

Matter of Ricketts

2024 NY Slip Op 32157(U)

May 21, 2024

Surrogate's Court, Bronx County

Docket Number: File No. 2020-1350 & 2020-1350/A

Judge: Nelida Malave-Gonzalez

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SURROGATE'S COURT, BRONX COUNTY

May 21, 2024

ESTATE OF LANFORD A. RICKETTS, Deceased
File No.: 2020-1350 and 2020-1350/A

In this contested probate proceeding, Dominique Ricketts (“the petitioner”), the decedent’s grandson and proponent of a testamentary instrument dated April 6, 2019 (“the propounded instrument”), moves by order to show cause seeking summary judgment dismissing the remaining objections to the probate of the instrument dated April 6, 2019 filed by one of the decedent’s daughters, Bridgette Ricketts (“Bridgette”) to the probate of the propounded instrument. He also seeks the issuance of a decree admitting the propounded instrument to probate, construing the interorem clause therein to be enforceable against Bridgette and awarding him letters testamentary. A second daughter, Dian Ricketts (“Dian”) who is not a testamentary beneficiary and did not file objections, is also a respondent. On the return date of the motion, there were no appearances by Bridgette or Dian, nor have they indicated opposition to the court to date.

The petitioner and Karen Ricketts (“Karen”), a third daughter who previously filed objections jointly with Bridgette, entered into a written

stipulation which provides, inter alia, that: Karen's objections were to be withdrawn; the interrorem clause would not be exercised against her; and a proceeding seeking to void leases entered into by Karen concerning realty owned by the decedent, directing her to turn over rents that she collected and eject the tenants therein would also be withdrawn (File No. 2020-1340/A). Bridgette and Karen proceed pro se as the attorney previously representing both of them was granted leave to withdraw (see Matter of Ricketts, NYLJ, May 9, 2022 at 23, col 2 [Sur Ct, Bronx County 2022]). Bridgette's objections remain pending.

BACKGROUND

The decedent died on May 13, 2020 at the age of 85, his spouse having predeceased on October 16, 2019. His distributees are two marital children, Karen and a son, Denzil Ricketts ("Denzil"), and two non-marital daughters, Bridgette and Dian. The propounded instrument dated April 6, 2019 consists of four typewritten pages and an attestation clause signed by two witnesses. An annexed self-proving affidavit states that its execution was attorney supervised. The will nominates the spouse as primary executor and sole testamentary beneficiary. Denzil, the nominated alternate executor, executed a renunciation and consent in favor of the petitioner, who is the nominated second alternate executor. The petitioner was awarded preliminary letters testamentary subject to SCPA 805 (3) restrictions concerning realty and upon posting a bond in the sum of \$202,000. The propounded instrument provides that had the spouse

predeceased, realty located at 742 East 221st Street in the Bronx is to be devised solely to Denzil; Denzil and Karen are respectively devised two-thirds and one-third shares of a neighboring property located at 746 East 221st Street, with the proviso that it is not to be sold for five years after the decedent's death; and Denzil and Karen; and Denzil and Karen are also bequeathed all personal property and bank and investment accounts in equal shares. Bridgette and Dian are not mentioned in the instrument.

BRIDGETTE'S OBJECTIONS

The remaining objections filed by Bridgette assert, inter alia, lack of due execution and testamentary capacity, undue influence and fraud. She alleges, inter alia, that the decedent was diagnosed with dementia over three years prior to the date the will was signed and that he "suffered terribly" for several months prior to a diagnosis of pancreatic cancer in or about November, 2019. Annexed to the objections is a letter dated November 20, 2019 from the decedent's treating physician, Vijay V. Khatiwala, M. D. stating that "due to his complex medical conditions [the decedent] is unable to care for himself and needs help from his daughter, 'Caren' [sic] Ricketts, to manage his financial affairs." The objections also assert that the decedent was cognitively impaired and signed a power of attorney in favor of Denzil while hospitalized in early November, 2019. As a result, Karen petitioned to appoint an Article 81 guardian for the decedent in or around December, 2019, and Denzil cross-petitioned to be appointed Article 81 guardian in January, 2020. Accordingly, the objections aver that the foregoing

establishes that the decedent lacked testamentary capacity and that Denzil coerced and unlawfully influenced the decedent to sign an instrument that left Denzil most of the estate.

