

Matter of Quinn

2018 NY Slip Op 31655(U)

June 28, 2018

Surrogate's Court, Nassau County

Docket Number: 2016-390356

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**In the Matter of the Probate of the Last Will
and Testament of**

DECISION & ORDER

CECILIA A. QUINN,

**File No. 2016-390356
Dec. Nos. 34094
34095**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition for Probate.....	1
Objections to Probate.	2
Petitioner’s Motion for Summary Judgment..	3
Affirmation (Tager)	4
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Affidavit (Maureen Quinn 2/18/17)	9
Notice of Cross Motion, Affirmation in Support with Exhibits	10

Before the court is a motion for an order: (a) pursuant to CPLR § 3212, granting summary judgment, dismissing the objections to probate filed by Eileen Quinn, and admitting to probate the last will and testament of Cecilia A. Quinn, dated July 26, 2010; and (b) awarding petitioner her attorney’s costs and fees in connection with this proceeding.

Respondent cross-moves for an order: granting summary judgment sustaining the objections, denying probate of the subject instrument, disqualifying Maureen Quinn as executor of the estate based upon financial misconduct and otherwise denying the motion for summary judgment in chief until the conclusion of the discovery proceeding necessary to establish the financial misconduct of the executor and granting such other, further and

different relief as to this court may seem to be just and proper in the premises.

This proceeding was commenced by the filing of a petition for the probate of an instrument dated July 26, 2010.

The decedent was survived by four children, Maureen Quinn (petitioner), Eileen Quinn (objectant), Matthew Quinn and Patricia Warren.

The objectant filed objections to probate alleging: (1) lack of testamentary capacity; (2) failure of due execution; and (3) fraud and undue influence. By a “so ordered” stipulation dated October 11, 2017, the parties agreed that pre-trial discovery is complete. Petitioner now moves for an order granting summary and objectant cross-moves for an order granting summary judgment. An issue was raised as to whether the sur-reply should be considered on the motions. The court declines to consider the sur-reply and attachments.

TESTAMENTARY CAPACITY

The requirements for testamentary capacity are that the testator: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of her property; and (3) was aware of the nature objects of her bounty (*Matter of Kumstar*, 66 NY2d 691 [1985]). The testator must be competent at the time the instrument was executed (*Matter of Anella*, 88 AD3d 993 [2d Dept 2011]).

Petitioner has the initial burden of establishing testamentary capacity (*Matter of Vosilla*, 121 AD3d 1489 [3d Dept 2014]). This may be accomplished by submission of an instrument with a proper attestation clause (*Matter of Aoki*, 99 AD3d 253 [1st Dept 2012])

and self-proving affidavits (*Matter of Farrell*, 84 AD3d 1374 [2d Dept]). Petitioner has submitted these documents and also the affidavit of the attorney draftsman as to conversations with the decedent concerning the preparation of the instrument. The burden then shifted to the objectant to submit evidence of lack of capacity.

In opposition to petitioner's motion for summary judgment and in support of the cross motion, objectant submitted part of the medical records of a physician dated October 21, 2010, which are not sworn to by the physician.

On a motion for summary judgment, the court may only consider documentary evidence in a form admissible at trial (*Fairlane Fin. Corp. v Longspaugh*, 144 AD3d 858 [2d Dept 2016]). If a proper foundation is laid, a physician's office records are admissible as evidence at trial under the statutory business rule (CPLR 4518 [a]; *Bruce-Bishop v Jafar*, 302 AD2d 345 [2d Dept 2003]). However, medical records which are unsworn cannot be utilized to defeat a motion for summary judgment (*see Vickers v Francis*, 63 AD3d 1150 [2d Dept 2009]). Therefore, the records in question may not be considered evidence in support of the objectant's position.

In further support of her objection based upon lack of testamentary capacity, the objectant has submitted an affidavit of a social worker stating "with reasonable medical certainty" that in her professional opinion as a social worker, the decedent was not competent to execute a will on the date which appears on the instrument. Objectant's counsel describes the affidavit as an "expert" opinion as to testamentary capacity.

A party is entitled to submit her own expert's affidavit in support of a motion for summary judgment (*Starr v Rogers*, 44 AD3d 646 [2d Dept 2007]). It follows that a party's expert affidavit can be submitted in opposition to a motion for summary judgment. An affidavit may be considered even if it is self-serving (*see Colao v St. Vincent's Med. Ctr.*, 65 AD3d 660 [2d Dept 2009]).

