Matter of Jakuboski

2017 NY Slip Op 30187(U)

January 31, 2017

Surrogate's Court, New York County

Docket Number: 2014-3542

Judge: Nora S. Anderson

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SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding in the Estate of

STEVEN V. JAKUBOSKI,

Deceased.

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New York County Surrogate's Court
Date JANUARY 31, 2017

File No. 2014-3542

ANDERSON, S.

Decedent's father ("movant") seeks to vacate a decree of this court, dated September 29, 2014, admitting the last will and testament of his son, Steven V. Jakuboski ("decedent") to probate.

Decedent died on September 2, 2014. In his will, dated August 13, 2014, he left his entire estate to Craig Archibald, his partner of 26 years. Movant, decedent's sole distributee, waived service of process and consented to the probate of his son's will on September 9, 2014, the same day on which the nominated executor ("proponent") filed a petition to admit the will to probate. Three weeks later, this court issued a probate decree and granted letters testamentary to proponent.

On December 31, 2014, movant filed the instant motion, claiming that his waiver-and-consent was invalid because it was obtained through "coercion, over-reaching, misconduct and duress" on the part of movant's daughter (decedent's sister), who, like movant, receives nothing under the will. Specifically, movant alleges that: (1) he signed the waiver-and-consent under duress while still grieving over his son's death, and he felt coerced by his daughter's threats that he would not see her or her children again if he did not sign it; (2) no one explained the purpose and consequences of the waiver-and-consent before he signed it; and (3) he was not presented with a copy of the will or given an opportunity to read it before signing the waiver-and-consent.

Movant's affidavit sets forth his version of the circumstances surrounding his signing of

the waiver-and-consent. On September 9, 2014, one week after decedent's death, movant's daughter visited him and "demanded [that] he sign a document that turned out to be the waiver." She told him "that if he refused to sign the document, she would never speak to him again." He then signed the waiver-and-consent "without ever having seen the purported will or realizing the significance and consequence of the waiver. . . ." He also claims that he "only signed the waiver because he was depressed over [his son's] death and feared [his daughter] would follow through on her threat and prevent him from seeing her and her children."

In her affidavit in opposition, movant's daughter denies these allegations and describes their conversation as calm. She asserts that she not only read the contents of decedent's will to her father, but also emphasized the portion which specified that decedent's friend was the sole beneficiary. She alleges that she explained to her father that by signing the waiver-and-consent, he would forgo his right to object to probate, and that her father told her that he understood.

Legal Standard

The Court of Appeals has held that a consent to probate is "essentially a stipulation and [should] be treated accordingly" (*Matter of Frutiger*, 29 NY2d 143, 149 [1971]). Consents, like stipulations, will not be set aside absent a showing of good cause, such as fraud, collusion, mistake or accident (*id.*, at 150]). After a probate decree has been issued, courts will set aside a waiver-and-consent only in "extraordinary circumstances," since vacatur of a probate decree disrupts the orderly process of administration and "creates a continual aura of uncertainty and non-finality" (*see Matter of Ancona,* NYLJ, Jan. 14, 2004, at 31, col 6 [Sur Ct, Suffolk County]); *see also Matter of Bobst*, 165 Misc 2d 776, 782 [Sur Ct, NY County 1995] *affd* 234 AD 2d 7 [1st Dept 1996]); *Matter of Arnold,* NYLJ, Oct. 29, 1993, at 22, col 5 [Sur Ct, NY County]; *Matter*

of Barclay, 2010 NY Slip Op 31755(U) [Sur Ct, Nassau County 2010]).

The Surrogate's Court Procedure Act is silent on the standard to be applied to requests for vacatur of decrees, and courts follow the standard set forth in Rule 5015(a) of the Civil Practice Law and Rules (*see* SCPA § 102; *Matter of American Committee for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 95 [2008]). One of the five enumerated grounds for vacatur under CPLR 5015 is "fraud, misrepresentation or other misconduct of an adverse party" (CPLR 5015[a][3]). Without expressly citing the subsection, movant's position implicitly alleges that his daughter's conduct in obtaining his waiver-and-consent comes within the purview of this provision.

It must be noted that movant's daughter was not an "adverse party" in the probate proceeding. Indeed, she was not party at all, since she is neither a distributee nor beneficiary under decedent's will. Even if the court were to take a broad view of the phrase "adverse party," movant could not prevail on his motion since, for the reasons set forth below, he fails to make a prima facie case that his waiver-and-consent was obtained through fraud, misrepresentation or other misconduct.

