Matter of Peckelis
2018 NY Slip Op 32101(U)
August 6, 2018
Surrogate's Court, Nassau County
Docket Number: 2016-390773
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 Probate Proceeding of

The Estate of ALBERT J. PECKELIS
a/k/a ALBERT PECKLIS,

Deceased.

---x

DECISION

File No. 2016-390773
Decision No. 34599

PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion	1
Attorney's Affirmation in Support of Motion with Exhibits.	2
Rosemarie LoPresti Affidavit in Support.	3
Jason Ross Berke, Esq. Affidavit in Support.	4
Jeffrey R. Berke, Esq. Attorney's Affirmation in Support.	5
Jason Meier Affidavit in Support.	6
Walter Spratley Affidavit in Support.	7
Memorandum of Law in Support of Motion.	8
Affidavit in Opposition..	9
Memorandum of Law in Opposition to Motion with Exhibits. . . .	10
Attorney's Affirmation in Reply..	11

In this contested probate proceeding, the petitioner, Rosemarie LoPresti, moves for an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing respondent's objections in their entirety and admitting the will of the decedent to probate; and (2) awarding the petitioner sanctions and costs for bringing this motion. The respondent/objectant, Joseph W. Peckelis, opposes the motion.

The decedent, Albert J. Peckelis, also know as Albert Pecklis, died a resident of Nassau County on July 17, 2016, survived by his three adult siblings: Patricia Korn, Susan Peckelis and Joseph Peckelis. Rosemarie LoPresti was the decedent's companion for approximately 11 years prior to his death. An instrument purported to be the last will and testament of the decedent, dated April 10, 2016, was offered for probate by the petitioner. The propounded instrument names the petitioner as the sole beneficiary, as well as the executor, of the decedent's estate.

The will was admitted to probate by decree dated October 20, 2016 and letters testamentary issued to the petitioner that same date. By decision and order dated August 10, 2017 (Decision No. 33530), this court vacated the probate decree and revoked the letters testamentary issued to the petitioner due to lack of personal jurisdiction over Joseph Peckelis.

Jurisdiction was subsequently obtained over Joseph Peckelis, who requested discovery in this proceeding. The SCPA § 1404 examinations of the attorney who drafted and witnessed the execution of the propounded instrument and of the two attesting witnesses were held and completed on February 15, 2018.

On February 26, 2018, the respondent filed objections to probate alleging: lack of due execution, lack of testamentary capacity and undue influence. Respondent further objects to the petitioner's appointment as executor of the decedent's estate on the ground that she is unfit to serve as a fiduciary. Petitioner now seeks summary judgment dismissing the respondent's objections and granting probate.

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Consequently, it is incumbent upon the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (CPLR 3212 [b]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). If the moving party meets his or her burden, the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that would require a trial, however, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to overcome a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The first objection raised by the respondent is lack of due execution. The requirements for due execution are set forth in EPTL § 3-2.1. In accordance with this section, every will must be in writing and executed with specific formalities. The will must be signed at the end by the testator or by someone else at the testator's direction. The signature of the testator must be affixed to the will in the presence of each attesting witness, or acknowledged by the testator to each witness that his signature is affixed to the will. Finally, the testator must declare that the instrument to which his signature has been affixed is his will. At least two attesting witnesses must attest to the testator's signature and, at the request of the testator, must sign their names and affix their addresses.

Petitioner, as the proponent of the will, has the burden of proving that the propounded instrument was duly executed in conformity with the statutory requirements. Where the attorney who drafted the will supervised the execution of the will, there is a presumption of regularity that the will was properly executed (*Matter of Moskowitz*, 116 AD3d 958 [2d Dept 2014]). Moreover, when the propounded instrument includes an attestation clause and is accompanied by a self-proving affidavit, it creates a presumption of compliance with the statutory requirements (*Matter of Mele*, 113 AD3d 858 [2d Dept 2014]).

The execution of the propounded instrument, which includes an attestation clause and a self-proving affidavit, was supervised by the attorney who drafted it, as well as another attorney, thereby creating a presumption of regularity. In support of her motion for summary judgment, the petitioner offers the deposition testimony and affidavit of the attorney draftsman, the depositions and affidavits of the two attesting witnesses, as well as the affidavit of the additional attorney present at the execution, all of which bolster the presumption of due execution and demonstrate full compliance with the necessary statutory requirements for proper execution of a will.

Petitioner has successfully met her burden of proving due execution of the propounded instrument and the burden of proof then shifts to the respondent to produce evidentiary proof in admissible form to raise a material issue of fact (*Matter of Halpern*, 76 AD3d 429 [1st Dept 2010], *affd* 16 NY3d 777 [2011]). Respondent has failed to do so. Respondent's affidavit in opposition fails to address the issue of due execution at all. Respondent's unsworn memorandum of law speculates that the witnesses to the propounded

instrument were not properly sworn before signing the self-proving affidavit. Such speculation is unsupported by any proof. Respondent's argument that misspellings in the will indicate lack of proper execution is similarly without merit. There being no issue of fact concerning due execution, summary judgment is **GRANTED** to the petitioner dismissing this objection.

