SURROGATE'S COURT : NEW YORK COUNTY

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Probate Proceeding, Will of

DOMENICK E. NATALE,

Deceased.

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File No. 2014-4202

A N D E R S O N , S.

Before the court are cross-motions for summary judgment in a contested probate proceeding in the estate of Domenick Natale.

Decedent, a retired attorney, died on August 21, 2014, at the age of 102. He left a handwritten will dated May 7, 2002. The nominated executor, a niece of decedent's predeceased wife offered the will for probate, and nine children of his predeceased sister filed objections, alleging lack of due execution, lack of testamentary capacity, fraud, undue influence and duress.

Summary judgment standard. Summary judgment is appropriate where a movant makes 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]) and there is insufficient evidence offered by the adversary to demonstrate the existence of a material issue of fact requiring a trial *(id.)*. It is thus the movant's burden, in the first instance, to set forth a prima facie case. If movant succeeds, it is then incumbent upon respondent to present evidence which establishes a

genuine material question of fact; "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *see also, Matter of Neuman,* 14 AD3d 567 [2d Dept 2005]). Since a summary ruling against a party on the merits deprives that party of the opportunity to have a trial, such relief should be considered with caution (*F. Garofalo Elec. Co. v NY Univ.*, 300 AD2d 186, 188 [1st Dept 2002]; *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204 [1st Dept 1990]). On the other hand, summary judgment for the movant is entirely appropriate where the opposing party raises no genuine issues of fact (*Matter of Ryan,* 34 AD3d 212 [1st Dept 2006], *lv denied,* 8 NY3d 804 [2007]; *Matter of Tully,* 227 AD2d 288 [1st Dept 1996]; *Matter of Coniglio,* 242 AD 2d 901 [4th Dept 1997]).

Motion and cross-motion for summary judgment on due execution. In deciding the motion for summary judgment, the court must first determine whether objectants have made a prima facie showing of entitlement to such relief. Objectants here seek a judgment dismissing the probate petition on the ground that the propounded instrument was not duly executed.

The will presented here is a three-page document in decedent's handwriting. Each page is numbered. At the top of page 3, the final provision of the will is followed by a standard preface to the signature line ("IN WITNESS WHEREOF I have

hereunto subscribed my name this 7th day of May 2007"), which is followed in turn by decedent's signature, an attestation clause in decedent's handwriting but in ink different from the body of the will, and the signatures of two witnesses, Janet Kors and George Tobias. The attestation clause attests to each of the elements of due execution (EPTL § 3-2.1). The next two pages (numbered 4 and 5) consist of a typed self-proving affidavit of attesting witnesses in accord with the requirements of SCPA § 1406, also signed by the witnesses and notarized by a notary public. The self-proving affidavit states that the will execution was supervised by Charlotte Natale, Esq., *i.e.*, decedent's wife.

One of the two attesting witnesses is dead. The surviving witness, his wife, was examined on May 13, 2015. She testified that she and her late husband were travel agents and lived in the same apartment building as testator and his wife. She knew both Natales as neighbors and as clients, as she and her husband arranged several cruises for them. She confirmed that the signatures on the will and on the affidavit of attesting witnesses were those of her husband and herself. While she clearly remembered that she and George had acted as witnesses, she could not recall any of the specifics of the event which had occurred some eight years earlier.

Where the attesting witnesses are unavailable or have no

memory of a will's execution, a will supervised by an attorney and/or with an attestation clause is entitled to a presumption of regularity (*Matter of Tuccio,* 38 AD3 791 [2 Dept, 2007]). Objectants argue that the presumption should not be applied here because decedent's spouse had retired from the active practice of law 17 years before the will was executed and therefore was not qualified to supervise a will execution. They further argue that the presumption of regularity should not be afforded to this instrument because it is handwritten; because the attestation clause is written in an ink different from the body of the will; and because the named supervising attorney (Charlotte) benefited under the will. Finally, they argue that the testimony of the surviving witness that "it is possible but not probabl[e]" that she signed the will at the address which appears on the self-proving affidavit makes it impossible for proponents to establish that the will was duly executed.

