Matter of Leiter
2017 NY Slip Op 32168(U)
October 13, 2017
Surrogate's Court, New York County
Docket Number: 2014-67
Judge: Rita M. Mella

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

---x

Probate Proceeding, Will of

SAUL LEITER,

Deceased.

---x

DECISION and ORDER
File No.: 2014-67

M E L L A , S.:

The following papers were considered (CPLR 2219[a]) in deciding this motion for summary determination in a contested probate proceeding:

Papers	Numbered
Petition for Probate and Paper Writing Dated January 11, 2008, Propounded as the Last Will and Testament of Saul Leiter	1, 2
Verified Objections to Probate with Jury Demand	3
Proponents' Notice of Motion for Summary Judgment dated August 31, 2016, Affirmation of Brian A. Raphan, Esq., with Exhibits A through Y, and Memorandum of Law in Support	4, 5, 6
Affidavit of Assistant Attorney General Lisa Barbieri, Esq., in Support	7
Affirmation of David Y. Wolnerman, Esq., in Opposition to Motion, with Exhibits A through R, Affirmation of Abba Leiter, and Memorandum of Law in Opposition	8, 9, 10
Reply Affidavit of Gina M. Ciorciari, Esq., in Support, with Exhibits A-C, Reply Affidavit of Brian A. Raphan, Esq., Reply Affidavit of Howard Greenberg and Reply Memorandum of Law	11, 12, 13, 14
Supplemental Affirmation of David Y. Wolnerman, Esq., dated February 22, 2017, in Further Opposition to Motion, with Exhibits A through R, and Memorandum of Law in Opposition	15, 16
Sur-Reply Memorandum of Law dated March 17, 2017, in Further Support and in Opposition to Objectant's Supplemental Submissions	17

In this contested probate proceeding in the estate of Saul Leiter, proponents Howard Greenberg and Brian A. Raphan, Esq., move for summary judgment (CPLR 3212) dismissing the

objections filed by decedent's brother, Abba Leiter, and admitting the instrument, dated January 11, 2008, to probate. Under this instrument, decedent nominates Greenberg, his long-time friend, and Raphan, the attorney who drafted it, as co-executors. The instrument leaves decedent's entire estate to his friend, Margit Erb.

Abba Leiter has objected to the probate of the propounded instrument on grounds of lack of due execution, lack of testamentary capacity, undue influence and fraud. For the reasons set forth more fully below, the motion is granted in its entirety.

BACKGROUND

Decedent Saul Leiter was a well-known photographer who died on November 26, 2013, at the age of 89, leaving a $5 million estate. He was survived by Objectant and the issue of his predeceased brother David, namely, Dena Leiter and Jonathan Leiter.

The record reflects that decedent's father, Wolf Leiter, was a well-known Talmud scholar who wanted his sons to follow in his footsteps. Decedent's brothers, Objectant and David, became rabbis. Decedent, however, at the age of 23, left his native Pittsburgh, Pennsylvania and his studies to become a rabbi, and moved to New York City to become an artist. Proponents allege that Objectant was not supportive of decedent's profession and suggest that decedent's break from family tradition caused a strain between decedent and Objectant, and, as a result, decedent left nothing to his family members under the propounded instrument and under all three of his prior wills. Objectant dismisses these allegations and claims that decedent always maintained a close relationship with his family, including Objectant.

Decedent never married or had any children natural or adopted. He did, however, maintain a long-term relationship with Soames Bantry. When Bantry passed away in 2002,

decedent retained Raphan to assist him in connection with the settling of her estate. Decedent later became Raphan's client.

Starting in the early 1990s, decedent's photographs were sold exclusively through the Howard Greenberg Gallery ("the Gallery"), which was owned by proponent Greenberg. At the Gallery, decedent met Erb who was employed there as a representative of some of the artists including decedent. The record shows that decedent and Erb worked closely together selling decedent's art.

Prior Wills

On December 24, 2002, decedent executed a testamentary instrument which had been drafted by Raphan. Under the instrument, decedent bequeathed his books and the contents of his library to his friend, Anders Goldfarb, the cooperative apartment decedent inherited from Bantry was given to another long-time friend, Alan Porter, and the residuary was equally divided between Erb, Porter, Goldfarb and his neighbor and friend, Susan Foristal. Decedent's family received nothing under this will.

