Matter of Davidovich

2018 NY Slip Op 31017(U)

May 30, 2018

Surrogate's Court, New York County

Docket Number: 2015-2492

Judge: Nora S. Anderson

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

New York County Surrogate's Court
Date: MAY 30, 2018

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In the Matter of a Proceeding for Probate in the Estate of

MARC DAVIDOVICH,

File No. 2015-2492

Deceased.

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A N D E R S O N , S .:

Cross-motions for summary relief (CPLR 3212) are presently before the court in a contested proceeding for probate of an instrument, dated December 26, 2014, in the estate of Marc Davidovich. Objectant, decedent's nephew and sole distributee, moves for summary dismissal of the petition on the ground of lack of due execution. Proponent, the sole beneficiary and nominated executor under the propounded instrument, cross-moves for partial summary judgment, seeking dismissal of objections alleging lack of capacity and undue influence.

The Undisputed Facts

The undisputed facts are as follows. Decedent died on June 15, 2015, at the age of 89, leaving an estate of $1.4 million. Decedent was a widower and had no children. He had suffered from health problems for several years and had at times been obliged to hire home aides and nurses for physical assistance. In 2009, decedent first hired proponent as a part-time health aide to substitute when no other part-time aide was available to accompany him at medical appointments, shopping, and his weekly attendance at his synagogue. Near the end of 2014, decedent's health had so declined that he needed continuous attention and additional aides.

The propounded instrument was prepared and executed through the offices of a company operating under the name, "We the People," which was owned and managed by W.B., a New York lawyer. The company was in the business of customizing various legal forms for sale, and

its store served as a site where patrons (decedent included) frequently executed their documents. A few months before executing the propounded instrument, decedent had executed a will (as well as a power of attorney and health care proxy naming proponent as his agent), also through "We the People." Under the prior will, decedent bequeathed his cooperative apartment and its contents to proponent. He made no provision for the disposition of his residuary estate. Decedent initiated both the prior will and the propounded instrument by visiting the "We the People" store. Part of that process was a workbook for the customer to include information for reference by "We the People", to prepare the customer's will. Such information included, inter alia, the identification of any beneficiary(ies) and the relationship to the customer. Decedent was accompanied by proponent on both visits, and the workbooks for the prior and the propounded instruments were filled in by proponent's hand. Proponent was not present, however, at the execution of either instrument.

On December 26, 2014, decedent appeared at the "We the People" to execute his will. He was accompanied by an aide, C.F., and her husband. There he was greeted by W.B., and they were subsequently joined by two individuals whom W.B. had arranged to serve as attesting witnesses. One of the witnesses, E.K., operated a nearby store and for some years, as an accommodation to W.B., had served as a witness to the execution of various types of legal instruments at "We the People." The other witness was K.P., a "We the People" employee who often served as a witness to the execution of instruments that the company had prepared for customers.

Standards Applicable to Summary Determinations

Although the phrases "burden of proof" and "preponderance of the evidence" appear in

some of the precedents addressing summary judgment motions, those references are not relevant in such a context and are therefore potentially misleading. Where there is a disputed issue of fact in a civil matter, a party at trial may have the burden at trial to marshal a preponderance of the evidence on that issue. For example, the proponent in a probate proceeding, has the burden as to due execution and capacity. However, the very premise of a motion for summary judgment is that the material facts are not an open question and that the issues therefore can be determined as a matter of law, *i.e.*, without the need for trial.

Although a movant for summary judgment has an evidentiary burden, he does not for purposes of the motion have a "burden of proof" within the standard meaning of that phrase. Instead, the movant must submit evidence making a prima facie case on the law, "tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). That "burden" is, for example, objectant's on his motion as to due execution, even though by contrast, proponent will have the burden of proof on the issue if the motion fails and the case proceeds to trial.

Where the movant has made a prima facie showing of entitlement to judgment as a matter of law, the adversary must try to demonstrate that a material issue of fact nonetheless remains open [*id.*]) and that a trial is therefore necessary (*see Zuckerman v City of New York*, 49 NY2d 557, 562).. If the adversary fails to do so, the motion must be granted.

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. C. v NY Univ.*, 300 AD2d 186, 188 [1st Dept 2002]; *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]). Moreover, counsels' affirmations cannot serve as evidence where, as here,

the lawyers do not purport to speak from personal knowledge (*see Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Nor may counsel's interpretation – or self-serving selection – of affidavit or deposition testimony be allowed to divert the court from assessing all of the witnesses' actual words as they appear in the record (*see Matter of Pearson*, NYLJ, Jul 5, 2013, at 39, col [Sur Ct, Kings County]).

Objectant's Motion on Ground of Lack of Due Execution

In New York, a testamentary instrument is duly executed only if it satisfies the statute of wills (EPTL 3-2.1). Under the statute, (1) the testator must affix his signature at the instrument's end and declare it to be his will and (2) at least two individuals, within a 30-day period and at the request of the testator, must witness the testator sign the instrument (or acknowledge a previously affixed signature to be his), must witness the testator's declaration as to the testamentary nature of the instrument, and then, at the end of the instrument, must sign and affix their addresses to it.

