

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0283-20**

**IN THE MATTER OF THE
ESTATE OF JOEL PERKEL,
deceased.**

Argued February 7, 2022 – Decided December 14, 2022

Before Judges Accurso and Enright.

On appeal from the Superior Court of New Jersey,
Chancery Division, Bergen County, Docket No.
P-000034-20.

Michael S. Kimm argued the cause for appellants
Robert Perkel and Jane Perkel (Kimm Law Firm,
attorneys; Michael S. Kimm and Jonathan Lugo, on
the brief).

John K. Walsh, Jr., argued the cause for respondents
Frank Cannella and Jane Cannella Perkel (Walsh &
Walsh, LLC, attorneys; John K. Walsh, Jr., of counsel
and on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

In this probate matter, Jane and Robert Perkel, sister and brother, appeal from an August 24, 2020 judgment dismissing their verified complaint seeking to revoke the probate of their late father Joel D. Perkel's Will, compel a formal accounting by the executor, Frank L. Cannella, and appoint plaintiff Jane Perkel administrator of the estate. We affirm.

Certifications submitted by plaintiffs averred their parents divorced in 1978 when their mother Rita Perkel, also deceased, learned their father was having "extra-marital relations with his then secretary," whom their father married after the divorce, the decedent's surviving wife, Jane L. Perkel. Plaintiffs averred "it was known to everyone" that Jane L. Perkel, who at the time of her marriage to the decedent "was a single divorced woman, . . . extremely materialistic while [their] mother was an educated intellectual, not materialistic, and a pianist," [and Jane L. Perkel] would regularly sign their father's name to checks "for him in the office" and had "once signed his signature to obtain an insurance broker's license in his name."

Jane Perkel averred she maintained a relationship with her father after the divorce, and he would assure her that "he divorced [her] mother not his children, when [she] would joke with him about writing his old family out of the will." She certified that she and her father "discussed in great detail that he

would always treat his own children fairly and that he would always provide for [them]." She claimed that during their visits in recent years, her father "would tell [her] to take good care of [her] mother" and "appeared . . . full of regret for his failed marriage." She insisted her father most recently told her in 2018 during his hospitalization "that he had taken care of all his children in his will and not to worry about anything." Because she maintained Jane L. Perkel "had become highly adept in signing [plaintiffs'] father's signature at the insurance brokerage" some forty years ago, plaintiff Jane Perkel believed "that the purported Will was signed" by Jane L. Perkel and thus concluded "it is a forgery."

Plaintiff Robert Perkel had been estranged from his father for many years after his parents' divorce. He certified that after his father remarried, "he significantly decreased his contacts with [him] and [his] sister Jane Perkel." Robert Perkel only introduced his father to his three children in 2013, while the decedent was at Kessler Institute for rehabilitation following an injury. Robert Perkel maintained his father "was more actively in communication with [him] and [his] three children, [the decedent's] three grandchildren, as well as with his daughter Jane Perkel" from that time, six years before his death.

Robert Perkel testified his father "reminded [him] on numerous occasions that he regretted" divorcing plaintiffs' mother "but that he would never forget his children in his death; and stated and reiterated that his Will had been prepared by Sheldon N. Witt, Esq., of Englewood." Based on those conversations, he averred his "father would never remove his own children or grandchildren from any Will of his own volition."

Robert Perkel testified Frank Cannella, Jane L. Perkel's son by a prior marriage, "is believed to be a retired police officer from North Bergen and, as such, he would have had training and ability to pressure [Robert and Jane's] late father to do things that he, [their] father, would not do voluntarily." He averred that when their father remarried, Jane L. Perkel's children "had been fully grown" and he did "not believe that [his father] would have been so emotionally connected with any of them that he would have disowned his own children and grandchildren and would have left everything to his new wife's children." It was for that reason, he explained, that he had "come to challenge the purported Will excluding [the decedent's] own children and grandchildren as a product of either undue influence and/or forgery."

The decedent's Will offered for probate was executed in 2007, when the decedent was seventy-five years old, eleven years prior to his death at eighty-

six. In his Last Will and Testament, the decedent left his home in Fair Lawn to his stepson, Frank Cannella, with the stipulation Jane L. Perkel should have life tenancy. In the event Cannella pre-deceased him, the decedent directed the property would go to Cannella's three children in equal shares, with the same life tenancy to decedent's wife Jane L. Perkel. The decedent left the remainder of his estate to his wife, and should she have pre-deceased him, to seven grandchildren — five Cannella grandchildren and two children of his daughter from his first marriage, Susan Weinrub, plaintiffs' sister — as well as to his daughter, plaintiff Jane Perkel. The Will expressly stated the decedent had "chosen not to bequeath anything to [his] daughter, Susan Weinrub, or to [his] son, Robert Yale Perkel, for reasons known to them."

