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

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In the Matter of the Probate Proceeding of the Last Will and Testament of

File No. 2011-363865

PHYLLIS FENSTER,

Dec. No. 26190

Deceased.

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In this contested probate proceeding, the proponent, Gail Gomberg, who is the decedent's daughter, moves for an order pursuant to CPLR 3212 granting summary judgment, dismissing the objections to probate and admitting the propounded instrument dated January 10, 2003 to probate. The objectants are Melissa Sheppard Broad and Arthur Sheppard, the children of the decedent's predeceased son, Stuart Sheppard. The propounded instrument nominates Gail Gomberg as executrix. For the reasons stated below, the motion is granted.

FACTUAL BACKGROUND

The decedent died on January 12, 2011 and was survived by Gail Gomberg (hereinafter, sometimes referred to as "Gail"), Melissa Sheppard Broad (sometimes hereinafter, "Melissa"), and Arthur Sheppard (sometimes hereinafter, "Arthur"). The propounded will bequeaths the decedent's personal effects, jewelry, and articles of adornment to Gail. Additionally, the will devises the decedent's residence, located at 25 Melville Lane, Saddle Rock, New York, and bequeaths the furniture within that residence to Gail, subject to a life estate to the decedent's husband, Sidney Fenster, if he survives her. The will bequeaths all of the residuary estate to Gail, and states that the decedent's residence and residuary estate shall pass to Gail's issue per stirpes if she predeceases the decedent. The will does not provide for Melissa and Arthur.

THE OBJECTIONS

The objectants contend that: (1) the decedent was not mentally capable of executing her will on January 10, 2003; (2) the alleged will was not duly executed; and (3) the document purported to be the decedent's last will and testament was obtained through fraud and undue influence.

THE MOTION

In support of the motion for summary judgment to dismiss the objections and admit the will to probate, Gail submits the deposition testimony of Mitchell Glick, the attorney-draftsman and witness to the will, and Andrew Bokar, a witness to the will. Gail also submits deposition testimony from the objectants, Melissa and Arthur.

In opposition, Melissa submits her own affidavit, and an affirmation of counsel. Melissa and Arthur maintain that because counsel for Gail failed to provide an affidavit of an individual with personal knowledge, Gail fails to make a prima facie showing of entitlement to summary judgment.

In further support of the motion, Gail submits her own deposition testimony, and the reply affirmation of counsel.

DISCUSSION

The decedent suffered from macular degeneration, which limited her ability to see. The decedent also used a walker to assist her in ambulating because of a hip replacement she received in 2000. However, the decedent continued to be active. She attended adult education classes, history classes, and actively played canasta. Because the decedent could not drive, her husband, Sidney Fenster, or Gail would often drive her to her adult education classes, and her friends would transport her to play canasta. Additionally, when a family member could not take the

decedent to her activities she would take a taxi.

Gail testified that on June 10, 2003 she drove the decedent to the attorney-draftsman's office, and listened as he read the decedent's will aloud. However, there is no evidence that Gail contacted the attorney-draftsman to create the will, or attended the decedent's first meeting with the attorney-draftsman where the will's provisions were determined. At the alleged will execution, two attorneys, including the attorney-draftsman, signed as witnesses and the attorney-draftsman supervised the signing.

During the SCPA 1404 examination, the attorney-draftsman testified that he had been a trust and estates attorney for 55 years; between 2000 and 2005 he drafted approximately 25 wills. Furthermore, he stated that although he did not have a specific recollection as to the execution of the decedent's will, he did have a particular ceremony which he used in all will executions. Additionally, the attorney-draftsman stated that according to the instrument's attestation clause, he read the will aloud because of the decedent's poor eyesight.

ANALYSIS

In reviewing the present motion for summary judgment, the court must address the objectants' assertion that the motion is fatally defective. The court must also consider the objections filed to probate which challenge the decedent's testamentary capacity and execution of the will, and raise questions concerning undue influence and fraud.

SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, presenting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the

sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 853 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York,* 29 NY2d 557, 562 [1980]). Summary judgment in a contested probate proceeding is appropriate where an objectant fails to raise any issues of fact regarding execution of the will, testamentary capacity, undue influence or fraud (*see e.g. Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]; *Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). The remedy, however, is inappropriate where there are material issues of fact (*Matter of Pollock*, 54 NY2d 1156 [1985]).