Even if movant's allegations were true, they do not amount to fraud or misrepresentation by movant's daughter. As to whether the allegations constitute "misconduct" sufficient to warrant vacatur, the case law indicates they do not. Evidence of misconduct must be clear and convincing (*see Matter of Anderson*, 22 Misc 2d 662, 663 [Sur Ct, Suffolk County 1960]). A party who signs a waiver-and-consent is presumed to have read and understood its contents (*see Matter of Anderson*, *supra*, 22 Misc 2d at 663 [holding that proponent was under no obligation to advise a distributee as to the nature of a waiver-and-consent to probate; the distributee "is chargeable with knowledge of the contents and the legal effect of such waiver"]; *see also Matter*

of Gold, 2014 NY Slip Op 33070(U) [Sur Ct, Nassau County 2014] ["necessary parties are deemed to have read and understood the contents and consequences of signing a waiver-and-consent"]; *Matter of Celantano*, 31 Misc 2d 727 [Sur Ct, Nassau County 1961][same]). Movant's allegations that he did not understand the significance of the waiver and signed it under duress are not substantiated by any credible evidence and do not warrant vacatur of this court's decree. *See Matter of Coccia*, 59 AD 3d 716 [2nd Dept 2009] [unsubstantiated allegations that a party did not understand the waiver-and-consent before signing it were insufficient to satisfy the standard for setting aside probate decree]; *Matter of Hall*, 185 AD2d 322 [2nd Dept 1992] [a party's claims that he did not understand the significance of the waiver and that he was suffering from bereavement and medical problems when he signed it did not warrant vacatur]; *Matter of Leeper*, 53 AD2d 1054, 1055 [4th Dept 1976] [distributee who signed waiver after being misinformed that, if she didn't, the police would serve her with citation at her home, and who feared the police, did not set forth the requisite misconduct or misrepresentation needed for vacatur]).

Even if movant demonstrated "misconduct of an adverse party" as required by CPLR 5015(a)(3), he could not prevail on his motion for vacatur of the probate decree unless he demonstrated a reasonable probability of success on the merits of his proposed objections (*see Matter of American Committee for Weizmann Inst. of Science v Dunn*, 10 NY3d 82, 96 [2008]; *Matter of Zilkha,* NYLJ, Aug. 3, 1989, at 6, col 4 [Sur Ct, NY County]; *Matter of Ancona,* NYLJ, Jan. 14, 2004, at 31, col 6 [Sur Ct, Suffolk County]). Movant states that he would assert two objections if this court were to reopen the probate proceeding: first, that decedent lacked the requisite testamentary capacity, and second, that decedent's signature on the will is a forgery.

(1) Lack of Capacity

A proponent of a will has the burden of proving that the testator possessed the mental capacity to execute the will, *i.e.*, that he understood the nature and consequences of executing it; that he had some idea of the nature and extent of the property affected by the will; and that he was aware of the identity of the persons who would normally be considered the natural objects of his bounty (*see Matter of Kumstar*, 66 NY2d 691 [1985]). The capacity required to execute a will is minimal, less than that required to execute any other type of legal document (*Matter of Martin,* NYLJ, Oct. 26, 2015, at 26 [Sur Ct, NY County] *citing Matter of Coddington*, 281 AD 143 [3d Dept 1952], *affd* 307 NY 181 [1954]; *Matter of Harper,* NYLJ, Nov. 14, 2014, at 36 [Sur Ct, Bronx County]). The time to be considered when determining capacity is the time of the instrument's execution (*Matter of Llewellyn,* NYLJ, Jan. 5, 2015, at 19 [Sur Ct, NY County], citing *Matter of Morris*, 208 AD2d 733 [2d Dept 1994]; *Matter of Cookson,* NYLJ, Dec. 18, 2015, at 42 [Sur Ct, Queens County]).

The two attesting witnesses signed an affidavit in which they affirmed that decedent was "of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a will." The will itself demonstrates that decedent knew the nature and extent of his property. Decedent specifically bequeathed "the cooperative apartment that I own" to Mr. Archibald, the value of which constituted the bulk of decedent's estate. The will also reveals that decedent was aware of the natural objects of his bounty. While there is no mention of his father, decedent's will refers to decedent's two siblings: "to my sister, . . . whom I love very much and because she is adequately provided for, I leave no bequest. To my brother, . . . for reasons best known to him, I leave no bequest."

Proponent submits affidavits from various individuals attesting to decedent's capacity in the period surrounding his signing of the will. Decedent's primary care physician states that, from 2002 until decedent's death in 2014, decedent was "mentally stable throughout and fully understood his actions," and the he was "alert, oriented, conversive, competent and lucid." Significantly, the doctor stated that he saw decedent on the day of the will's execution, and decedent asked him to write a letter attesting to his capacity. The doctor stated that decedent was then "competent and capable of executing his last will and testament." Decedent's sister submits an affidavit describing decedent as "clear minded" and "completely capable of making decisions," notwithstanding the fact that decedent suffered from seizures and "intermittent bouts of depression." She further states that decedent's testamentary intentions "were consistent and very clear to me . . . over the course of several years . . . . His will accurately reflected his wishes."

