | 14 |

Affirm Opp Plaintiff's Motion - Exhibits . . . . . . . . . .. . . . . . . . . . . . . 15-16

Memo Law in Opp Plaintiff's Motion . . . . . . . . . . . . . . . . . . . . . . . . . . 17

Affirmation Service . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 18

Defendant's Reply Memo of Law . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

Affirmation of Service . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

Jose Rafael Padilla, (hereinafter, "plaintiff") claims that James Clayton Larmett (hereinafter, "decedent") promised to change his will to benefit him. Decedent died on February 15, 2021 and his February 19, 2016 will was admitted to probate by this court on April 27, 2021 (hereinafter, "will"). Plaintiff is not a named beneficiary under the will. On or around July 28, 2021 plaintiff filed a claim against decedent's estate for one-third of the estate, basing his claim on alleged oral promises made to him by decedent and two "will questionnaires"[1] dated April 5, 2020 and January 29, 2021, allegedly signed by decedent. On August 6, 2021, Charles A. Yamarone III, the executor of the will (hereinafter, "executor") rejected plaintiff's claim. In response, on or around September 21, 2021, plaintiff filed a summons and complaint in Supreme Court, County of New York, Index no. 158905/2021, seeking to enforce his claim against decedent's estate (hereinafter, "defendant").

Defendant served an filed an answer in that proceeding, subsequently moving to have the complaint dismissed pursuant to CPLR 3211[a][7]. In an order dated May 13, 2022 denying defendant's motion and transferring the matter to this court, the Supreme Court noted, that a

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[1] According to plaintiff, "Legal Shield" is a "pre-paid legal service that in Mr. Larmett's case, employed the services of the Long Island law firm, Feldman, Kramer and Monaco, to prepare and supervise the execution of a client's last will and testament." As part of this process, LegalShield provides a form to be filled in with answers to questions concerning the presumptive testator's family, dispositive intents and nominated executor(s). The decedent signed one of these completed forms on April 5, 2020 and another separately completed form, on January 29, 2021.

"breach of an oral promise to make a will or testamentary provision is not a viable cause of action, as it would be barred by the statute of frauds (*see Matter of Hennel*, 29 NY3d 487, 492-93 [2017], citing EPTL § 13-2.1[a][2] and General Obligations Law § 5-701[a][1]." The court continued, noting that "even if the statute of frauds defect was remedied by [the will questionnaires] (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007] ["affidavits may be considered . . . to remedy pleading defects and not to offer evidentiary support for properly plead claims"], the claim would be dismissed if the writings failed to 'evince "a clear and unambiguous manifestation of the testator's intention to renounce the future power of testamentary disposition"'" (*citing Aaron v. Aaron*, 64 AD3d 1103, 1104 [3d Dept 2009]). The court found that this question could not be resolved on the motion to dismiss.

Following the transfer, the parties engaged in discovery. Defendant alleges in its motion for summary judgment pursuant to CPLR 3212[b] that neither of the will questionnaires relied upon by plaintiff include a surrender of the decedent's rights to subsequently revoke any testamentary bequests. On the other hand, plaintiff's motion for summary judgment alleges that the will questionnaires, along with parole evidence, satisfy the requirements of an oral contract.

In a motion for summary judgment, the 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" (*Alvarez v Prospect Hosp*, 68 NY2d 320, 324 [1986]). Where the movant succeeds in doing so, the burden shifts to the opposing party to submit proof that there exists a material issue of fact and that a trial is therefore necessary (*id.*). "[I]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of credibility" (*Dauman Displays, Inc v Masturzo*, 168 AD2d 204 [1st Dept 1990], *appeal dismissed* 77 NY2d 939 [1991]). However,

speculation cannot serve as a substitute for evidence (*see Matter of Hatzistefanou*, 77 Misc 2d 594 [Sur Ct, NY County 1974]). Hearsay testimony cannot be a basis for a summary ruling, but such evidence may be used in opposition to a motion for summary judgment if it is corroborated by other admissible evidence (*see Matter of Maurer*, 106 AD3d 622 [1st Dept 2013]).

Finally, "timidity in exercising the power [to rule summarily] in favor of a legitimate claim and against an unmerited one ... contributes to calendar congestion which, in turn, denies to other suitors their rights to prompt determination of their litigation" (*Di Sabato v Soffes*, 9 AD2d 297, 299 [1st Dept 1959]). However, the court recognizes that a summary disposition against a party on the merits deprives that party of the opportunity to have a trial, such relief is a "drastic measure" that should be considered with caution (*F. Garofalo Elec. C. v New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

Pursuant to EPTL 13-2.1[a][2] a promise to make a testamentary provision of any kind is unenforceable "unless it or some memorandum thereof is in writing and subscribed by the party" who made the promise. Additionally, as already noted by the Supreme Court, a contract to make a will must be in writing and "evince 'a clear and unambiguous manifestation of the testator's intention to renounce the future power of testamentary disposition" (*Aaron v Aaron*, 64 AD3d 1103, 1104 [3d Dept 2009]). Moreover, because a will is an ambulatory instrument, "a promise to refrain from altering an existing will must be reduced to writing" (*Estate of Morse*, 1 AD3d 516 [2d Dept 2003]; *see In re Lubins*, 250 AD2d 850 [2d Dept 1998]; *Matter of American Comm for the Weizmann Institute of Science v Dunn*, 10 NY3d 82 [2008].

It is undisputed that plaintiff's only written evidence of decedent's alleged promise are the April 5, 2020 and January 29, 2021 will questionnaires. Defendant is not contesting that decedent signed both will questionnaires. However, as plaintiff concedes, neither questionnaire can be

probated as a will and the decedent never executed a will to reflect the information in either questionnaire.

It is also uncontested that in the April 5, 2020 will questionnaire, decedent indicates that he wanted to leave plaintiff one-fourth of his estate, while the January 29, 2021 will questionnaire, created seventeen days prior to decedent's death, indicates that decedent wanted plaintiff to receive one-third of his estate. Moreover, plaintiff testified that after January 29, 2021, decedent told him he wanted to make further changes to his testamentary dispositions. Finally, neither will questionnaire includes any suggestion, let alone a clear and unambiguous manifestation, that decedent in any way intended to renounce his future power of testamentary disposition. Accordingly, plaintiff's proffered writings are insufficient to support his claim or overcome the statute of frauds. Therefore, it is

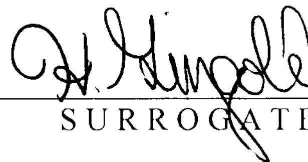
ORDERED that, defendant's motion for summary judgment to dismiss plaintiff's claims against the estate, with prejudice is granted; and it is further

ORDERED that, plaintiff's motion for summary judgment to enforce a claim against the estate is denied.

This is the decision and order of the court.

The court clerk shall serve a copy of this order to all parties in this proceeding by email at the addresses below.

Dated: October 16th, 2023



SURROGATE

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