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

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Probate Proceeding, Estate of

ROBERT H. BERDOW,

Deceased.

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DECISION
File No.: 2014-3125

M E L L A, S.:

The court considered the following submissions in determining the competing motions for summary determination:

	Date Filed
1. Petitioner's Notice of Motion	July 27, 2016
2. Affirmation of Thomas Sciacca in Support of Petitioner's Motion	July 27, 2016
3. Objectant's Notice of Motion	July 28, 2016
4. Affirmation of John Catterson in Support of Objectant's Motion	July 28, 2016
5. Objectant's Amended Notice of Motion	August 3, 2016
6. John Catterson's Affirmation in Opposition to Petitioner's Motion	September 20, 2016
7. Thomas Sciacca's Affirmation in Opposition to Objectant's Motion	September 28, 2016
8. Thomas Sciacca's Reply Affirmation	October 3, 2016

In the probate proceeding in the estate of Robert H. Berdow, petitioner (and preliminary executor) Richard P. Shupper and objectant Marilouise Berdow have filed competing motions for summary determination regarding the propounded instrument, dated June 20, 2014 (*see* CPLR 3212).

Decedent died on July 5, 2014, at age 74, leaving a $2.5 million estate, survived by his sister, Marilouise Berdow, as his sole distributee. Article FIRST (E) of the propounded instrument reads: "I deliberately choose to make no provisions for my family members, not out of lack of love for them, but because I want to provide for the friends and charity I have named herein and in my non-testamentary assets. I trust my family will honor and respect my wishes." The instrument provides for distribution of tangible personal property and $400,000 to each of decedent's friends, petitioner and Kelly McKaig, and the residuary to Columbia University, "to

be applied to the History Department of Columbia College."[1] There were two attesting witnesses to the instrument: Kathy N. Rosenthal, the attorney-drafter who supervised the execution of the instrument, and Gary M. Giardina, who was the superintendent of the building in which decedent lived and, as such, had known decedent since 1981. Ms. Rosenthal was the notary public on the contemporaneous affidavit of attesting witness.

In her pleading, objectant alleges testamentary incapacity, lack of due execution, and undue influence, fraud, and duress exercised by decedent's friend, Howard Sklar, petitioner, Mr. McKaig, and Ms. Rosenthal, "all of whom enjoyed a close confidential relationship" to decedent, or by some other person or persons acting "in concert or privity" with them. In addition, objectant contends that petitioner is unfit to serve as fiduciary of decedent's estate.

As reiterated by the Court of Appeals very recently: "It is well established that 'the proponent of a summary judgment motion must make 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'" which would require resolution at trial (*Stonehill Capital Mgt., LLC v Bank of the West*, 2016 NY Slip Op 08481 [Dec. 20, 2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Petitioner argues that he has done so. Objectant, however, contends that genuine disputes as to material facts exist. Much of objectant's motion is based upon attempts to discredit witnesses who testified at depositions. Her motion is styled as one for summary determination, but, in effect, is merely opposition to petitioner's motion, in that, the

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[1] The immediately prior instrument, dated October 29, 2010, contained a single dispositive provision. The estate was to be divided equally among three beneficiaries: Marilouise Berdow; The Lesbian, Gay, Bisexual & Transgender Community Center; and Columbia University, "to be applied to the History Department of Columbia College." Robert P. Shupper was the nominated executor of the October 29, 2010 instrument.

main argument advanced is that the petitioner has not established his entitlement to judgment as a matter of law.

BACKGROUND

On June 12, 2014, decedent, who had prostate cancer that had metastasized to the bone and laryngeal cancer, sent an email to three friends — petitioner and Messrs. Sklar and McKaig — that he was checking himself into Mt. Sinai Hospital where, on June 13, 2014, he had an emergency tracheotomy.[2] The subject of the June 12, 2016 email reads: "I am about to check into Mt. Sinai tonight," and the text reads: "tomorrow they are doing a trech [sic] on my throat to alleviate congestion. I will be there until Mon just [sic] check on me. I should be fine. Dr. Genden is my doctor and his assistant is Kara.Bland@mountsinai.org. Stay in touch . .Robert . . . I am bringing my computer to hospital [sic]."