On August 21, 2007, decedent executed a new will, which was also drafted by Raphan. In this instrument, decedent left his entire estate to Erb. According to Raphan, during his meeting with decedent to discuss decedent's requested changes to the 2002 will, decedent expressed "great fondness" for Erb. Raphan's notes from that meeting also reflect that decedent did not want to leave anything to Objectant or his nephew Jonathan.

Medical records provided by Proponents show that decedent was hospitalized for a two-week period in December of 2007, during which his gallbladder was removed. These records reflect that decedent was consistently "alert and oriented to time, place and person," and that

decedent signed all of the medical authorizations during his hospital stay, including authorizations for surgery and blood transfusions. Erb, who had been appointed as decedent's health care proxy in January 2007, signed only a notice of Medicare rights and a guarantee of payment/insurance form.

Decedent left the hospital on December 28, 2007, and the hospital records show that his condition was stable, that he was allowed to go home, and that the only instruction provided was to follow-up with his attending physician. On January 8, 2008, decedent went for a follow-up visit with Dr. L. Brian Katz, who described decedent's examination as "normal" and stated that decedent was "expected to continue to do well."

Shortly after this visit with Dr. Katz, decedent contacted Raphan and informed him that he wanted to make changes to his will. Decedent and Raphan scheduled a meeting for January 10, 2008. At that meeting, decedent stated that he had had lunch with his nephew Jonathan and that the two had gotten into an argument. Raphan's notes from this meeting also reflect that decedent told Raphan that Objectant had expressed his willingness to contest decedent's will. According to Raphan, decedent was very upset by this conversation and wanted to make sure Objectant did not receive anything from his estate. Also during this meeting, Raphan and decedent discussed the nature of decedent's assets. To confirm the details, decedent invited Raphan to call his accountant.

The Propounded Instrument

Following this meeting, Raphan drafted the propounded instrument in which the entire residuary estate is left again to Erb. This instrument, however, adds Goldfarb and unnamed charitable organizations as contingent residuary beneficiaries, and contains a clause specifically

disinheriting Objectant and decedent's niece and nephew. Erb is nominated as Artistic Executor and Greenberg as successor Artistic Executor, in charge of disposing of decedent's artwork.[1] Raphan testified that he did not discuss the terms of this new instrument with anyone prior to its execution, which occurred on January 11, 2008, at Raphan's office. On that day, decedent showed up by himself, and Lauren Bush, Esq., an associate at Raphan's firm, presided over the execution ceremony. Bush and Jacqueline Boone, a secretary at the firm, acted as witnesses to the will.

Almost six years passed between the execution of the propounded instrument and decedent's death on November 26, 2013.

DISCUSSION

On a motion for summary judgment, the court must determine whether the movant has made 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]; CPLR 3212). Once this showing has been made, the burden shifts to the party opposing the motion, to produce proof sufficient to establish the existence of material issues of fact (CPLR 3212[b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In determining whether summary judgment is appropriate, the court "should draw all reasonable inferences in favor of the non-moving party and should not pass on issues of

[1] Following decedent's death, Erb renounced her appointment. In order to eliminate the need to pay Federal estate tax, she also renounced a portion of her interest in decedent's artwork with the understanding that the renounced property would be distributed to the Saul Leiter Foundation.

credibility" (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). Allegations by the party opposing the motion must be "specific and detailed, substantiated by evidence in the record; mere conclusory assertions will not suffice" (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]), and speculation cannot serve as a substitute for evidence.

In a probate proceeding, if the proponent makes a prima facie case that the instrument is valid and for summary dismissal of the objections, and the objectant fails to raise a material issue of fact, summary judgment should be granted to the proponent.

Due Execution

In order to make a prima facie showing of entitlement to summary determination on the issue of the instrument's due execution, Proponents must establish that the instrument was signed at the end by the testator in front of at least two witnesses, the testator declared to those witnesses that the instrument was his or her will, and the witnesses attested to the testator's signature having been affixed in their presence (EPTL 3-2.1; SCPA 1404; *Matter of Collins*, 60 NY2d 466, 471 [1983]).