The objections allege that the execution ceremony did not satisfy the statutory requirements in several respects: that the formalities were not performed within a 30-day period; that the testator did not tell the witnesses that the instrument was his will and that he wanted them to witness its execution; and that the witnesses did not see testator sign the instrument. However, the standard attestation clause included in the will, as well as the attesting witnesses' contemporaneous affidavit, stands as evidence that all of the formalities required for execution were observed. It is well established that an attestation clause "is entitled to great weight" as to the averments contained therein (*Matter of Natale*, 158 AD3d 579 (1st Dept 2018).

In an effort to support his position that the propounded instrument was not duly executed,

objectant offers as his proof the deposition transcripts of the two attesting witnesses and an affidavit from W.B. The deposition testimony of the attesting witnesses does not however, raise a genuine question as to due execution. The court is aware that each witness's memory of specific observations in this execution ceremony, performed more than one year earlier and among many in which they had participated, was either faulty or faint or equivocal, in the case of E.K., or faint or equivocal, in the case of K.P. However, the failure of the witness's memory is not fatal to an application for probate (*see, e.g.*, *Matter of Katz*, 277 NY 470; *Matter of Collins*, 60 NY 466; *Matter of Kellum*, 52 NY 512). The court is also aware that K.P. conceded in her deposition that her practice was to answer the phone or meet some other pressing office need while simultaneously serving, some distance away, as a witness in another distant execution ceremony. In light of the attestation clause and the averments of the contemporaneous affidavit, this and other arguably contradictory or equivocal aspects of K.P.'s testimony raise issues of credibility not appropriately resolved on a summary judgment motion (*see, e .g., Matter of Shapiro*, 65 AD3d 790 [3d Dept 2009]; *Matter of Jacinto*, 172 AD2d 664 [2d Dept 1991]).

The affidavit of W. B. is merely neutral for movant's purposes. The affidavit does not refer to the particulars of this execution ceremony, other than to state that the affiant notarized the affidavit of the attesting witnesses but did not serve as one of those witnesses – facts that are disclosed in any event on the face of the will and the affidavit. Although movant would make much of the fact that W.B.'s affidavit contains no claim that W.B. supervised the will execution, it is enough to note that the lack of attorney supervision is not per se proof of lack of due execution under the statute. Nor will the court allow W.B.'s statement that his "sole role with respect to the execution of a will is to act as a notary," to be taken literally, since elsewhere in the

same affidavit W.B. describes his having assumed a broader role.

In light of the foregoing, the court concludes that movant has failed to make a prima facie case for dismissal of the petition on the ground of lack of due execution. Notwithstanding this finding, reference to proponent's papers in opposition, support denial of dismissal. Those papers include W.B.'s affidavit which explains why he recalls the propounded will in particular as well as his standard practice of reviewing an instrument with the customer prior to the execution ceremony which he, as an attorney, supervises. In fact it is proponent's status as an attorney which renders immaterial the written disclaimer by "We the People" of any lawyer-client relationship. W.B.'s license to practice law in the State of New York includes by definition, the license to perform legal services such as supervision of will executions. The standard will-execution ceremony performed at "We the People" conforms to the statutory requirements. The execution ceremony did not require that decedent himself advise the witnesses that the instrument at hand was his will and that he wished them to witness it: it is well established that a testator's understanding that the instrument in question is his will can be communicated to the witnesses, along with his request that they serve as such, through the agency of a third person connected to the execution ceremony (see *Matter of Nelson*, 141 NY 152) ("A request to sign a will made by one supervising the will execution within the hearing of the testator with his silent assent is sufficient publication").

Finally, the court notes that several questions of fact have been established by the attestation clause in the propounded instrument, the contemporaneous affidavit annexed to it (*see Matter of Schlaeger*, 74 AD3d 405,406), as well as by proponent's evidence that the execution ceremony was lawyer-supervised, giving rise to a presumption of regularity (*see Matter of Falk*,

47 AD3d 21 [1st Dept 2007]; *Matter of Tuccio*, 38 AD3d 791 [2d Dept 2007]; *Matter of Spinello*, 291 AD2d 406 [2d Dept 2002]).

Based upon all of the above, objectant's motion for summary judgment is denied.

Proponent's Cross-Motion for Summary Dismissal of Objection as to Testamentary Capacity

For purposes of executing a will, an individual "need not have perfect mind or memory" (*Matter of Horton*, 26 Misc 2d 843, 847 [Sur Ct, Suffolk County 1960, *affd* 13 AD2d 506 [2d Dept 1961]). Nor does "old age, physical weakness [or even] senile dementia" per se disqualify an individual from having capacity to execute a will (*Matter of Hedges*, 100 AD2d 586, 588 [2d Dept 1984]). A testator needs merely to be able to understand the nature and extent of his property and to understand on at least an elementary level the function and content of the will disposing of that property, as well as to recognize that there are persons who would ordinarily be the natural objects of his bounty and to identify who they are (*Matter of Kumstar*, 66 NY2d 691).