Mr. Sklar testified that, during decedent's hospitalization, decedent indicated to him, by writing a note, that he wanted Mr. Sklar to find him a lawyer, and that Mr. Sklar had understood that decedent wished to make a new will. Reluctantly accepting such responsibility, Mr. Sklar obtained Ms. Rosenthal's name from his boss's boss, then engaged in a series of communications with her.

Petitioner testified that he accompanied decedent home from the hospital and saw decedent every day thereafter, until decedent's death, that Mr. McKaig was with decedent at night, and a nurse from Visiting Nurses of New York came almost every day. Petitioner also

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[2] According to the Mayo Clinic website, a "Tracheostomy . . . is a surgically created hole through the front of your neck and into your windpipe (trachea). The term for the surgical procedure to create this opening is tracheotomy."

testified that he shopped and prepared food for decedent and "would help him with his tracheostomy cleaning, and also with the maintenance of the atomizer that provided moisture in the area of the tracheostomy itself," but did not assist decedent with any medication or in the bathroom. Petitioner testified that the nurses at the hospital had instructed him and Mr. McKaig with respect to the tracheostomy and atomizer/vaporizer. Petitioner, however, indicated that he did not spend all day, every day, with decedent.

On June 16, 2014, Mr. Sklar sent an email to Ms. Rosenthal: "Roberts [sic] physical condition may worsen quickly. He's totally cogent, but his breathing is laboured [sic]. A week may be too long between visits. . . . HE CAN BE CRANKY. But ultimately an old school gentleman." A June 19, 2014 email from Mr. Sklar to Ms. Rosenthal reads: "Robert asked me to tell you that he wants to write a new will. I'm not the appropriate choice to deliver messages about his will; it's best left to his friends who were assigned those responsibilities like Jim Fleischman or Rick Shupper. But if Robert asks me to do something, I do it. I've relayed the message per his request; please follow up with Jim or Rick."

Later that day, petitioner sent an email to Ms. Rosenthal in which he set forth the members of decedent's family and persons to be named as executor and successor executor, listed decedent's assets (without assigning a value to any), and indicated that petitioner and Mr. McKaig were each to receive "½ of IRA plus $400,000 from sale of apartment," and that Columbia University was to receive the residuary. The email ends: "Looking forward to meeting you tomorrow at 12:30." Petitioner testified that decedent had communicated such information to him by writing it on a pad of paper, and that petitioner then sent the email from his own apartment.

Ms. Rosenthal replied to petitioner by email: "Richard, here is the draft of Robert's Will. When you read it to him, or reads [sic] it himself, he will see comments in bold, italic font. Please email the answers back to me this afternoon or tonight. . . ."

Petitioner testified that, on June 20, 2014, he greeted Ms. Rosenthal at the door to decedent's apartment, introduced her to decedent, "Then they did their business, and I went to the other end of the apartment," having been asked to do so by Ms. Rosenthal.

James Fleischmann, nominated successor executor of the propounded instrument, testified that he had been friends with decedent since 1979 or 1980. He further testified that he arrived at decedent's apartment at approximately 1 pm on June 20, 2014, that Ms. Rosenthal arrived at approximately 2 pm, and that he "was present from the time she arrived until the time she left. I heard every word that transpired." Further: "Kathy arrived, opened her computer, explained the process. Robert could only communicate through writing. Whether she had some indications beforehand of what he wanted to do, I don't know, but they proceeded to write the will." He indicated that Ms. Rosenthal was present for at least two hours.

When asked his opinion of decedent's capacity on June 20, 2014, Mr. Fleischmann testified: "He was in perfect control." And: "He knew exactly what he wanted to be in the will. He specified amounts, he specified that he did not want Marilouise to be included in the will," and further indicated that decedent was very capable of expressing his opinions. Mr. Fleischmann also testified that he observed no change in decedent's mental capacity on June 20, 2014 from the prior year. And: "I perceived him to be in full control of the process."

Mr. Fleischmann testified, in response to questioning:

"Q: Would you describe Kathy as being a thorough attorney?

"A: Very.

"Q: Can you — why? Why would you describe her as being thorough?

"A: Because she was parsing his comments, his written comments very finely and she was very much getting under his skin because of the specifics, the exactitude that she was trying to input into the document.

He became very frustrated several times.

"Q: do you think his frustration impaired his capacity in any way?

"A: Not at all."