A social worker can testify to her observations of the condition of a testator on the day of execution of an instrument offered for probate (*see e.g. Matter of Engstrom*, 47 Misc 3d 1212 [A] [Sur Ct, Suffolk County 2014]). However, objectant did not establish that the social worker is a medical professional qualified to offer an opinion as to the decedent's "testamentary capacity" based upon a "reasonable medical certainty." Therefore, the affidavit does not represent a professional opinion of the decedent's condition nor is it an expert medical opinion as to testamentary capacity.

The subsidiary question is whether the affidavit of the objectant, in an individual capacity, is entitled to consideration on the issue of testamentary capacity.

In a probate proceeding, a subscribing witness can state an opinion as to the decedent's testamentary capacity (*Matter of Coleman*, 111 NY 220 [1888]). An ordinary witness cannot state a conclusion as to testamentary capacity but may relate her observations of the decedent (*Matter of Ruparshek*, 36 AD3d 998 [3d Dept 2007]). In this regard, objectant alleges that the decedent did not recognize her grandchildren and was confused about her financial affairs. Although the objectant would be barred from testifying as to transactions with the decedent if an objection were to be raised at trial (CPLR § 4519), her

affidavit describing these transactions may be considered in opposition to the petitioner's motion for summary judgment, but not in support of her own motion (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]).

Deposition testimony that would be barred at trial because of CPLR §4519 is insufficient to defeat a motion for summary judgment where it is the only evidence offered in opposition to the motion (*Marszal v Anderson*, 9 AD3d 711 [3d Dept 2004]). Likewise, the affidavit of the objectant is not sufficient, standing alone, to defeat petitioner's motion for summary judgment (*Matter of Roublick*, 36 Misc 3d 1205[A] [Sur Ct, Bronx County 2012]).

Petitioner submitted prima facie evidence which created a presumption of testamentary capacity. In opposition, objectant failed to raise a triable issue of fact (*Matter of Jacobs*, 153 AD3d 622 [2d Dept 2017]). Petitioner's motion for summary judgment dismissing the objection based upon lack of testamentary capacity is **GRANTED**.

DUE EXECUTION

Petitioner seeks summary judgment dismissing the objection based upon failure of due execution. The attorney-draftsperson states that she forwarded the draft to the decedent by mail because the decedent did not want to travel to her office. The attorney-draftsperson further states that she furnished instructions for execution and received the executed document back in the mail. Therefore, the presumption of due execution that attaches where the execution of the will is supervised by an attorney is not applicable here (*Matter of Frame*, 35 Misc3d 1229 [A] [Sur Ct, Dutchess County 2012]). On a petition for probate, the

proponent is ordinarily entitled to the presumption of compliance with EPTL § 3-2.1 where, as here, the will contains an attestation clause and self-proving affidavits were executed by the attesting witnesses (*Matter of Selvaggio*, 146 AD3d 891 [2d Dept 2017]; *Matter of Mooney*, 74 AD3d 1073 [2010]). However, where objections are interposed, the proponent may not rely solely on the self-proving affidavits to establish a prima facie case (*Matter of Pungello*, NYLJ, Jan. 9, 2017, at 24, col 6 [Sur Ct, Kings County]).

Based on all of the foregoing, the court finds that the petitioner has failed to establish a prima facie case for summary judgment on the issue of due execution. That being so, the court need not consider the sufficiency of the opposing papers (*Pullman v Silverman* 28 NY3d 1060 [2016]). Petitioner's motion for summary judgment on the question of due execution is therefore **DENIED**. The cross-motion to sustain the objection on the issue of due execution is also **DENIED**.

FRAUD AND UNDUE INFLUENCE

The objectant bears the burden of establishing undue influence which amounts to moral coercion which restrained independent action (*Matter of Curtis*, 130 AD3d 722 [2d Dept 2015]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). There must be affirmative evidence of facts and circumstances from which the exercise of undue influence can be inferred (*Matter of Malone*, 46 AD3d 975 [3d Dept 2007]).

Objectant contends that petitioner diverted assets of the decedent during her lifetime. As evidence, petitioner has submitted checks written on the decedent's bank account signed by petitioner for the year 2012 but not prior thereto.