Here, the propounded instrument was drafted by Raphan and its execution supervised by Bush, an associate at his firm, which creates a presumption that the instrument was executed with the statutory requirements (*Matter of Kindberg*, 207 NY 220, 227-228 [1912]). The joint affidavit of attesting witnesses Bush and Boone, executed the same day as the propounded instrument, has been filed with the court and indicates that decedent declared the instrument to be his will, and that he signed the instrument at the end and in front of them. In addition, in that Affidavit, the witnesses state, among other things, that in their respective opinions, decedent was of sound mind, memory and understanding, could read, write and speak in the English language

and was not suffering from any physical or mental impairment which would hinder his ability to execute a will. Finally, the instrument has a valid attestation clause which creates a presumption of due execution (*Matter of Halpern*, 76 AD3d 429, 431 [1st Dept 2010]). Under these circumstances, Proponents have made their prima facie showing.

In his verified objections, dated March 25, 2015, Objectant alleges that the purported will was not properly signed and executed by decedent. In opposition to the instant motion, he explains that his objection is based on the following facts: (1) decedent's signature is on a stand-alone page; (2) the instrument was not read aloud to decedent; (3) there are differences between Raphan's drafting notes and the instrument itself; (4) "inconsistencies" in the instrument make it "difficult if not impossible to decipher" and the instrument "appears to have been prepared and executed in a rushed manner;"[2] and (5) Bush had no recollection of the execution ceremony. Objectant avers that these are material facts that prevent summary determination of his objection because they show that decedent did not know what he was doing or who would be the beneficiary under the instrument.

Objectant's arguments are unavailing. EPTL 3-2.1(a)(1) requires no more than that the testator's signature appear at the "end" of the instrument. The purpose of this is to prevent

---

[2] For example, Objectant's counsel states: "the Propounded Will provides that in the event Erb predeceases [D], an 'Artistic Executor' is to be appointed to hold, control and/or display Saul's work." Counsel adds that the FIFTH clause of the instrument further provides for the appointment of Erb as Artistic Director. Counsel asks: "how could Erb possibly act as 'Artistic Executor' if such a position only arises after Erb's death? She could not and the Propounded Will simply makes no sense." The possibility that Erb would have to act as Artistic Executor if some of decedent's photographs had to be sold to raise funds to pay for administration expenses or, as it turned out to be the case, if Erb renounced her interest under the will at least partially is overlooked by Objectant's counsel.

fraudulent additions and the requirement is satisfied so long as the signature follows the instrument's dispositive provisions (*see Matter of Lerman*, NYLJ, Aug. 31 206, at 31, col 1 [Sur Ct, Kings County], *see also Matter of Makris*, 124 NYS2d 891, 893-894 [Sur Ct, NY County 1953]).

Raphan testified that the terms of the propounded instrument were conveyed to him by decedent. Thus, even if decedent's vision was impaired and the instrument was not read aloud to him, as Objectant contends, all that matters is whether decedent knew and approved of its content and whether decedent executed it as his own (*see Matter of DeMaio*, 43 Misc 3d 1218[A], 2014 NY Slip Op 50691[U] [Sur Ct, Queens County 2014][vision impaired testator was not required to read will or have it read to him; what was required was that contents were correctly made known to him and that instrument, as executed, was what testator had intended]). Here, Raphan's notes from his conversation with decedent on January 10, 2008, reflect decedent's testamentary wishes and those wishes are, in turn, reflected in the instrument.

In addition, contrary to Objectant's contention, discrepancies between an attorney-drafter's notes and the propounded instrument have no bearing on whether the instrument was duly executed. Nor does the possibility that a particular provision of the instrument does not, as Objectant maintains, "make sense" prevent the instrument from having been duly executed. Finally, an attesting witness's inability "to remember the details of the execution ceremony is 'not the same as testifying that the formalities described in the attestation clause did not occur'" (*Matter of Leach*, 3 AD3d 763, 765 [3d Dept 2004] *citing Matter of Ruso*, 212 AD2d 846, 847 [2d Dept 1995]; *see also Matter of Collins*, 60 NY2d 466, 470 [1983]; *Matter of Schlaeger*, 74 AD3d 405 [1st Dept 2010]; *see also Matter of Finocchio*, 270 AD2d 418, 418-419 [2d Dept

2000]).