MOTION SEEKING DISMISSAL

In support of dismissing Bridgette's objections, the attorney for the petitioner filed an affirmation stating that the decedent's will was prepared by the decedent's attorney, Jeffrey Schwartz, Esq., and an affidavit was annexed to the instrument executed by the two subscribing witnesses that the decedent had testamentary capacity, was not under any restraint that would render him incompetent to make a will, and that Attorney Schwartz supervised its execution. Accordingly, as the propounded instrument was attorney drafted and supervised counsel avers that there is a presumption of due execution.

In further support, counsel annexes medical records dated in or about November 2019, proximate to the dates of the medical reports filed by Bridgette in support of her objections, approximately seven months after the will was executed. While Bridgette supplied only fragments of those reports stating, inter alia, that the decedent was admitted to a rehabilitation facility for abdominal lesions and multiple medical problems, there is no indication of a dementia diagnosis, administration of pain medications, dietary restrictions, or a concrete cancer diagnosis. The radiology studies show a possible abdominal mass and an inflamed gallbladder. In any event, the decedent did not require skilled nursing services and was discharged for

palliative home care. The Article 81 proceedings in early 2020 concern the decedent's deterioration after that hospitalization and there was no final determination of incapacity.

Counsel also opines that there is no proof that coercion was practiced by Denzil in obtaining a power of attorney or in any other transactions with the decedent. She also points out that although the petitioner supplied authorizations to the objectant's former counsel and did not oppose subpoenas to numerous medical providers who allegedly provided services to the decedent, the objectant never responded to multiple demands for production and did not supply even one document relating to the time period proximate to the date of execution. Counsel concludes that, even assuming *arguendo*, that the decedent suffered from dementia or terminal cancer at the time of his hospitalization in November, 2019 and the Article 81 proceedings, there is absolutely no evidence that he was unable to knowingly execute his will in April, 2019, seven months prior, or that it was procured by undue influence or fraud.

SUMMARY JUDGMENT

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 movants must make a *prima facie* showing of entitlement to judgment as a 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 movants have made out a prima facie case, the burden 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]). 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]).

In a contested probate proceeding, summary judgment is appropriate where a petitioner establishes a prima facie case for probate and the objectant fails to raise a triable issue of fact concerning the viability of the will (see Matter of Sabatelli, 161 AD3d 872 [2nd Dept 2018]; Matter of Moskowitz, 116 AD3d 958 [2d Dept 2014]). The proponent of a will has the burden of proving that the propounded instrument was duly executed in conformance with statutory requirements (see EPTL 3-2.1 [a]; Matter of Fiorentino, 2019 NY Slip Op 52012 [U] [Sur Ct, Queens County 2019], aff'd 224 AD3d 685 [2nd Dept 2024]). The proponent must also establish that the decedent understood the nature and consequences of making the will, the nature and extent of his or her property, and the natural objects of his or her bounty (see Matter of Kumstar, 66 NY2d 691, 692 [1985], Matter of Falkowsky, 197 AD3d 1300 [2d Dept. 2021]).

DUE EXECUTION

Where, as here, the attorney-draftsperson supervised the will's execution there is a presumption of regularity that the will was properly executed in all respects (see *Matter of Kindberg*, 207 NY 220 [1912]; *Matter of Cottrell*, 95 NY 329 1884]; *Matter of Finocchio*, 270 AD2d 418 [2nd Dept 2000]; see also *Matter of Coniglio*, 242 AD2d 901 [4th Dept 1997]; *Matter of Hedges*, 100 AD2d 586 [2nd Dept 1986], appeal dismissed, 63 NY2d 944 [1984]). The objections consist merely of allegations and present no specifics indicating lack of execution to rebut that presumption. Accordingly, the petitioner has met his burden concerning due execution.