Here, both decedent and his wife had long careers as practicing lawyers before retirement, and, after retirement, both filed biennial registration statements with the Office of Court Administration pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR § 118.1[g]). They were registered at the time the will was executed. As the court noted in *Matter of Dawson*, 133 AD3 1083 (3d Dept 2015), "[r]etirement from practice and resignation from the bar are not synonymous

concepts." A retired lawyer remains a lawyer and is permitted to practice law as long as no compensation is paid for his or her services (*id.*). A retired lawyer is subject to the rules of professional conduct (*see, e.g., Matter of Sullivan,* 140 AD3 1391 [3d Dept 2016] [retired lawyer disbarred]). Only upon resignation or disbarment is an attorney stricken from the roll of attorneys and thereafter prohibited from practicing law (*Matter of Dawson, supra,* at 1084). Thus, Charlotte's status as a retired lawyer did not disqualify her, as objectants argue, from supervising her husband's will execution. Moreover, it is noted that, although the self-proving affidavit names Charlotte as the supervising attorney, the presumption of regularity applies when a testator is himself the lawyer-draftsman of his own will (*see, Matter of Young,* NYLJ, Nov. 12, 2015 at 20, col 6 [Sur Ct, NY County]).

Objectants argue that in order for a presumption of regularity to apply there must be affirmative evidence that the supervising attorney was experienced in trusts and estates, misstating the holdings in *Matter of Kellum,* 52 NY 517 (1873), (applying a presumption of regularity to an attorney-supervised will execution when the witnesses could not recall any salient details), and *Matter of Cottrell,* 95 NY 329 (1884) (admitting a will to probate despite testimony by both attesting witnesses against due execution). This is not the law. In *Kellum,* the

court found that the record as a whole, including the existence of an attestation clause, confirmation of the witnesses's signatures, the attorney-drafter's testimony regarding his experience in will drafting and his usual practice at will execution ceremonies, and the fact that testator kept the will until his death, was sufficient to establish a presumption of due execution. In the absence of any evidence to the contrary, the will was thus admitted to probate. In *Cottrell,* there was no evidence of lawyer-supervision at all; rather, the court found the fact that the testator had executed a previous will, and that he drew, in his own handwriting, a regular will with a properly worded attestation clause, showed that he had sufficient experience to conduct an execution ceremony in accord with formal requirements (*see also, Matter of Collins,* 60 NY2d 466 [1983] [enactment of SCPA § 1405 did not vitiate ruling in *Cottrell*]). *Kellum* and *Cottrell* thus do not stand for the proposition that a presumption of regularity applies only to wills supervised by a lawyer with specialized experience in this area of practice. Rather, these and other cases hold that the court may apply a presumption of regularity "if the attestation clause and other circumstances are satisfactory to prove its execution" (*Matter of Kellum,* 52 NY at 519).

Objectants do not dispute that decedent was a lawyer for more than 70 years, first practicing criminal defense law, then

serving as an arbitrator, and in later years practicing jointly with his wife, who was a former general counsel to Saint Vincent's Hospital in New York City. The propounded will is regular in both form and content, evidencing professionalism in the language used and the administrative provisions included, in the carefully worded full attestation clause, and in the attachment of a self-proving affidavit which meets statutory requirements. The surviving witness affirmatively acknowledged her own signature and that of her deceased husband, the second witness, on both the will and the affidavit. The will was maintained so that it was available for probate at decedent's death.

The fact that the will is a handwritten document is not inherently suspicious and does not require any specific acknowledgment by the attesting witnesses in the self-proving affidavit, as objectants argue. The statute setting out the elements of due execution requires only that the will be "in writing" (EPTL § 3-2.1[a]), and the propounded instrument fully meets that requirement.

Similarly, the testator's use of one pen for the attestation clause and another for the body of the will does not raise here a question of fact as to the will's due execution. There is no requirement that a single pen be used. While irregularities of form may, in some instances, suggest the occurrence of document

manipulation or tampering, that is not the case here. It is undisputed that the entire instrument is in decedent's handwriting. The location of the attestation clause immediately after decedent's signature, which is followed on the same page by the signatures of the witnesses, does not suggest any post-execution manipulation or similar mischief. Nor do objectants offer any theory, let alone any evidence, to suggest that the will was not an intact document at the time it was executed.

Objectants further argue that the following testimony of the surviving witness is fatal to a determination of due execution:

> Q. So, you mentioned that your signature is on this will in two places.
> Would it be fair to say that you signed on the day that it says on the document, May 7, 2007?
> A. It could be. I don't ...
> Q. Is it possible that you signed the will at this address, 769 Broadway?
> A. I wasn't there and I don't think George was there. It's possible but not probably.
> Q. But you don't really recall?
> A. No.

Viewed in the context of the witness's testimony as a whole, this testimony does not defeat the will's due execution. Although she did not remember any particulars as to the will execution, she did not dispute her involvement in it; indeed, she testified that she and her husband "were surprised that they asked us to be witnesses" and surmised that "they probably had George available and I tagged along." Most importantly, she affirmatively confirmed both her own and George's signatures

which follow a full attestation clause, as well as on the notarized self-proving affidavit. Since, as discussed above, a will can be admitted to probate even when both attesting witnesses testify against it (*see, Matter of Cottrell,* 95 NY 329), then, *a fortiori,* when the witness professes a lack of memory and the circumstances as a whole indicate that the will was duly executed, an equivocal statement does not defeat its admissibility *(see, Matter of Halpern,* 76 AD3 429 (1st Dept 2010, *aff'd* 16 NY3d 777 [2011]).