Accordingly, Proponents have established compliance with the formalities required by EPTL 3-2.1, and Objectant has failed to raise a genuine issue of fact to require a trial on the issue of due execution. Therefore, summary judgment is granted to Proponents on this objection.

Testamentary Capacity

As movants for summary determination, Proponents must make a prima facie showing that decedent possessed testamentary capacity, i.e., they must establish that, at the time of execution, decedent understood, in a general way: (1) the nature and extent of his property, (2) who would be the natural objects of his bounty, and (3) the consequences of executing the instrument (*see Matter of Kumstar*, 66 NY2d 691, 691 [1985], *rearg denied* 67 NY2d 647 [1986]). The capacity to execute a will is less than that required to execute other legal documents (*see Matter of Coddington*, 281 App Div 143 [3d Dept 1952], *affd* 307 NY 181 [1954]), is measured at the time of the propounded instrument's execution (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]), and is not disproved by a showing of testator's advanced age or affliction with fatal disease (*McGown v Underhill*, 115 App Div 638, 640 [2d Dept 1906]; 3 Warren's Heaton on Surrogate's Court § 42.06 [7th ed. 2017]).

A testator is presumed to have the capacity to make and execute a will (*Matter of Roberts*, 2011 NY Slip Op 52472[U], *4 [Sur Ct, NY County 2011], *citing Matter of Smith*, 180 App Div 669 [2d Dept 1917]), and a prima facie showing of capacity may be made by presenting the affidavit of the attesting witnesses (*Matter of Curtis,* 130 AD3d 722, 723 [2d Dept 2015]).

Proponents here naturally rely on the presumption of capacity that arises from the self-proving affidavit of attesting witnesses Bush and Boone, which indicates that decedent appeared

to be "of sound mind, memory and understanding, and not under any restraint or in any way or respect incompetent to make a will." Proponents further rely on the testimony of Raphan, who stated that he met with decedent on January 10, 2008, the day before the propounded instrument was executed, because decedent requested that a new will be drafted. Raphan further testified that, at that meeting, he and decedent discussed all of decedent's major assets, including his bank accounts, apartments and photographs, and that decedent understood the provisions of the instrument, which had been conveyed by decedent in the first place.

As to those persons considered to be the natural objects of decedent's bounty, Proponents point out that decedent spoke of his family often but that, after losing Bantry, his long-time companion, decedent's relationship with employees at the Gallery, including his relationship with Erb, became much closer. In his affidavit in support of the motion, Raphan states that at the January 10th meeting, decedent made it clear that he wanted to benefit Erb and disinherit his brother and nephew.

As proof that decedent knew the consequences of executing the propounded instrument, Proponents rely on a post-execution discussion testified to by decedent's friend, Goldfarb. Specifically, Goldfarb testified that decedent informed him that he had changed his will and that decedent was no longer leaving Goldfarb the contents of decedent's library. Finally, as further support for a prima facie showing of capacity, Proponents point to the fact that decedent traveled to Paris for an exhibition of his work within weeks of executing the propounded instrument. According to Greenberg, decedent "spent hours signing books and being with people." They rely on *Matter of Fairbairn* (9 AD3d 579, 580-581 [3d Dept 2004]) and *Matter of Jerrell* (63 NYS2d 499, 503 [Sur Ct, Monroe County 1946]), for the proposition that a testator's ability to carry on

his business affairs around the time of the will's execution is compelling evidence of his capacity to make that will.

The court concludes that Proponents have made a prima facie showing of decedent's testamentary capacity.

Objectant contends that disputed issues of fact exist because at or around the time decedent executed the propounded instrument, he was of advanced age, suffered from depression, dizziness, cataracts, emphysema, and insomnia, continued to harbor deep feelings of guilt in connection with Bantry's death which occurred five years earlier, and was recovering from complications resulting from gallbladder surgery for which he was taking a powerful pain medication.