When asked about "any points that [decedent] emphasized," Mr. Fleischmann testified:

"We were at the point where I believe it was Kathy who asked him if he wanted to leave anything to his sister or his nephews, and he said no, he wrote down 'No.'

"And she may have queried him again; same response.

"I asked him the same question at least once, maybe twice, but he was getting irritated.

"And I don't remember exactly the context of how I asked him the question the second time, if there was a second time, but he took his yellow pad and wrote something on it and he jabbed it and he held it up to me.

"Q: What did it say?

"A: 'She already has enough' or 'She has enough.'"

When asked: "How is it you remember that conversation?" Mr. Fleischmann testified: "It was a significant factor, I thought. It was the epicenter of why we were there."

Included in Ms. Rosenthal's estate planning file that she retained as counsel are notes which decedent wrote to her, in her presence, which read: "Do you think we should put my sister

in the will for a small amount to keep her mouth shut." And: "She is well off & we are not close Rick and Kelly are my family."

Mr. Fleischmann testified in response to questions about those notes, as follows:

"Q: Do you recall Robert writing that on that day in June 2014?

"A: Yes, but I recall the 'She already has enough,' but I think this is that piece of paper, so I –

"Q: The top asks whether or not he should leave his sister in the will for a small amount.
Do you see that?

"A: Yes. That may have been written to me. I thought that I broached that point with him. I actually thought maybe I asked that question.

* * * * *

A: . . . I know I was pressing him about whether or not he wanted to completely exclude Marilouise from the will, and we went back and forth several times.

"Q: More than is reflected here?

* * * * *

"A: Correct.

"Q: There is only one note here.

"A: I don't think he would have written down several times, but I think he was — the process was very difficult for him. He couldn't speak, so it was very frustrating for him.

So he would nod and shrug his shoulders, nod "Yes", nod "No", so I think he's repeating back to me the question.

"Q: The question that you posed specifically

"A: Right.

* * * * *

"Q: Do you recall seeing the bottom of this note 'She is well-off'?

"A: I definitely saw that because he stuck it in my face. He held out the pad like that. (Indicating.) I'm extending my arms."

Ms. Rosenthal testified regarding the notes, as follows:

"A: It was a note, two different notes that Robert wrote to me while we were talking on a yellow pad he had in front of him while we were talking.

Those were his responses to me about excluding Marilouise.

"Q: Do you recognize the handwriting as Robert's?

"A: I remember that Robert wrote those notes to me in front of me.

"Q: Is this document part of your estate planning file you retained as attorney?

"A: Yes."

After Ms. Rosenthal had reviewed with decedent "his family, his assets, his plan, the will, and I made all the changes he wanted," she emailed the instrument to decedent's email address, petitioner retrieved the document, printed it, and retrieved it from the printer.

Mr. Giardina testified as to the will execution ceremony: "On June 20th, he spoke with some — the limitations of having to put your finger here, but he particularly impressed me. I remember thinking, this man is unbelievable because he is so himself."

Ms. Rosenthal testified that she followed her normal custom and practice in supervising the execution of the will, which includes reviewing every paragraph of the instrument with the testator,[3] reading aloud the attestation clause and, after the witnesses have signed, reading aloud

[3] Ms. Rosenthal testified:

the affidavit of attesting witness.

On June 24, 2014, four days after the execution ceremony, decedent went to the office of his internist, Alexander McMeeking, M.D. Dr. McMeeking testified that he previously had examined decedent on June 2, 2014, at which time, decedent was acutely ill with "a respiratory infection, a laryngitis, a bronchitis, probably a throat infection." Dr. McMeeking testified that, on June 24, 2014, decedent was "Cachectic. It means wasted, you know, very thin, weight loss; not unexpected in this situation." But, when asked: "Did you notice any decline in his mental faculties between June 2, 2014 and June 24, 2014, the doctor answered: "Not that I recall, sir." When asked, "Did you observe Robert exhibiting any confusion of any kind on June 24, 2014?,"

> "I usually sit with the client so we can both see the will. I point as I read or I point to the paragraph I am reading, summarizing . . . . We go over the dispositive paragraphs, fiduciary paragraphs, the powers clauses, the definitions and the disqualification paragraph."
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> * * * * *
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> "I ask the client: Are these terms acceptable? We talk about what the function, nature and function of a will is . . . .
>
> "I asked [sic] the client if he is ready to sign the will, and I call the witnesses in.
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> * * * * *
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> "I again in front of the witness [sic] say to the client, 'I am going to explain the nature and function of a will to you. Is this your will? Does it dispose of your property the way you want to dispose of your property? Do you currently have a will? Do you want this will to revoke any and all prior wills? Would you like us to act as witnesses to the signing of your will? After that would you like us to sign an attestation clause that said we acted as witnesses to the signing of your will and you would you [sic] like us to sign an affidavit that says under oath we acted as witnesses to the signing of your will?'"