Finally, objectants argue that the self-proving affidavit should be disregarded because the will would have benefited decedent's pre-deceased spouse had she survived the testator, and, as it happened, benefited her nieces. They cite to a legal doctrine that is used in the analysis of undue influence (rather than due execution) when an attorney unrelated to the testator, or members of that attorney's family, benefit under a will which the attorney drafted (*see, Matter of Putnam,* 257 NY 140 [1931]). In any event, the doctrine does not apply to the facts here. Objectants present no evidence that decedent's wife was the drafter of the will. Decedent left one-half of his residuary estate to members of his side of the family, excluding only objectants, with whom, it is undisputed, he did not have a close relationship. It is further undisputed that the couple was close to the wife's nieces who also benefited under the will.

Since objectants have failed to make a prima facie case that the will was not duly executed, their application to dismiss the probate petition on this ground is denied.

Turning next to proponent's cross-motion to dismiss the objection based on lack of due execution, the facts described above establish a prima facie case that the will was duly executed. In *Kellum,* the Court of Appeals held that:

> "[i]f the attestation clause is full and the signatures genuine and the circumstances corroborative of due execution, and no evidence disproving a compliance in any particular, the presumption may be lawfully indulged that all the provisions of the statute were complied with, although the witnesses are unable to recollect the execution or what took place at the time. In proportion to the absence of memory, should care and vigilance be exercised in examining the facts to prevent fraud and imposition; but if the circumstances of good faith and intelligence of the witnesses satisfy the judgment that the statute has been complied with, there is no rule of law to prevent admitting the will to probate, and this accords with the authorities in this State."

Matter of Kellum, 52 NY at 519. The facts presented here are sufficient, under *Kellum,* to establish due execution. As indicated in the discussion above, objectants have failed to raise a material question of fact disputing due execution. Accordingly, the objection as to due execution is dismissed.

Proponent also moves for summary judgment on objections as to decedent's testamentary capacity, undue influence and fraud.

Testamentary capacity. Proponent makes a prima facie case that decedent was competent at the time of the will execution

based on the presumption that a testator was competent (*Matter of Beneway*, 272 AD 463 [3d Dept 1947]), the attestation clause of the will, and the attesting witness's testimony that decedent was not incapacitated until the last year of his life. The fact that decedent's will was competently drawn and in his own handwriting further supports his testamentary capacity. Objectants present medical records of decedent's beginning about a year before the will execution which evidence that decedent suffered from some cognitive difficulties. Objectants' burden here is only to show that there is a material question of fact about decedent's capacity. While the medical records alone are insufficient to establish that decedent lacked capacity at the time he executed the will, objectants assert that they have not had the opportunity to complete their discovery on this issue. They do not, however, specify with any particularity what discovery they would seek. Accordingly, objectant is directed to specify the further discovery which they intend to conduct by affirmation served and filed within three weeks of the date of this decision. If the court is satisfied that there is a basis for additional discovery, the motion for summary dismissal of the objection as to testamentary capacity will be held in abeyance in accordance with CPLR 3212(f) pending the completion of discovery, and a discovery schedule will be set following a conference before a court attorney-referee. If, however, the court determines that

no additional discovery is warranted, the court will resolve the capacity issue in a further decision.

Other objections. Proponent does not attempt to make a prima facie case that the will was free from undue influence, fraud or duress. Instead, she argues incorrectly that objectants, by failing to move for summary judgment on these objections, have waived them, and, in any event, would not be able to meet their heavy burden of proof on these issues at trial. However, objectants are not required to move for summary judgment on all of their objections. A motion for partial summary judgment is permissible under CPLR § 3212(e) (court may grant summary judgment "as to one or more causes of action, or part thereof"), and proponent can therefore offer no support for her argument that failure to move on all objections constitutes a waiver of the remaining objections. Similarly, proponent gives no authority for her argument that objectants' failure refer specifically to subsection (e) of the summary judgment statute (CPLR 3212) in their motion, in which they clearly seek a determination of only one of several objections, constitutes a waiver. Although at trial objectant will bear the burden of proof on the issues of undue influence, fraud and/or duress, this does not obviate the obligation of proponent, on a motion for summary judgment, to present a prima facie case that the will was executed free from these infirmities. Her failure to do so

mandates denial of the cross-motion with respect to these objections.

This decision constitutes the order of the court.

NSA

S U R R O G A T E

Dated: December 22 , 2016