It is undisputed, however, that at the time of the will execution, decedent lived independently and was able to take care of himself and that he continued to do so for years. In addition, the medical records from decedent's hospitalization in Decedent 2007, as well as Dr. Katz's letter after the January 8, 2008, follow-up visit, three days before the propounded instrument was executed, reveal that decedent was expected to resume his normal life and "continue to do well." Those medical records also reflect that, although decedent might have shown signs of depression or frustration, he remained alert and oriented during his hospitalization. Additionally, depression, alone, does not require a finding of lack of capacity (*Matter of Hirschorn*, 21 Misc 3d 1113[A], 2008 NY Slip Op 52061[U] [Sur Ct, Westchester 2008]). In fact, decedent made all of his own medical decisions during that hospitalization. Nothing in decedent's medical records suggests that decedent lacked capacity in any way.

Objectant's attempt to raise an issue of fact as to whether decedent knew the natural

objects of his bounty also fails. Even though Raphan's notes from the meeting with decedent make no reference to decedent's sister Deborah, who passed away four years after the will was executed, both Raphan and Goldfarb testified that decedent had many discussions with them about his family members. As a result, after decedent's death, Goldfarb was able to identify the names of each and every member of decedent's family including decedent's sister.

Objectant also claims that decedent was not aware of his assets as evidenced by Raphan's notes. As previously mentioned, however, Raphan testified that, at the January 10th meeting, he and decedent discussed decedent's assets including his art, accounts and apartments. As Proponents correctly point out, in order to have testamentary capacity, decedent only needed to possess general knowledge of the nature of his assets.

Finally, even accepting as true Objectant's allegation that decedent was taking powerful pain medication at the time, evidence of drug use, in the absence of any evidence of actual impairment of a testator's testamentary capacity, is insufficient to defeat a motion for summary judgment (*Matter of MacGuigan*, NYLJ, Apr. 20, 2015, at 21, col 4 [Sur Ct, NY County], *affd* 140 AD3d 625 [1st Dept 2016]). Accordingly, Objectant has failed to raise a genuine issue of fact and Proponents' motion for summary judgment dismissing the objection based on lack of capacity is granted.

Undue Influence

Proponents seek summary determination in their favor of the objection to the probate of the propounded instrument asserted on the basis that it was procured by undue influence. In order to prevail, Proponents must make a prima facie showing that the propounded instrument was a natural will.

Proponents have made such a showing. The record shows that after Bantry's death, decedent's relationship with employees of the Gallery, including Erb, deepened. According to Goldfarb, decedent "seemed to think the world of Ms. Erb and characterized her as a saint." During that period of time, according to Objectant's own account, he did not attend any of decedent's exhibits, openings or other events recognizing decedent's work. It would not be unusual then for decedent to want to bestow a benefit on Erb, a person whom he loved and considered a very close friend, whom he trusted with his work for years, and whom he designated as an agent to make medical decisions for him, over family members with whom he had disagreements and arguments, and whom he had disinherited or disfavored consistently in his estate planning for close to 10 years prior to the execution of the propounded instrument.[3]

To defeat summary judgment in favor of Proponents, Objectant must provide evidence of undue influence (*Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]), including motive, opportunity, and actual exercise of such influence (*Matter of Walther*, 6 NY2d 49 [1959]), sufficient to raise a material issue of fact requiring a trial. It is well settled that undue influence must amount to:

> "moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices but a coercion produced by importunity, or by a silent, resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear."

(*Children's Aid Soc'y of City of N.Y. v Loveridge*, 70 NY 387, 394 [1877]). Objectant may show

[3] Under a 1998 will, decedent had left all his property to Bantry.

undue influence by circumstantial rather than direct evidence (*Matter of Walther*, 6 NY2d at 54). Such evidence, however, must be specific and detailed. Mere conclusory assertions will not suffice (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]).

In his pleading, Objectant alleges that the propounded instrument was procured by the undue influence or fraud of Erb "or by others acting in concert with her." Objectant submits that there is a triable issue of fact as to whether Erb, Raphan and Greenberg unduly influenced decedent to make Erb the sole legatee of his substantial estate. Specifically, Objectant asserts that Erb and "her cohorts" (Greenberg and Raphan) had motive and opportunity to exploit Erb's relationship with decedent, whose apartment and finances were in disarray and that, insofar as decedent was in a weakened physical and mental state because of various ailments, he was susceptible to influence. Objectant also submits that Erb and others isolated decedent from his family and took complete control over every aspect of decedent's life, including his finances, as evidenced by the fact that Erb wrote checks from decedent's account, which decedent would sign, and she ran errands and cleaned his apartment. Other than speculation and conjecture, however, Objectant has failed to offer any evidence of the conspiracy among Erb, Greenberg and Raphan which he alleges resulted on the execution of the propounded instrument. Even crediting Objectant's circumstantial evidence of Erb's motive and opportunity to exert undue influence, the court concludes that Objectant has failed to raise a triable issue of fact of her actual exercise of such influence.