Dr. McMeeking answered: "No. My recollection was Robert was very clear in what he wanted and didn't want." When asked about decedent's cognitive ability on June 24, 2014, Dr. McMeeking testified: "Based on my recollection, it wasn't impaired. I mean, he came in on time for his appointment. He was very weak. He had somebody to help him, but he knew what he wanted to cover with me and talk about. Essentially, I think he was coming in to say good-bye."

ANALYSIS

Testamentary Capacity

Petitioner has made a prima facie showing of entitlement to summary determination, as a matter of law, on the issue of decedent's testamentary capacity. Petitioner paints a portrait of an individual who, although mortally ill, was in full possession of his mental faculties. Objectant notes that decedent had been discharged from the hospital on the evening of June 16, 2014, with prescriptions for Ambien, Valium, Fentanyl, and Liquid Morphine. Even assuming, *arguendo*, that decedent took the prescribed medications, evidence of drug use, in the absence of evidence of any actual impairment of decedent's testamentary capacity, is inadequate to defeat a motion for summary determination (*see Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, New York County]). Accordingly, petitioner's motion for summary dismissal of the objection as to testamentary capacity is granted.

Due Execution

Petitioner has made a prima facie showing that the formal requirements for the execution of a will have been met (*see* EPTL 3-2.1). The supervision of the execution of the will by the attorney-drafter creates a presumption of regularity, and the existence of an attestation clause

creates a presumption of due execution (*see Matter of Halpern*, 76 AD3d 429, 431 [1st Dept 2010]). Objectant, however, challenges the credibility of the two attesting witnesses to the will.

Objectant argues that Mr. Giardina's testimony is unworthy of belief for three reasons.

First, objectant seems to contend that Mr. Giardina could not have attended the will execution ceremony because, had he done so, he would have known about the "tube" in decedent's neck. Objectant notes that Mr. Giardina, when asked whether, on June 20, 2014, decedent was "connected to any kind of tube," replied, "I don't recall it," and, when asked, "When [decedent] got up to move about the apartment, what happened to the tube?" replied, "I don't remember a tube." Yet, objectant, herself, quotes Mr. Giardina's specific testimony regarding the tracheostomy "tube:"

> "Q. So when he spoke during the meeting on June 20th, he had to place his fingers over a tracheotomy in his neck?
>
> "A. Yes."

Second, objectant contends that Mr. Giardina's testimony was "bought and paid for." Objectant alleges: "Giardina admitted that he had received a check dated June 25, 2014 for the sum of $5,000.00, allegedly from the Decedent." Objectant then quotes from Mr. Giardina's testimony that, "at some point," he had received a $5,000 check, signed by decedent, and that, "I assumed it was a gesture of gratitude for having worked for him for 30 years." Objectant argues: "[I]t is highly unlikely that the Decedent signed that check and Petitioner's continued failure to produce a copy of it should lead to a presumption that not only was it not signed by Decedent, but was [sic] in all likelihood drawn without his knowledge or authorization." Objectant's belief that the check was not signed by decedent and that the payment was "not a gesture of gratitude"

to Mr. Giardina, "for having worked for him for 30 years," but, instead, represented some sort of bribe, is only speculation.

Finally, objectant argues that, according to petitioner, Mr. Giardina's testimony — to the effect that decedent had asked him — orally — in advance of the execution ceremony, to be an attesting witness and had spoken during the will execution ceremony — was inaccurate, because, as petitioner testified, "Robert did not speak after the tracheostomy. He could not speak at all." Ironically, objectant relies on the testimony of petitioner — one of the people whom objectant alleges unduly influenced and defrauded decedent and subjected decedent to duress, and presumably, a person whom objectant believes "bought" Mr. Giardina's testimony — to undermine that very testimony. In any event, Dr. McMeeking testified that, during his June 24, 2014 visit, decedent "could still talk."