In light of the above, the court finds that proponent has made a prima facie case that decedent understood the nature and consequences of executing his will, that he knew the nature and extent of his property, and that he was aware of those individuals who would be considered the natural objects of his bounty and his relations with them (*see Matter of Kumstar*, 66 NY2d at 692).

In support of his contention to the contrary, movant notes that decedent committed suicide three weeks after executing his will. He submits an affidavit from his other son, decedent's brother, containing the following allegations: (1) decedent stopped working in 2005 on account of a seizure disorder; (2) decedent was taking multiple medications and was probably "abusing his prescription drugs"; (3) decedent's memory deteriorated to the extent that "often he

did not know the day of the week" or "recognize people he knew"; (4) during one "recent" visit, decedent suggested to his brother that he believed their father was dead; (5) decedent was "unable to take care of himself" or communicate with his attorney in another court proceeding, and thus a guardian ad litem was appointed for him in July of 2013; (6) decedent's description in his will of Mr. Archibald as his "life partner of 26 years" was an "insane delusion," since the decedent and Mr. Archibald had broken up several years earlier, and Mr. Archibald had been living in California ever since. Movant also attaches reports from three doctors, all from 2009, noting that decedent suffered from various afflictions, including a seizure disorder making him prone to falling, major depression, suicidal thoughts, chronic pain, memory loss, and anxiety. Notably, one of these doctors is the same doctor who submitted the previously-described affidavit attesting to decedent's capacity on the day he executed his will.

It is well established that a diagnosis of mental illness, including depression, progressive dementia, and even incompetency, does not preclude a finding that a testator had the capacity to execute a will, even in cases where the testator took his own life (*see Matter of Hatzistefanou*, 77 Misc. 2d 594, 596 [Sur Ct, NY County 1974] ["the fact that decedent may have attempted suicide does not give rise to an inference of insanity or unsound mind"]; *Matter of Butler,* 2012 NY Slip Op 51324(U) [Sur Ct, Monroe County 2012][while there was evidence that testator suffered from psychiatric distress and allegedly attempted suicide, such evidence did not give rise to an inference of lack of testamentary capacity]; *see also Matter of Cookson,* NYLJ, Dec. 18, 2015, at 42 [Sur Ct, Queens County]). Nor is physical weakness inconsistent with testamentary capacity (*Matter of Cookson, supra*). Regarding the allegations that decedent was taking many medications and may have been abusing drugs, such information is relevant only "to the extent

that the condition may have affected his . . . understanding of and ability to make a will at the time of its execution" (*Matter of Redington,* NYLJ, July 18, 2014, at 24, col 1 [Sur Ct, NY County]). Proponent must show only that decedent was lucid when he executed the will (*see Matter of Redington*, *supra*), and proponent has made such a showing.

With respect to movant's assertion that decedent suffered from an insane delusion about his relationship with Mr. Archibald, Mr. Archibald's affidavit offers a detailed and credible explanation of their relationship and the reasons why decedent bequeathed his estate to him. Movant's conclusory allegation regarding decedent's purported "insane delusion" does not, in the court's view, increase the likelihood that movant would succeed on an objection premised upon decedent's incapacity.

In light of the strong evidence proffered by proponent demonstrating that decedent had the requisite testamentary capacity, and the relatively weak, conclusory and outdated evidence submitted by movant in opposition, the court finds that movant has failed to demonstrate a reasonable probability of success on his proposed objection based on incapacity.

(2) Forgery

Movant asserts that the decedent's signature may have been forged. Decedent's will contains a self-proving affidavit, which in itself is evidence of the genuineness of decedent's signature (*see Matter of Taylor*, NYLJ, Aug. 16, 2011, at 22, col 6 [Sur Ct, Bronx County]. At the end of the will, each of the two witnesses signed a sworn and notarized statement that "the within will was subscribed in our presence and sight at the end thereof by Steven V. Jakuboski, the within named testator. . . . Each of the undersigned was acquainted with said testator at such time . . . ." By virtue of this affidavit, the court finds that proponent has made a prima facie case

that decedent's signature is genuine.

Movant submits several documents containing decedent's signature and argues that a comparison between those signatures to the signature contained in the will evidences a likelihood that decedent himself never signed the will. However, movant has not offered any expert's opinion on the forgery issue, nor has he offered any other particulars, such as the identity or motivations of the individual(s) who may have committed the alleged forgery (*see, e.g., Matter of Herman*, 289 AD 2d 239 [2d Dept 2001] [dismissing, on a motion for summary judgment, an objection based on forgery where objectants failed to provide "the particulars of the forgery"]). The court cannot conclude from the exemplars of decedent's signature that it is more likely than not that decedent's will was forged. In the absence of an opinion of any handwriting expert, and considering that a person's signature is not always identical (*see Matter of Taylor*, *supra*), movant has not demonstrated a likelihood of success on his forgery allegation.

For the reasons stated above, the motion is denied in its entirety.

This decision constitutes the order of this court.

NSA

SURROGATE

Dated: January 31, 2017