Respondent's next objection is that the decedent lacked testamentary capacity. Petitioner has the burden of proving that the decedent possessed testamentary capacity, which requires that the testator: (1) understood the nature and consequences of executing a will; (2) knew the nature and extent of his property being disposed of; and (3) was aware of the natural objects of his bounty and his relation with them (*Matter of Kumstar*, 66 NY2d 691 [1985]).

The witnesses to the execution of the propounded instrument signed a self-proving affidavit, which recites that the decedent was under no physical or mental impairment that would have affected his capacity to make a valid will. This affidavit constitutes prima facie evidence of the facts attested to and creates a presumption of testamentary capacity (*Matter of Jacobs*, 153 AD3d 622 [2d Dept 2017]). The deposition testimony and supporting affidavits of the attorney draftsman and the two witnesses, all of whom had known the decedent for a number of years, provide additional evidence that the decedent possessed the requisite testamentary capacity at the time he executed the propounded instrument.

In response to the petitioner's prima facie proof of the decedent's testamentary capacity, the respondent has once again failed to raise a triable issue of fact. Respondent's

affidavit in opposition fails to address the issue of the decedent's testamentary capacity at all. Respondent's unsworn memorandum of law speculates as to his brother's capacity, but fails to offer any evidentiary proof. There being no issue of fact concerning testamentary capacity, summary judgment is granted to the petitioner dismissing this objection.

Respondent also raises the objection that the petitioner exerted undue influence upon the decedent. Respondent bears the burden of establishing undue influence (*Matter of Curtis,* 130 AD3d 722 [2d Dept 2015]). Undue influence consists of moral coercion, duress or importunity (*Matter of Walther*, 6 NY2d 49 [1959]). The deposition testimony and supporting affidavits of the attorney draftsman and the two witnesses establishes that the petitioner was not present at the execution and took no part whatsoever in the preparation or execution of the propounded instrument at all.

Respondent's affidavit in opposition to the motion for summary judgment fails to offer any evidence of undue influence exerted upon the decedent by the petitioner. Respondent's unsworn memorandum of law casts aspersions upon the character of both the decedent and the petitioner, but fails to offer any evidentiary basis for his claim of undue influence. In the absence of any substantive basis for the objection of undue influence, summary judgment is **GRANTED** to the petitioner dismissing this objection.

"In a contested probate proceeding, summary judgment is appropriate where a petitioner establishes a prima facie case for probate and the objectant fails to raise a triable issue of fact concerning the validity of the will" (*Matter of Sabatelli*, 161 AD3d 872, 873 [2d Dept 2018]). Petitioner has established her entitlement to summary judgment dismissing

the respondent's objections of lack of due execution, lack of testamentary capacity and undue influence. Since the respondent's objections to probate have all been dismissed, the will shall be admitted to probate.

Respondent further objects to the petitioner's appointment as executor, claiming that she is not qualified to serve (SCPA § 707 [1] [e]). Respondent's grounds for this objection are either unfounded or unsubstantiated. In any event, now that the will is being admitted to probate and he has no beneficial interest in it, the respondent lacks standing to raise the objection on this motion.

With regard to so much of the petitioner's motion as seeks sanctions and costs, Part 130 of the Rules of the Chief Administrator of the Courts (22 NYCRR part 130) provides for the award of costs and imposition of financial sanctions for frivolous conduct in civil litigation. Conduct is frivolous and subject to the award of costs and/or the imposition of sanctions when it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false (22 NYCRR 130-1.1 [c]; *Weissman v Weissman*, 116 AD3d 848 [2d Dept 2014]; *Muro-Light v Farley*, 95 AD3d 846 [2d Dept 2012]; *Mascia v Maresco*, 39 AD3d 504 [2d Dept 2007]).

In determining whether a party's conduct is frivolous, the court must consider, among other factors, the circumstances under which the conduct took place, including the time available to investigate the legal or factual basis of the conduct, and whether the conduct was

discontinued when its lack of legal or factual basis should have been apparent of was brought to the attention of counsel or the party (22 NYCRR 130-1.1 [c]; *Finkelman v SBRE, LLC*, 71 AD3d 1081 [2d Dept 2010]; *Matter of Ernestine R.*, 61 AD3d 874 [2d Dept 2009]; *Glenn v Annunziata*, 53 AD3d 565 [2d Dept 2008]).

This court has determined that the conduct of the respondent does not rise to the level of frivolous conduct as defined by the applicable rule and thus the court declines to impose costs or sanctions at this time.

Accordingly, the petitioner's motion for summary judgment is **GRANTED**, to the extent that the respondent's objections are dismissed and the will shall be admitted to probate.

Settle decree on notice.

Dated: August 6, 2018
Mineola, New York

E N T E R:

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HON. MARGARET C. REILLY
Judge of the Surrogate's Court

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