The disparity among certain witnesses who were deposed as to decedent's capacity to "speak" after his tracheostomy is unsurprising. It is reasonable that decedent would have communicated with people, such as petitioner and Mr. Fleischmann, with whom he spent a good deal of time, by gesturing and writing on a pad, and that, to the extent decedent could speak — and people can disagree about the extent to which a raspy sound constitutes speech[4] — he would have reserved such speech for specific limited occasions, such as his final encounter with his

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[4] For example, Mr. Sklar testified:

"A: . . . Well, he couldn't speak clearly. Well, he could kind of talk like this (indicating) but he was writing things out on the pads.

"Q: Indicating that his voice was low and raspy or —

"A: Well, at that point it was almost nonexistent, but I think that might have been after he had had some sort of procedure."

physician of many years.

More important: the issue of decedent's ability to express himself orally is immaterial to a determination of the due execution of the propounded instrument. A testator can indicate to the attesting witnesses, in writing or through gestures in response to questions, that the instrument that he has signed is his will and that he is requesting the witnesses to attest to his execution of the instrument.

As the Court of Appeals has stated:

> "The legislative intent was that a declaration should be made by the testator, either in words, or by signs, to the witnesses of his understanding of the nature of the instrument and a publication of a will requires that the testator declare, in some comprehensible way, that the instrument was signed by him. It must appear that, as between the testator and the witnesses, there was some meeting of the minds upon the understanding that the instrument was the testator's will; that it had been subscribed by him and that the attestation of the latter was desired to the will so subscribed." (Citations omitted).

Matter of Turell, 166 NY 330, 337 (1901).

And:

> "[I]t is well settled that the necessary publication may be discovered by circumstances as well as words, and inferred from the conduct and acts of the testator and that of the attesting witnesses in his presence, as well as established by their direct and positive evidence. Even a person both deaf and dumb may by writing or signs make his will and declare it." (Citations omitted).

Lane v Lane 95 NY 494, 499 (1884).

Objectant argues that, during Ms. Rosenthal's deposition, her "memory failed her abysmally," and that "Rosenthal's total failure to 'recall' the events of June 20, 2014 cannot be explained as a simple lapse of memory, but rather it is evidence that leads to the conclusion that the events that she cannot recall never in fact occurred."

It has long been established that an instrument may be admitted to probate even if no attesting witness can recall the execution ceremony (*see Matter of Collins*, 60 NY2d 466, 470 [1983]). Accordingly, "if 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" (*id.* at 471, quoting *Matter of Kellum*, 52 NY 517, 519 [1873]). Here, objectant has offered "no evidence disproving a compliance in any particular." As stated by the Court of Appeals, "[B]ald, conclusory assertions or speculation and 'a shadowy semblance of an issue' are insufficient to defeat summary judgment" (*Stonehill Capital Mgt., LLC v Bank of the West*, 2016 NY Slip Op 08481 [Dec. 20, 2016], citing *S.J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

Objectant points to disparities between the testimony of Mr. Fleischmann and certain other evidence. She notes, for example, Mr. Fleischmann's testimony that Ms. Rosenthal arrived at decedent's apartment at around 2:00 p.m. on June 20, 2014, after Fleischmann himself had arrived, in contrast with "evidence and testimony" that the meeting with Ms. Rosenthal that day had been called for 12:30 p.m.; and the fact that neither Mr. Giardina nor Ms. Rosenthal recalled Mr. Fleischmann's presence during the will execution ceremony, which leads her to note: "[O]ne can only speculate if in fact Flesichmann [sic] was in the apartment for the entire time as he alleges, why he was not asked to be a witness to the Purported Will along with Giardina," given that Ms. Rosenthal was the notary on the affidavit of attesting witness. These contentions, however, have no bearing on the due execution of the propounded instrument.

Objectant having failed to demonstrate a genuine dispute as to a material fact, petitioner's motion for summary dismissal of the objection as to the execution of the June 20, 2014 instrument is granted.

Undue Influence

Petitioner has made a prima facie showing that the June 20, 2014 instrument is a "natural will," one which benefits two friends — people whom decedent contacted when he took himself to the hospital for emergency surgery, people who cared for him during the final weeks of his life — but primarily benefiting a charity that had been named in an instrument executed four years earlier.