The law is clear that evidence of actual exercise of undue influence must be offered by an objectant in order to avoid summary judgment (*see, e.g., Matter of Fiumara*, 47 NY2d 845, 846 [1979]). That is, the objectant must demonstrate that the testamentary disposition in the

propounded instrument is one which decedent would not have made but for "moral coercion" or "importunity [that] could not be resisted " (*Matter of Walther*, 6 NY2d at 53). Speculation and conclusory allegations are not enough to establish that undue influence was actually exercised (*see, e.g.*, *Matter of Young*, 289 AD2d 725 [3d Dept 2001]).

Here, Objectant only offers his self-serving Affirmation which suggests that he and decedent shared a "deep" relationship and that decedent would not have knowingly disinherited him and his niece and nephew with whom he also had a close relationship. Objectant's contention, however, is belied by decedent's three prior wills which reveal that he always intended to benefit primarily his close friends and not his family. In addition, and more importantly, Raphan's testimony and notes make clear that Erb had no input in decedent's estate planning, including in the drafting of the propounded instrument. In fact, Raphan avers that he did not know Erb well and that he did not discuss the terms of the propounded instrument with anyone prior to its execution. As appellate authority has stated "[m]ere opportunity of undue influence does not mean it was exercised" (*Matter of Colby*, 240 AD2d 338 [1st Dept 1997]; *Matter of Walther*, 6 NY2d at 54).

In opposition to the motion, Objectant further argues that Erb and decedent were in a confidential relationship because Erb "was acting in the capacity of [decedent]'s attorney in fact and health-care-agent (in addition to acting as his personal assistant)" at the time of the execution of the propounded instrument. This confidential relationship, according to Objectant, permits an inference of undue influence.

Accepting as true, for the sake of argument, that Erb was in a confidential relationship with decedent, the existence of that relationship, without more, does not create such an inference.

In fact, no inference of undue influence arises where, as here, "there is no evidence that the fiduciary-legatee . . . had any direct or indirect involvement in the preparation or execution of the testamentary instruments offered for probate" (*Matter of Bartel*, 214 AD2d 476, 477 [1st Dept 1995]; *see also Matter of Colby*, 240 AD2d at 338).

Finally, Objectant has produced no evidence whatsoever to suggest that Erb had "disparate power and control over the decedent" (*Matter of Zirinsky*, 10 Misc 3d 1052[A] [Sur Ct, Nassau County 2005]). It is undisputed that Erb had a business relationship with decedent for nearly two decades and that she was also his attorney-in-fact and health care agent. The record before the court reveals, however, that it was after the execution of the propounded instrument that decedent started paying Erb to visit decedent's apartment once a week to organize his prints and offer assistance as needed, but that even then, decedent was in control of his life. While it is also true that Erb began, at some point in 2007, to take decedent to monthly doctor's appointments in addition to assisting with banking by writing checks and organizing his bank statements, the medical records show that decedent made his own health care decisions, and decedent's bank records, covering the period from March 2007 through January 2009, reveal that the overwhelming majority of checks were written and all were signed by decedent personally.

Under these circumstances, Objectant has not shown that decedent "relied exclusively upon" Erb's "knowledge and judgment in the conduct of [his] financial affairs, . . . was dependent upon [her] and subject to [her] control" (NY PJI2d 7:56.1).

Objectant's speculation, conclusory allegations and mere expressions of his beliefs and surmise fail to raise an issue of fact and, accordingly, Proponents's are entitled to summary judgment on the objection relating to undue influence.

CONCLUSION

Based on the foregoing, proponents' motion for summary judgment dismissing Abba Leiter's objections based on lack of due execution, lack of testamentary capacity, undue influence and fraud, is granted, and the January 11, 2008 instrument shall be admitted to probate.

Settle Probate Decree.

Date: October 13, 2017

SURROGATE