1.1. The objectants assert that the motion for summary judgment is defective

The objectants' attorney claims that the proponent's motion papers are fatally defective because they were submitted without an attached affidavit by the will's proponent. To support this assertion, the objectants cite decisions issued by the Second Department, which hold that, "[o]n a motion for summary judgment, a 'bare affirmation of an attorney, who demonstrates no personal knowledge of the matter, is unavailing and without evidentiary value'" (*Winter v Black*, 95 AD3d 1208 [2d Dept 2012] citing *Bahlkow v Greenberg* (185 AD2d 829 [2d Dept 1992]). However, in this case, the proponent did not submit a "bare affirmation." In her initial motion papers, the proponent cited deposition testimony from the objectants and witnesses with personal knowledge of the preparation and execution of the decedent's last will and testament. Furthermore, the proponent attached those depositions as exhibits in her motion papers. According to the New York State Court of Appeals, supporting proof does not need to be offered to the court by means of affidavits of fact on personal knowledge. Rather, proof may be submitted to the court by an attorney's affidavit which presents deposition testimony (*see Olan v*

Farrell Lines Inc., 64 NY2d 1092 [1985]; *Gaeta v New York News, Inc.*, 62 NY2d 340 [1984]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). The court therefore finds that the proponent's motion papers are not fatally defective.

2. Did the decedent have testamentary capacity?

The proponent has the burden of proving testamentary capacity. The testatrix must generally understand the scope and meaning of the provisions of her will, the nature and condition of her property and her relation to the persons who ordinarily would be the natural objects of her bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]); *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Although the decedent must be able to understand the plan and effect of the will, less mental faculty is required to execute a will than any other instrument (*see Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from old age, physical infirmity and progressive dementia is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY 2d 845, 847 [1979]). Rather, the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). Additionally, a self-executing affidavit "creates a presumption that the will was duly executed and constitutes prima facie evidence of the facts therein attested to by the witnesses" (*Matter of Clapper*, 279 AD2d 730, 731 [3d Dept 2001]); *(see Matter of Leach*, 3 AD3d 763 [3d Dept 2004]; *Matter of Johnson,* 6 AD3d 859 [3d Dept 2004]).

In this case, both attesting witnesses signed a self-executing affidavit on January 10, 2003, which stated that the decedent was "of sound mind, memory and understanding, and was not under any restraint or in any respect incompetent to make a Will." Therefore, the proponent established a prima facie case on the issue of testamentary capacity. Furthermore, the fact that

the attesting witnesses are not able to specifically remember the will execution does not overcome this presumption of mental capacity (*see Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Leach*, 3 AD3d 763 [3d Dept 2004]).

To rebut the presumption of mental capacity, the objectants offer Melissa's affidavit in opposition. Within her affidavit, Melissa states that the decedent was suffering from severe depression and stress over the loss of her son approximately six weeks prior to executing her will. However, the objectants fail to provide any evidence of the decedent's depression other than Melissa's testimony. The objectants do not provide any medical evidence to support their assertion that the decedent was suffering from "severe depression," nor do they provide evidence that if she was suffering from "severe depression," that it affected her ability to understand the nature and consequence of executing a will, the nature and extent of the property she was disposing of, or the natural objects of her bounty and her relations with them.

As further evidence of the decedent's lack of testamentary capacity, Melissa states that the decedent suffered from severe macular degeneration as well as constant, excruciating pain from a hip replacement. The objectants claims that these physical infirmities, coupled with the decedent's depression, stress, and inability to manage her daily affairs, illustrate that she did not have the requisite testamentary capacity to execute her last will and testament. However, allegations of the decedent's depression and physical infirmities are insufficient to illustrate that she lacked the mental capacity to create a will. The Second Department has held that where a decedent suffered from physical infirmities and depression, but was able to attend to her household and financial affairs, she possessed the requisite testamentary capacity necessary to make a will (*see Matter of Esberg*, 215 AD2d 655 [2d Dept 1995]).

Here, the objectants concede that at the time the will was executed the decedent attended to her own financial affairs, lived with her husband without a nurse or home care provider, and participated in a number of educational classes. Thus, the decedent was able to attend to her household and financial affairs despite any physical infirmities or depression that the she might have suffered from.

Based upon the foregoing information, the proponent has established prima facie that decedent was of sound mind and memory when she executed the will (EPTL 3-1.1). The record is devoid of any proof that at the date of the execution of the propounded instrument, decedent was incapable of handling her own affairs or lacked the requisite capacity to make a will.

Accordingly, the objection of lack of testamentary capacity is dismissed.

3. Was the decedent's will duly executed?

The proponent has the burden of proof on the issue of due execution (*Matter of Kumstar*, 66 NY2d 691 [1985]). Due execution requires that the proposed will be signed by the testator, that such signature be affixed to the will in the presence of the attesting witnesses or that the testator acknowledge his signature on the propounded will to each witness, that the testator publish to the attesting witnesses that the instrument is his will and that the witnesses attest the testator's signature and sign their names at the end of the will (EPTL 3-2.1). If the will execution is supervised by an attorney, the proponent is entitled to the presumption of due execution (*Matter of Collins*, 60 NY2d 466 [1983]); *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]). Where an attorney states to the attesting witnesses, in the decedent's presence, that decedent is executing a will, such statement meets the publication requirement (*see Matter of Frank*, 249 AD2d 893 [4th

Dept 1998]). If the decedent does not expressly request that a particular witness sign the will, such a request may be inferred from a testator's conduct and from circumstances surrounding execution of the will (*Matter of Buckten*, 178 AD2d 981 [4th Dept 1991], *lv denied* 80 NY2d 752 [1992]). An attestation clause and self-proving affidavits further support a proponent's assertion that the propounded will was executed in compliance with statutory formalities (*Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Moskoff*, 41 AD3d 481 [2d Dept 2007]).