Objectant alleges that each of Mr. Sklar, petitioner, Mr. McKaig, and Ms. Rosenthal was in a confidential relationship with decedent. Objectant contends: "[C]ourts have long recognized that the existence of a confidential/fiduciary relationship between the person alleged to have been asserting the undue influence and the testator shifts that burden to the proponent of the Will." Objectant misstates the law. As this court has explained:

> "The combination of a confidential relationship plus evidence of its exploitation, such as: the legatee's assumption of an active role in obtaining execution of the will, testator's failure to obtain independent advice, testator's mental and emotional condition, and the magnitude of the bequest, permits an inference of undue influence, which obligates proponent to explain the bequest (*see Matter of Smith*, 95 NY 516, 523 [1884]; *Matter of Bartel*, 161 Misc 2d 455, 458 [Sur Ct, New York County, 1994], *affd sub nom. Cordovi v Karnbad*, 214 AD2d 476 [1st Dept 1995]; PJI2d 7:56.1 [2006]; 2 NY PJI2d 1284-1285, and 1286-1287 [2006])."

Matter of Katz, 15 Misc 3d 1104 (A) (Sur Ct, New York County 2007).

As to Mr. Sklar, petitioner, and Mr. McKaig, objectant has made no showing that decedent "relied exclusively upon" their "knowledge and judgment in the conduct of [his]

financial affairs, . . . was dependent upon [them] and subject to [their] control" (PJI2d 7:56.1). That is, objectant has failed to demonstrate the existence of a confidential relationship. But, even if objectant had demonstrated a confidential relationship between decedent and either Mr. Sklar or petitioner or Mr. McKaig, the burden would not have shifted to petitioner to establish the absence of undue influence.

It is undisputed that, by June 19, 2014, decedent's close friends were aware that decedent was moribund, that, on that same day, petitioner conveyed by email to Ms. Rosenthal — a lawyer found by Mr. Sklar, who has no beneficial interest under the propounded instrument — information about decedent's family, assets, and decedent's testamentary scheme, that Ms. Rosenthal drafted an instrument based on such information, and that, the next day, when Ms. Rosenthal met with decedent in his apartment, petitioner accessed the draft instrument that Ms. Rosenthal emailed to decedent, and printed it. However, Ms. Rosenthal testified as to her custom of reviewing in detail every dispositive provision with a testator. Significantly, decedent's notes — which he wrote by hand during his meeting with the attorney-drafter — evince his clear intent to disinherit objectant. Thus, even if (by his email report to the lawyer as to decedent's testamentary plan) petitioner might be suspected of having played an "active role" in the will drafting process, any such concern is put to rest by the evidence that decedent independently and deliberatively determined his testamentary dispositions on the day he executed the will.

As to Ms. Rosenthal, decedent's lawyer, objectant is correct that she was in a confidential relationship with decedent, as a matter of law (*see Matter of Henderson*, 80 NY2d 388, 392 [1992]). Objectant, however, has not demonstrated an exploitation of that relationship.

In sum, objectant has offered no evidence to create a genuine dispute as to motive,

opportunity, and actual exercise of undue influence upon decedent (*see Matter of Fiumara*, 47 NY2d 845 [1979]). Accordingly, petitioner's motion for summary dismissal of the objection as to undue influence is granted.

Fraud and Duress

The objections as to fraud and duress have no cognizable basis. Objectant has neither pleaded fraud with the requisite particularity (*see* CPLR 3016 [b]) nor articulated any element of duress. Accordingly, objections as to fraud and duress are dismissed (*see Canagro v Marangos*, 61 AD3d 430 [1st Dept 2009]; *Matter of Hughes*, NYLJ, Sept. 22, 2014, at 22, col 3 [Sur Ct, New York County]).

CONCLUSION

Petitioner's motion for summary dismissal of Marilouise Berdow's objections to probate, based on testamentary incapacity, lack of due execution, and undue influence, fraud, and duress, is granted. It follows that objectant's motion for summary determination that her objections are valid is denied. Objectant, having no interest under the propounded instrument, is without standing to contest petitioner's fitness to serve as fiduciary of the decedent's estate.

Settle proposed probate decree.

Dated: January 6, 2017

S U R R O G A T E