Petitioner argues that there is no evidence of interference by petitioner in the preparation or execution of the instrument (*Matter of Dubin*, 54 AD3d 945 [2d Dept 2008]). In opposition to the objectant's cross motion, petitioner submits the affidavit of the attorney-draftsperson which states that the instrument is the product of her discussions solely with the decedent.

In determining whether a will is the product of undue influence consideration is given to whether the beneficiaries are natural objects of the decedent's bounty and whether any beneficiary receives an unnatural, disproportionate share of the estate (*see Matter of Katz*, 63 AD3d 836 [2d Dept 2007]; *Matter of Itta*, 225 AD2d 548 [2d Dept 1996]). Here, the instrument makes a natural disposition of the decedent's assets in equal shares to each of the decedent's children, albeit in trust.

The objectant's allegations as to undue influence are conclusory at best (*Matter of Capuano*, 93 AD3d 666 [2d Dept 2012]). The petitioner's motion to dismiss the undue influence objection is therefore **GRANTED** and the cross motion to sustain the objection is **DENIED**.

The objectant has not produced any evidence of fraud. She did not provide evidence of false statements made to the decedent which would have caused the decedent to make dispositions in her will which the decedent would otherwise not have chosen (*Matter of Spangenberg*, 248 AD2d 543 [1998]).

Petitioner's is entitled to judgment in her favor on the issue on the objection related to fraud (*Matter of Eastman*, 63 AD3d 738 [2d Dept 2009]). Petitioner's motion for summary judgment dismissing the objection to probate on the ground of fraud is therefore **GRANTED**.

AFFIRMATIVE DEFENSE

The objectant raises as an “affirmative defense” that petitioner is not qualified to serve as an executor. Petitioner did not specifically move to dismiss the affirmative defense (*see e.g. ECI Financial Corporation v Resurrection Temple of Our Lord, Inc.*, 43 Misc 3d 1220 [A] [2014]). Petitioner’s motion for summary judgment refers to the “objections” only.

However, petitioner argues that the affirmative defense is not sustainable because the court’s decision and order dated June 29, 2017 rendered it moot. In response, objectant argues that the affirmative defense should not be dismissed. As both parties have addressed the issue, there is no procedural impropriety in addressing the question as to whether the affirmative defense should be dismissed despite an omission in the pleadings (*Cooper v Gala*, 150 AD2d 417 [2d Dept 1989]).

The affirmative defense is dismissed for failure to state a cause of action (CPLR 3211 [a] [7]; *see Friedland Realty, Inc., 416 W, LLC.*, 120 AD3d 1185 [2d Dept 2014]). As a matter of law, the allegation that the petitioner is not qualified to serve as executor is not an issue to be raised in a probate proceeding (*Matter of Krom*, 86 AD2d 689 [3d Dept 1982]).

Petitioner further contends that the issue cannot be addressed in a subsequent proceeding, on the grounds that any question as to her qualification under SCPA § 707 was finally resolved in the court’s decision and order dated June 29, 2017. In that decision, the court denied a motion to revoke preliminary letters testamentary.

Any question as to qualification to serve as executor is not res judicata by virtue of the court’s prior decision. It is reserved for a subsequent proceeding in the event the instrument is admitted to probate (*Matter of Krom*, 86 AD2d 689 [3d Dept 1982]) for the following reasons. The standard for revocation of preliminary letters testamentary is different

than that the standard applied to the denial of full letters. The purpose of the issuance of preliminary letters testamentary is to provide for immediate administration of an estate (*Matter of Hernesh*, 37 Misc 3d 1213 [A] [Sur Ct, Bronx County 2012]). A petition to revoke preliminary letters testamentary is therefore sparingly granted (*Matter of Vermilye*, 101 AD2d 865 [2d Dept 1984]) and a hearing is not required.

Further, objectant's request for relief required a petition (SCPA § 711) rather than a motion.

Petitioner's motion for summary judgment is **GRANTED** as to objections "SECOND" and "THIRD." Petitioner's motion for summary judgment is **DENIED** as to objection "FIRST." Objectant's affirmative defense is dismissed without prejudice to a subsequent proceeding. Objectant's cross motion for summary judgment is **DENIED** in all respects. Petitioner's motion for attorneys' fees and costs is **DENIED**.

This constitutes the decision and order of the court.

Dated: June 28, 2018
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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