Here, the propounded will was executed under the supervision of an attorney. Therefore, there is a presumption of due execution (*see Matter of Young*, 289 AD2d 725 [2001]; *Matter of Rosen*, 291 AD2d 562, 562 [2002]). Moreover, the instrument includes a self-executing affidavit of the attesting witnesses, and an attestation clause, which further establish the presumption that all necessary formalities of will execution were met in this case. (*Matter of Collins*, 60 NY2d 466 [1983]; *Matter of Moskoff*, 41 AD3d 481 [2d Dept 2007]). Although the attorney-draftsman and attesting witness cannot remember the details of the execution ceremony, the presumption of due execution remains (*see Matter of Collins*, 60 NY2d 466, 468 [1983]; *Matter of Finocchio,* AD2d 418, 418-19 [2d Dept 2000]). The objectants fail to provide any proof that the propounded instrument was not executed in conformity with the formal requirements of EPTL 3-2.1 (*see Matter of Weinberg*, 1 AD3d 523 [2d Dept 2003]).

Accordingly, the objection of lack of due execution is dismissed.

4. Was the will execution a result of fraud?

To prevail upon a claim of fraud, the objectant must prove by clear and convincing evidence (*see Simcuski v Saeli*, 44 NY2d 442 [1978]) that the proponent knowingly made false

statements to the decedent to induce him to execute a will that disposed of his property in a manner contrary to that in which he would have otherwise disposed of it (*see Matter of Gross*, 242 AD2d 333 [2d Dept 1993]; *Matter of Evanchuk*, 145 AD2d 559 [2d Dept 1988]). There is no such evidence in this case. The objectants argue that Gail told the decedent that the objectants were very spoiled and that they received a large inheritance from their father's estate. The objectants argue that these statements were false and caused the decedent to disinherit them. However, there is no proof that the proponent ever made such statements to the decedent. The proponent's deposition testimony merely states that the decedent believed the objectants were very spoiled and that they received a large inheritance from their father.

Accordingly, the objection of fraud is dismissed.

5. Was the testator subjected to undue influence?

In order to prove undue influence, the objectants must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence as to subvert the mind of the testator at the time of the execution of the will; and (3) the execution of a will, that, but for undue influence, would not have been executed (*cf. Matter of Walther*, 6 NY2d 49 [1959]). Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of his will, his family relations, the condition of his health and mind and a variety of other factors such as the opportunity to exercise such influence (*see generally* 2 Pattern Jury Instructions, Civil, 7:55). It is seldom practiced openly, but it is the product of persistent and subtle suggestion imposed upon a weaker mind and furthered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). Without the showing

that undue influence was actually exerted upon the decedent, mere speculation that opportunity and motive to exert such influence existed is insufficient (*see Matter of Chiurazzi*, 296 AD2d 406 [2d Dept 2002]; *Matter of Herman*, 289 AD2d 239 [2d Dept 2001]). Circumstantial evidence is sufficient to warrant a trial on the question of undue influence (*Matter of Pennino*, 266 AD2d 293 [2d Dept 1999]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). However, the objectants must illustrate that there is a genuine triable issue by providing specific, detailed allegations which are substantiated by evidence in the record and are not mere conclusory assertions (*Matter of O'Hara,* 85 AD2d 669, 671 [1981]).

As a result of the decedent's physical infirmities, she was unable to drive. Therefore, the proponent often drove the decedent to her daily activities, including doctor's appointments, classes, and even the grocery store. The objectants argue that the decedent relied heavily on the proponent for transportation, and as such, the proponent had ample opportunity and motive to unduly influence her. However, the proponent was not the decedent's only means of transportation. The decedent's husband, Sidney Fenster, also drove her to various activities, and if neither the proponent nor Mr. Fenster were available, the decedent would have her friends drive her or she would take a taxi. At the time of the propounded will's execution, the decedent lived an independent life with her second husband, managed her own finances, took a number of adult education classes, and often visited and socialized with her friends. The objectants have provided nothing more than mere speculation that the proponent exerted influence on the decedent.

Accordingly, the objection of undue influence is dismissed.

CONCLUSION

The court grants proponent's motion for summary judgment. The objections to the January 10, 2003 will are dismissed. A decree may be entered admitting the propounded instrument to probate.

Settle decree.

Dated: December 21, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate's Court