In this case, cross-movant has made a prima facie showing that decedent had testamentary capacity at the time he executed the will. She submits medical records of October 2014, November 2014, and December 2014, which state that decedent was then "alert," "oriented as to person, place, and time," and of "normal mood and affect." Proponent's position is also supported by a presumption that the decedent was mentally competent (*see Matter of Beneway*, 272 AD 463 [3d Dept 1947]). In addition, the attestation clause and contemporaneous witness affidavit both contain averments as to the soundness of decedent's mind, a view that is echoed by several affidavits from caregivers for decedent.

Objectant has submitted no evidence that would create a genuine question as to

decedent's capacity at the time of the will execution. Therefore, the cross-motion for dismissal of the objection as to capacity is granted.

Proponent's Cross-Motion for Summary Dismissal of the Objection as to Undue Influence

The premise of an objection alleging undue influence is that the propounded instrument was the product of the volition of someone other than the decedent himself. Influence per se, of course, need not be "undue." But if an influence amounts to "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity could not be resisted [and] constrained the testator to do that which was against his free will and desire" (*Children's Aid Society v Loveridge*, 70 NY 387, 394 [1877]) the propounded instrument affected by it cannot be regarded, or probated, as the testator's will.

It is cross-movant's task, in the first instance, to set out evidence that the propounded instrument was a natural will given the circumstances. Toward that end, she has offered the affidavits of several individuals. A care giver who worked for decedent in 2014 and 2015 attests to a friendship and respect between decedent and proponent, and states that decedent said several times that "if not for [proponent] he would be dead by now." Another witness, C.F.,who worked for decedent as a care giver for six years, avers that decedent had expressed anger that objectant had sold an apartment in Israel that decedent had given him a few years earlier, and she states flatly her view that decedent did not like objectant or his son (decedent's great-nephew). A third witness, a neighbor of decedent's, avers that, from what she had observed of the interaction between decedent and proponent, proponent was not just an employee, but also a "trusted friend" and decedent's "most devoted" care giver. She also states that, other than to express disappointment at objectant's sale of the apartment in Israel, decedent never mentioned objectant

or his son. Finally, yet another neighbor and "good friend" who regularly dined and shopped with decedent, offers that decedent was too strong-willed to be manipulated; that he respected proponent, but disliked objectant. In addition, she echoes the view that decedent was upset about objectant's sale of the apartment.

In their totality, the proofs submitted by cross-movant establish prima facie that the propounded instrument was a natural expression of decedent's wishes. The court must now determine whether objectant has set forth adequate evidence to put cross-movant's evidence into question.

In his opposition papers, objectant has submitted affidavits from two individuals. The first is a member of the synagogue that decedent attended for many years. He states that he and decedent had become friends and that decedent told him of his plan to leave most of his estate to objectant, and the balance to the synogogue. He further attests that decedent had only good things to say about objectant and that his impression from discussions with decedent over two decades was that decedent and objectant were "very close." The synagogue's rabbi, knew decedent as a congregant for 18 years, stated that objectant sometimes attended services with decedent. It is noted that objectant's own affidavit, is not barred by the Dead Person's Statute (CPLR 4519) since it is in opposition to, rather than in support of, a summary determination (*Phillips v Joseph Kantor & Co.*, 31 NY2d 307). Objectant avers that he and decedent maintained a close relationship and that he had been a frequent visitor to decedent's home, and that they had made or brought decedent meals when decedent was ill in his later years. Of particular note is objectant's assertion that decedent never gifted him the apartment in Israel but instead retained title until decedent himself sold it. Objectant annexes certain documents tending

to confirm his version of these facts.

Certain objective factors raise questions as to proponent's prima facie case. First, there is proponent's role in the genesis of the will, from accompanying decedent to "We the People" at the outset to filling out the worksheet that identified her as his sole beneficiary and executor. Second, the Power of Attorney and Health Care Proxy naming her as decedent's agent are evidence that proponent occupied a position of special trust. However, there is no need at this time to determine whether proponent occupied a "confidential relationship" which would impose a special evidentiary burden at trial (*see Matter of Butta*, 3 AD3d 347 [1st Dept 2004]). It is sufficient to note that proponent's formal link to decedent was as his paid employee. Furthermore, there was the synagogue that he attended regularly and that decedent had expressed a charitable intent toward. These factors are enough to create a question of fact as to undue influence.

Accordingly, the cross-motion for dismissal of the objection as to undue influence is denied.

This decision constitutes the order of the court.

Dated: May 30, 2018

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