TESTAMENTARY CAPACITY

The objections assert that the decedent suffered from dementia three years prior to the date of the will's execution; however there are no medical reports or evidentiary corroboration of lack of capacity at any time. The fragments of medical reports dated in or about November, 2019 that are annexed to the objections are belied by the full reports presented by the petitioner from the same medical providers that do not show any mental infirmities, sedation or confusion. Although there were allegations of mental incapacity made by both Karen and Denzil in Article 81 proceedings commenced in December, 2019 and January, 2020, there is no concrete demonstration of lack of testamentary capacity dating back to April 6, 2019, the date of execution of the propounded instrument. Thus, the petitioner has

met his burden of demonstrating that the decedent possessed testamentary capacity when the propounded instrument was executed and the objectant has failed to submit any evidence to rebut this conclusion.

UNDUE INFLUENCE AND FRAUD

Although the decedent executed a power of attorney in Denzil's favor in the fall of 2019, there is no showing that it was misused or that Denzil abused a confidential relationship to procure the propounded instrument executed over six months prior. The decedent's spouse and natural object of the decedent's bounty, who would have been the sole testamentary beneficiary had she not predeceased, was alive at the time the propounded instrument was executed and allegedly executed a mirror instrument. There is nothing in the record indicating that Denzil prevented the other children from visiting or communicating with the decedent or had anything to do with the decedent's decision to leave Denzil a greater share of the realty should the spouse predecease. There is likewise no indication that Denzil controlled the decedent's financial affairs at the time the will was executed or misused the power of attorney. Accordingly, the court finds that the objectant has not met her burden concerning undue influence and there is no showing whatsoever of fraud.

THE INTERROREM CLAUSE

The court finds while the interrorem clause contained in Paragraph Eighth of the instrument . . .

“Any beneficiary who contests the validity of this Will or in any way assists in such an act shall automatically forfeit whatever gift or bequest he or she would have been entitled to receive under the terms of this Will. . . .”

may have been exercised should Karen have continued to prosecute her objections, it is inapplicable to Bridgette because she is not named as a beneficiary (see Matter of Lippner, 104 Misc 2d 819 [Sur Ct, Kings County 1980]). In any event, this request for determination is rendered moot for reasons set forth below.

CONCLUSION

On this state of the record, mere speculation cannot serve as a substitute for proof (see Matter of Eastman, 63 AD3d 728, 740 [2nd Dept. 2009]; Matter of Martin, NYLJ, Oct. 26, 2015 at 26 [Sur Ct, N Y County 2015]), and Bridgette, the remaining objectant, fails to raise any material issue of fact as to due execution, lack of testamentary capacity, undue influence based on a confidential relationship, fraud, or any other ground, in the preparation or execution of the will (see Matter of Dorris, 205 AD3d 630[1ST Dept 2022]; Matter of Ryan, 34 AD3d 212, 215 [1st Dept 2006]; lv denied 8 NY3d 804 [2007]; Matter of Bartel, 214 AD2d 476, 477 [1st Dept 1995]).

Based upon the evidence submitted, the court finds that the will dated April 6, 2019 was executed in accordance with the statutory formalities at a time when the testator had testamentary capacity and was not under restraint (see EPTL 3-1.1; SCPA 1408). Accordingly, this decision

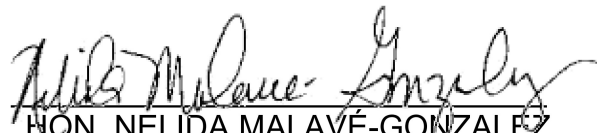
constitutes the order of the court granting summary judgment in those branches of the motion concerning dismissing all of Bridgette's objections and denying the request to determine that the interrorem clause contained in Paragraph Eighth of the instrument disqualifies Bridgette as a beneficiary for filing objections to its probate.

This decision constitutes the order of the court marking the proceeding filed by the petitioner seeking to void leases at the decedent's realty, turnover and other relief "withdrawn pursuant to a written stipulation" (File No. 2020-1340/A).

Accordingly, letters testamentary shall issue to the petitioner forthwith. The letters shall be subject to the terms of the written stipulation dated September 19, 2023. The preliminary letters testamentary that issued to the petitioner are to be revoked in the decree to be entered hereon.

The Chief Clerk shall mail a copy of this decision and order to counsel for the petitioner, Karen Ricketts, Bridgette Ricketts and Dian Ricketts.

Settle decree.


HON. NELIDA MALAVÉ-GONZÁLEZ
SURROGATE