Following the filing of the complaint, Cannella and Jane L. Perkel moved to dismiss in lieu of answer, claiming the complaint was untimely in accordance with Rule 4:85-1, failed to state a claim and was otherwise insufficient under Rule 4:5-8(a). The Will was probated and Letters Testamentary issued to Cannella by the Bergen County Surrogate on May 13, 2019. Plaintiffs did not file their complaint, however, until January 24, 2020, over four months beyond the four months provided in Rule 4:85-1 for a will

challenge.¹ Cannella and Perkel also argued the allegations as to forgery and undue influence were conclusory and without sufficient factual support to sustain plaintiffs' causes of action. Alternatively, Cannella and Perkel argued they were entitled to a more definite statement of the allegations of the complaint under Rule 4:5-8(a), requiring that all allegations of fraud or undue influence be pled with particularity.

Plaintiffs countered that the four-month period for challenging the Will did not begin to run until they were served by Cannella with the notice of probate, which did not occur until September 30, 2019. Robert Perkel averred that was "[t]he first time" he and his sister Jane became aware of any will other than the one they understood had been drafted for their father "by a lawyer named Sheldon N. Witt, Esq., in Englewood," thus making their complaint timely. Counsel for plaintiffs argued no more definite statement of claim was required as the verified complaint and the "facts and circumstances" revealed "a substantial likelihood that Jane [L. Perkel] was involved in a series of

¹ The Rule requires that a will challenge by an in-state resident be "filed within four months after probate or of the grant of letters of appointment," unless relief is sought based on "R. 4:50-1(d), (e) or (f) or R. 4:50-3 (fraud upon the court)." In that event, "the complaint shall be filed within a reasonable time under the circumstances."

events that manipulated [the decedent's] signature and [his] credentials to her advantage and those facts really warrant an investigation in a civil action."

The probate judge denied the motion without prejudice. The judge declined to dismiss the complaint on timeliness grounds, finding a factual dispute over when plaintiffs became aware of the Will, as plaintiffs averred in the verified complaint that they obtained a copy from the Surrogate's Office in August 2019, prior to it being served by the estate. As to the factual allegations sufficing to set forth causes of action for undue influence and forgery, the judge remarked "if this suffices, it's hanging by a thread," noting the complaint contained "nothing but supposition and speculation." The judge nevertheless determined plaintiffs should be permitted the opportunity to find and depose the lawyer who drafted the 2007 Will as well as locate any will drafted for decedent by Sheldon Witt, serve basic interrogatories and depose Cannella and Jane L. Perkel, if they wished, over the next sixty days.

Over the next few months, plaintiffs located the lawyer who drafted the 2007 Will, Michael A. Jimenez, who advised the decedent and Jane L. Perkel were clients of Joseph J. Ryglicki when Jimenez was employed in Ryglicki's office. Jimenez claimed he had no recollection of the matter beyond being asked to assist in the drafting and execution of the Will, that he'd left the firm

in 2016 and understood that most of the firm's files were destroyed in Superstorm Sandy in 2012. The Ryglicki firm confirmed all of its files created before the storm, including that of the decedent, were destroyed in its aftermath. Cannella and Perkel renewed their motion to dismiss the complaint, which plaintiffs successfully sought to have adjourned for several weeks while they obtained a report from a handwriting expert.

Plaintiffs' expert report was, at best, inconclusive. Examining six known signatures of the decedent, three made near the time of the Will, and three known signatures of Jane L. Perkel, the expert stated he could come to "no conclusion" as to whether the decedent's signature on the Will was genuine.² Noting that "whether Jane L. Perkel was the actual writer of either questioned signature [on the Will] is moot until a determination regarding genuineness can be reported," the expert further concluded, however, that "the nature of both questioned signatures is such that, if it were determined that one or both questioned signatures is non-genuine, no actual writer could be identified."

² The expert wrote that a comparative analysis between the two questioned signatures and the group of six known specimen signatures revealed "similarities in form between the questioned signature and those exhibited by the entire group of known specimens and a lack of observable significant differences, with some exceptions which might be attributable to natural variation."

Plaintiffs' counsel also reported plaintiffs had been unable to locate lawyer Sheldon Witt of Englewood³ and had no other will to offer.

Despite defense counsel having established by virtue of the Surrogate's records that Robert Perkel obtained a copy of his late father's Will from the Surrogate on May 7, 2019, three months earlier than plaintiffs claimed in the complaint, and well before the estate served him and his sister with a copy in late September 2019, the judge did not rest his decision dismissing the complaint on the grounds it was untimely. While the judge discussed the timeliness of the complaint, he ultimately determined plaintiffs had failed to muster any facts to support their allegations that their father's Will, drafted eleven years before his death, was either forged or the product of undue influence after having been permitted several months of discovery.

Plaintiffs' expert could not support their claim of forgery and their efforts to find some irregularity in the execution of the Will through the scrivener were thwarted by his lack of recollection and the destruction of the file in the hurricane. Plaintiffs' counsel also conceded to the trial court that the Will probated by Cannella appeared to be the only Will for decedent in

³ Attorney Sheldon N. Witt, admitted in 1966, who formerly practiced in Englewood, is deceased according to Bar records.

existence. While plaintiffs' counsel noted Cannella and Jane L. Perkel had not responded to the interrogatories he propounded, he could not identify any discovery that would support the allegations of the complaint. Viewing the evidence adduced on the motion beyond the pleadings, the judge concluded the complaint had to be dismissed under the summary judgment standard as plaintiffs' belief that Cannella "is a devious person who can manipulate" and decedent's wife Jane L. Perkel "is a devious person who can forge [the decedent's] name" was insufficient to sustain their causes of action, and plaintiffs had adduced no evidence "to back that up in order to continue to do discovery much less to go to trial."

Plaintiffs appeal, contending the probate judge erred in dismissing their complaint as it was timely filed and discovery was incomplete. They maintain the judge should have compelled defendants to answer interrogatories "or deem their refusal as admissions." We disagree.

Plaintiffs spend the majority of their nineteen-page brief explaining why their will challenge was timely filed, devoting only two-and-a-half pages to the substance of their argument that the decedent's Will was forged or the product of undue influence. Like the trial court, however, we find no need to decide whether the complaint could be considered timely filed, notwithstanding it was

admittedly filed beyond the four-month period provided by Rule 4:85-1, because plaintiffs failed to muster even a scintilla of evidence in support of their claims.

As the trial court first noted on the return date of the order to show cause in March 2020, will challenges under Rule 4:85 proceed as summary actions in accordance with Rule 4:67-1 because the issues are narrow and the matter can ordinarily be fairly and expeditiously resolved with limited discovery based on well-settled precedent. See Garruto v. Cannici, 397 N.J. Super. 231, 240-41 (App. Div. 2007). Plaintiffs filed this case alleging forgery and undue influence without any particulars, contrary to Rule 4:5-8(a). See State, Dep't of Treasury, Div. of Inv. ex rel. McCormac v. Qwest Commc'ns Int'l., Inc., 387 N.J. Super. 469, 484 (App. Div. 2006) (discussing the requirements of pleading fraud). In an attack on the validity of a will, our law presumes "the testator was of sound mind and competent when he executed the will," Gellert v. Livingston, 5 N.J. 65, 71 (1950), and the burden is on the challenger to prove otherwise by clear and convincing evidence, Haynes v. First Nat'l State Bank, 87 N.J. 163, 175-76 (1981).

Although the probate judge acknowledged plaintiffs' claims appeared to be based on nothing more than bruised feelings and rank speculation, he

denied Cannella and Jane L. Perkel's initial motion to dismiss in order to allow plaintiffs an opportunity for limited discovery and the chance to flesh out their claims. But after over four months of discovery, including inquiry of the scrivener of the Will and retention of an expert to opine on the genuineness of the decedent's signature, plaintiffs had nothing more to offer than the bare bones pleading of their complaint. While a plaintiff may bolster a cause of action through discovery, the Rules do not permit a plaintiff to file a conclusory complaint to find out if a claim exists. See Camden Cnty. Energy Recovery Assocs., L.P. v. N.J. Dep't of Env't Prot., 320 N.J. Super. 59, 64 (App. Div. 1999) ("Discovery is intended to lead to facts supporting or opposing an asserted legal theory; it is not designed to lead to formulation of a legal theory.").

We are satisfied the probate judge provided plaintiffs a fair opportunity to undertake limited discovery to flesh out the conclusory allegations of their complaint, including the opportunity to take the depositions of defendants. Plaintiffs' failure to avail themselves fully of that opportunity or to move to compel outstanding answers to interrogatories, the overwhelming bulk of which related to the decedent's assets and their disposition, does not constitute

error on the judge's part. Plaintiffs' failure to adduce any facts to support the allegations of their complaint warranted the dismissal of their will challenge.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION