Matter of Djavaheri-Saatchi
2018 NY Slip Op 32754(U)
September 27, 2018
Surrogate's Court, Nassau County
Docket Number: 2015-384378/A
Judge: Margaret C. Reilly
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

[* 1]

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
---x
Probate Proceeding, Will of

DECISION

MOHAMMAD REZA DJAVAHERI-SAATCHI,

File No. 2015-384378/A
Dec. No. 33824

Deceased.
---x
PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion	1
Affirmation in Support of Motion for Summary Judgment and Exhibits thereto	2
Memorandum of Law in Support of Motion	3
Affidavit in Support of Motion for Summary Judgment (Brickman)	4
Affirmation in Opposition to Motion for Summary Judgment and Exhibits	5
Objectant's Memorandum of Law in Opposition to Petitioner's Motion for Summary Judgment	6
Reply Affidavit in Further Support of Motion (Parisa Djavaheri) and Exhibits	7
Reply Memorandum in Further Support of Motion for Summary Judgment	8

Before the court in this contested probate proceeding is a motion for summary judgment by Parisa Djavaheri (petitioner), pursuant to CPLR 3212, dismissing the objections to probate filed by Pasha Djavaheri-Saatchi (objectant) and admitting to probate the propounded instrument dated July 9, 2010; and issuing the petitioner letters testamentary. The motion is opposed by the objectant.

The decedent, Reza Djavaheri Saatchi a/k/a Mohammad Reza Djavaheri Saatchi, died on April 20, 2015. He was survived by his two children, petitioner and objectant.

The objectant alleges that: (1) the will was not duly executed; (2) the decedent lacked the mental capacity to execute a will; (3) the will is invalid as petitioner and others exercised

undue influence over the decedent; (4) the will was a product of duress; (5) the will was fraudulently procured; and (6) petitioner should not be granted letters testamentary or allowed to serve in any capacity in the administration of the estate of the decedent.

Summary Judgment

"[T]he 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]). Without making a prima facie showing a denial of the motion, regardless of the sufficiency of the opposing papers is warranted (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.,* 68 NY2d 320, 324 [1986]*; see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment in contested probate proceedings may be appropriate where a contestant fails "utterly to show any deficiency in the form of the testatrix's will" (*Matter of Posner,* 160 AD2d 943, 944 [2d Dept 1990]), fails to raise a triable issue of fact with regard to testamentary capacity (*Matter of DeMarinis*, 294 AD2d 436 [2d Dept 2002]), or fails to raise triable issues of fact regarding the claim of undue influence and fraud (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]).

Due Execution

The objectant alleges, in pertinent part, that the will was not duly executed because the petitioner, not the decedent, provided the decedent's estate plan. Specifically, the objectant argues that the petitioner: (1) contacted the attorney; (2) met with him privately on

June 10, 2010; and (3) arranged for the decedent, the petitioner, the petitioner's mother and the decedent's manager to meet with the attorney drafter to discuss the estate plan. He further argues that the decedent either did not participate in these meetings or if he was there, he was only minimally involved. These arguments however, are more pertinent to the issue of undue influence than they are to whether the statutory criteria of EPTL 3-2.1 have been met.

The proponent of a summary judgment motion must meet her burden of establishing that the purported will was duly executed (*id.*). EPTL 3-2.1 sets forth the following:

> "a . . . [E]very will must be in writing, and executed and attested in the following manner:
>
> (1) It shall be signed at the end thereof by the testator . . .
>
> (2) signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his direction . . .
>
> (3) The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will.
>
> (4) There shall be at least two attesting witnesses, who shall . . . both attest the testator's signature, as affixed or acknowledged in their presence and at the request of the testator, sign their names and affix their residence addresses at the end of the will."

The presence of an attestation clause and a self-proving affidavit gives rise to a presumption that the statutory requirements were satisfied (*Matter of Malan,* 56 AD3d 479 [2d Dept 2008]). The will offered for probate contains both an attestation clause and self-proving affidavit. Where an attorney-drafter supervises the will's execution, "there is a

presumption of regularity that the will was properly executed in all respects" (*Matter of Finocchio*, 270 AD2d 418, 418 [2d Dept 2000]). The attorney drafter of the decedent's will was Stephen Block. He also acted as an attesting witness. Mr. Block was examined pursuant to SCPA 1404. He testified that he was retained to provide estate planning for the decedent. A retainer letter was signed by the decedent on June 17, 2010. Mr. Block and his firm were also asked to provide advice regarding a relationship the decedent had with a woman named Sandy, a caretaker/employee who may have been unduly influencing the decedent "or something of that nature" (Block tr at 15, lines 10-11). Mr. Block prepared a revocable trust and the decedent's last will and testament which has been offered for probate. Mr. Block believed that he met with the decedent at some point in June of 2010, but he was not entirely sure. With regard to the execution of the will on July 9, 2010, Mr. Block testified:

> "So he [the decedent] would have been there with me and the Will would have been stapled and I would have gone through the pages with him and explained what the Will said. There was also an [sic] revocable trust and all the other papers. He signed the revocable trust. We reviewed all the documents. I explained to him that the Will was a pour over Will, pours over to the revocable trust. We would have signed the revocable trust first so the Will can pour over into something. I would have gone over with him. I would have certainly made sure that he was clear, that he wanted Parisa to get everything . . . I wouldn't have had him sign the Will unless he acknowledged that he really understood what was going on and that he indicated that Parisa was the one that was going to get the bulk of his estate" (Block tr at 108, lines 16-25; at 109, lines 2-6, 10-15).

Mr. Block then stated that he would have asked the decedent if the document was his will and did he read it and understand it. When the decedent replied yes, Mr. Block would

have the decedent sign it. He next would have asked the decedent if he wanted the witnesses to act as witnesses to his will. If the decedent replied yes, the two witnesses would sign the document. Mr. Block testified that the decedent was lucid and rational, to the best of his recollection.

Diana Caracciolo, another attesting witness, was also examined pursuant to SCPA 1404. Ms. Caracciolo testified that she worked as a legal assistant for Mr. Block for approximately eight years. She believed that she had acted as a witness to a will execution approximately 800 times. She could not remember exactly what happened that day, but testified that the general procedure was:

> "[t]he client is taken into the conference room, given the original Will and asked to read it and confirm that this is what they want and then they would be there reading it . . . I would go in with Steven and the other witness and the notary and the client would initial each page that indicates that they read it and we staple it and they sign it in front of us. Steven would ask the normal questions, your Will, do you want us to be the witnesses, the general Affidavit and he would sign it after the client signs. That is the procedure that we follow. That day I can't tell you exactly but that is usually the procedure and we never really get away from that" (Caracciolo tr at 23, line 25; at 24, lines 2-5, 12-24).

David Schoenhaar, another attesting witness, was examined pursuant to SCPA 1404. Mr. Schoenhaar is a partner at Ruskin, Moscou, Faltischek, P.C., where he is chair of the estate planning and administration practice groups. Mr. Schoenhaar testified that he did not have a specific recollection of the event. If he acted as a witness, however, he followed a set procedure which included: making sure that the testator read the will prior to signing it; personally observing the testator signing the will; and acting as a witness after he saw the

testator sign the will. Mr. Schoenhaar also noted that the usual practice was that the attorney supervising the will execution would ask the testator if it was his last will and testament. The supervising attorney would also ask the testator if he would like the people in the room to act as witnesses. He further testified that he would not have acted as a witness if he felt that the person did not have testamentary capacity and that it was the practice that the witnesses would all sign in the presence of each other.

Based on the attestation clause, self-proving affidavits, and corroborating testimony of the three attesting witnesses, the petitioner has established a prima facie case for due execution and the objectant has failed to raise a triable issue of fact on the issue of due execution. Summary judgment dismissing the objection as to due execution is accordingly **GRANTED**.

Testamentary Capacity

The proponent also has the burden of proving testamentary capacity. It is essential that a testator understand in a general way the scope and meaning of the provisions of his will, the nature and condition of his property and his relation to the persons who ordinarily would be the natural objects of his bounty (*Matter of Kumstar*, 66 NY2d 691 [1985]; *Matter of Bustanoby*, 262 AD2d 407 [2d Dept 1999]). Less mental faculty is required to execute a will than any other instrument (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], *affd* 307 NY 181 [1954]). Mere proof that the decedent suffered from physical infirmity is not necessarily inconsistent with testamentary capacity and does not preclude a finding thereof (*see Matter of Fiumara*, 47 NY2d 845 [1979]) as the relevant inquiry is whether the decedent was lucid and rational at the time the will was made (*see Matter of Hedges*, 100 AD2d 586 [2d Dept 1984]). "As a general rule and until the contrary is established, a testator is

presumed to be sane and to have sufficient mental capacity to make a valid will" (*Matter of Beneway*, 272 App Div 463, 467 [3d Dept 1947] [internal citations omitted]).

In his examination pursuant to SCPA 1404, the attorney drafter was asked whether the decedent "was sufficiently in control of his faculties and free will to decide how to spend his life and his money" (Block tr at 22, lines 4-6). Mr. Block testified "He was competent, yes. He knew exactly what he wanted to do except for the Sandy aspect" (Block tr at 22, lines 7-9). At a later point in the examination, Mr. Block testified "[t]here was no issue with respect to his [decedent] competency to make a dispositive plan upon his death. So that was clear. It was real clear what he wanted to happen. He wanted Parisa to get it . . . The dispositive plan, there was no lack of competency" (Block tr at 57, lines 12-16, 19-20).

Pat Caroleo, the decedent's real property manager, testified at his deposition that the decedent was alert in June of 2010 and able to sign checks. Mr. Caroleo was a co-signer on the decedent's business account "from July [2010] until year ending 2010" (Caroleo tr at 16, lines 5-6).

The petitioner argues that the decedent had a testamentary plan from 2004 forward which disinherited the objectant and left everything to her. To this end and according to the petitioner, the decedent executed at least three prior wills with the same disposition. The petitioner alleges that the objectant was disinherited because the decedent was angry with the objectant's mother, whom the decedent claimed stole property from him while he was hospitalized. She also alleges that the objectant was disinherited because there was property in Iran which would, in accordance with Iranian law, be distributed primarily to the objectant.

The objectant, however, alleges that the decedent had a history of mental illness and was suffering from memory loss at the time he executed the will. According to the objectant,

he and the decedent had a good relationship and took trips together. The objectant points to the deposition testimony of the petitioner in support of his argument that the decedent lacked testamentary capacity. Specifically, the objectant highlights the following testimony from petitioner's examination before trial: the petitioner reported that at some point in 2010 the decedent was involved with a woman named Sandy who took money from her father; the petitioner was concerned that her father was being influenced by this woman to transfer funds to herself; the petitioner approached her law professor about the situation and he referred her to his law firm where the decedent's revocable trust and will were drafted; she then took her father to see a neurologist and was advised that her father may be displaying early signs of Alzheimer's.

In 2015, the petitioner on behalf of Djavaheri Realty Corporation commenced a law suit against Dove Organization, Ltd. In that proceeding and as reiterated in her deposition testimony in the instant proceeding, the following testimony was elicited from the petitioner regarding the decedent around the time he executed the will being offered for probate:

"Q: But you felt, at least in hindsight, that he [decedent] seemed to be making poor financial decisions starting in at least 2008?
A: Yes
Q: Do you recall when the Miami office building was sold?
A: In 2010.
Q: Was the Miami office building sold in June of 2010?
A: I believe so, yes.
Q: And would it be correct to say that you did not believe that your father was in the right frame of mind when he signed in June of 2010?
A: I don't think he was as sharp as he had been in hindsight" (Parisa Djavaheri tr at 194, lines 6-25; at 195, lines 2-3).

The testimony continued:

> "Q: It was your view, was it not, that your father was not mentally competent at the time that he sold the Miami office building in June of 2010; isn't that right?
> A: No. I mean no. That's not true.
> Q: Isn't it correct that you testified at a deposition on May 8, 2015, in the Djavaheri Realty Corp. versus Dove Organization, Limited, Pat Caroleo, et al case?
> A: I testified that in terms of being financial business decisions and contracts. In hindsight I saw that my dad was not – I said– you're saying I said in the right frame of mind, quote, unquote. I don't remember exactly how I worded it. But that's still my belief.
> Q: Well, you testified in a deposition under oath that your view was that your father was not mentally competent at the time he signed the papers relating to the sale of the property in Miami in June of 2010; isn't that correct?
> A: Exactly. As I said in the context of big financial contract decision making, and I also said in hindsight specifically" (Parisa Djavaheri tr at 195, lines 14-25; at 196, lines 2-17).

Both the petitioner, in reply to the objectant's papers in opposition, and the objectant have attached copies of medical reports regarding the capacity of the decedent. There are no affirmations or affidavits from any of the decedent's physicians. The attorney for the petitioner argues that the objectant's medical reports are not certified and must not be considered. The petitioner's medical records do not appear to be certified either. Uncertified medical and hospital records may not be considered on summary judgment motions (*Matter of Delgatto,* 82 AD3d 1230 [2d Dept 2011]).

"When there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the jury" (*Matter of Kumstar,* 66 NY2d 691 [1985]). Here, contemporaneous with the timing of the execution of the will, there is conflicting testimony regarding the capacity of the decedent and his

understanding of financial transactions. There are clearly questions of fact regarding the testamentary capacity of the decedent in July of 2010 that precludes granting the motion for summary judgment. Summary judgment dismissing the objection as to testamentary capacity is **DENIED**.

Fraud, Undue Influence and Duress

Fraud

The objectant bears the burden of proof on the separate issues of fraud and undue influence (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]; *Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). To prove fraud, the objectant must show by clear and convincing evidence that a false statement was made to the testator that induced him to make a will disposing of his property differently than he would have if he had not heard the fraudulent statement (*Matter of Gross*, 242 AD2d 333 [2d Dept 1997]).

In order to defeat a proponent's summary judgment motion on the issue of fraud, the objectant must submit evidence, beyond conclusory allegations and mere possibility, that fraudulent statements were made to the decedent, that the petitioner knew they were false, and that they caused the decedent to change his will (*Matter of Eastman,* 63 AD3d 738 [2d Dept 2009] [internal citations omitted]). The objectant has offered nothing but conjecture to prove fraud. Therefore, the petitioner's motion for summary judgment dismissing the objection on the issue of fraud is **GRANTED.**

Duress

The objectant bears the burden of proof on duress (*Matter of Beneway,* 272 App Div 463 [3rd Dept 1947]). "Duress, generally speaking, may be said to exist where one is compelled to perform an act which he has the legal right to abstain from performing. The

compulsion must be such as to overcome the exercise of free will" (*Gerstein v 532 Broad Hollow Rd. Co.,* 75 AD2d 292, 297 [1st Dept 1980]). "Duress is a physical wrong; coercion a moral wrong. Where duress is established in law or in equity no consent of a testator is possible" (*Matter of Hermann,* 87 Misc 476, 482 [Sur Ct, New York County 1914]). "[D]uress encompasses wrongdoing that is more overt, such as threats of force or harm" (*Matter of Bellasalmo,* 54 Misc3d 1216 [A] [Sur Ct, Queens County 2017]; *see also Mater of Alini,* NYLJ, Mar. 28, 2017 at 29 col 5 [Sur Ct, Richmond County 2017]).

The objectant has offered nothing to prove duress. For this reason, the petitioner's motion for summary judgment dismissing the objection on the issue of duress is **GRANTED**.

Undue Influence

To prove undue influence, the objectant must "demonstrate that decedent was actually constrained to act against her own free will and desire by identifying the motive, opportunity and acts allegedly constituting the influence, as well as when and where such acts occurred" (*Matter of Murray*, 49 AD3d 1003, 1005-1006 [3d Dept 2008] [citations omitted]). Undue influence is seldom practiced openly but it is the product of persistent and subtle suggestion imposed upon a maker fostered by the exploitation of a relationship of trust and confidence (*Matter of Burke*, 82 AD2d 260 [2d Dept 1981]). "Without a showing that undue influence was actually exerted upon the decedent, mere speculation that the opportunity and motive to exert such influence existed is insufficient" (*Matter of Chiurazzi*, 296 AD2d 406, 407 [2d Dept 2002]).

Undue influence may be proved by circumstantial evidence but the evidence must be substantial (*Matter of Walther,* 6 NY2d 49 [1959]). Among the factors that are considered are: (1) the testator's physical and mental condition (*Matter of Woodward,* 167 NY 28

[1901]; *Matter of Callahan,* 155 AD2d 454 [2d Dept 1989]); (2) whether the attorney who drafted the will was the testator's attorney (*see Matter of Lamerdin*, 250 App Div 133 [2d Dept 1937]; *Matter of Elmore,* 42 AD2d 240 [3d Dept 1973]); (3) whether the propounded instrument deviates from the testator's prior testamentary pattern (*Children's Aid Socy. v Loveridge,* 70 NY 387 [1877]); and (4) whether the person who allegedly wielded undue influence was in a position of trust (*Matter of Burke,* 82 AD2d 260, 270 [2d Dept 1981]).

In the instant proceeding, petitioner, objectant, Stephen Block and Pat Caroleo testified in their examinations before trial that at some point in 2010, they became aware that a woman named Sandy was influencing the decedent to transfer money to herself. This was the precipitating event that caused the petitioner to take the decedent to the attorney-drafter where he drafted a will, revocable trust and power of attorney. In her examination before trial, the petitioner testified:

> "Q: Well, as of the date that your father signed the trust
> in July of 2010 - -
> A: Yes.
> Q: - - didn't you believe that since your father and Sandy
> were still together, that she was exerting a negative or
> undue influence over him through and part of the use of
> drugs and alcohol?
> A: Um, as I said, I don't know what exactly I was thinking.
> Um, I'm not sure. I was thinking a lot of things. I don't like
> undue influence. That's a legal term but, yes, she was definitely
> influencing him for sure.
> Q: Did you feel that your father was under the spell of Sandy?
> A: Yes. For sure" (Parisa Djavaheri tr at 166, lines 6-22).

She further testified with regard to the lawsuit against Dove:

> "Q: My question is: In 2015 during the litigation,
> looking back at 2008 - -
> A: Yes.
> Q: - - to 2010 - -

[* 13]

A: Uh-hum.
Q: - - didn't you form the view that your father, in fact, had a diminished mental capacity because of dementia and Alzheimer's in 2008 to 2010 such that it made him more susceptible to the wiles and defalcations of Pat Caroleo?
A: Yes, he was more susceptible to being defrauded.
Q: And in 2010 and June and July of 2010, did you feel that generally other than just Pat Caroleo, that your father was susceptible to being misled or led astray by third parties with regard to financial matters?
A: Probably, yes. I was worried about my dad" (Parisa Djavaheri tr at 213, lines 5-25).

Both the petitioner and the objectant testified in their examinations before trial that they approached the Nassau County District Attorney's office with regard to their father's relationship with Sandy and the concomitant transfer of funds. The petitioner also testified that she took her father to a neurologist to be examined and she was informed that he was in the beginning stages of Alzheimer's.

The attorney-drafter, in his examination pursuant to SCPA 1404, testified as follows with regard to the estate plan and Sandy:

> "One of the main reasons for the revocable trust was more the protection of the assets from Sandy. So there was something that I put in this trust which is not what I usually do but we added this in here where there was - - a notification requirement to Parisa if he is going to revoke the trust. So the goal was to put all the assets in the trust and then if Sandy would take him to another lawyer Paris would have had to be notified. We would be on notice if Sandy was going to be doing something against his will" (Block tr at 57, lines 21-25; at 58, lines 2-9).

Pat Caroleo testified at his examination before trial that the decedent was fearful of the petitioner and that she bullied him. He also testified that petitioner told him that she was seeking "full custody of her dad" and that he was not to share that information with the

objectant[1] (Caroleo tr at 29, lines 5-7). The objectant also testified at his examination before trial that he personally observed the petitioner on multiple occasions hectoring and yelling at his father, especially with regard to money. He further testified that the petitioner did not give him keys to the house in which his father resided and as a result he was denied access to see him. Although some of the testimony elicited in the examinations may be precluded at trial pursuant to CPLR 4519, it may be used in opposition to a motion for summary judgment (*Lauriello v Gallotta,* 59 AD3d 497 [2d Dept 2009]).

The "amount of undue influence which will be sufficient to invalidate a will must of course vary with the strength or weakness of the mind of the testator" (*Matter of Woodward,* 167 NY 28, 30 [1901] [internal citations omitted]). There are clearly questions of fact regarding the testator's mental condition, whether he was susceptible to undue influence and the behavior of the petitioner in relation to the decedent which makes the granting of summary judgment on this issue inappropriate. For this reason, the petitioner's motion for summary judgment dismissing the objection on the issue of undue influence is **DENIED**.

Denial of Letters Testamentary

The objectant's final objection is that Parisa Djavaheri should not be granted letters testamentary or allowed to serve in any capacity in the administration of the estate of the decedent.

SCPA 711 provides that a person interested may present to the court a petition praying for a decree suspending, modifying or revoking letters upon a showing of any of the factors set forth in SCPA 711 (1) through (9). The court may make a decree, without

[1] Both Pat Caroleo and Parisa Djavaheri are involved in litigation which may color his or her testimony. The question of credibility, however, is not for the court to assess on a summary judgment motion (*Ferrante v American Lung Ass'n,* 90 NY2d 623 [1997]).

process, pursuant to SCPA 719, upon a showing of certain factors (SCPA 719 [1] through [10]). The objectant has neither petitioned the court for the removal of the petitioner as preliminary executor nor shown that the petitioner is ineligible to act pursuant to SCPA 719. Accordingly, the petitioner's motion for summary judgment dismissing the objection on the issue of eligibility to receive letters testamentary is **GRANTED**.

This proceeding will appear on the court's calendar for conference on October 18, 2018 at 10:00 a.m., at the Nassau County Surrogate's Court, located at 262 Old Country Road, 3rd Floor, Mineola, New York.

This constitutes the decision and order of the court.

Dated: September 27, 2018
Mineola, New York

E N T E R:

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

cc: McLaughlin & Stern, LLP
Attorneys for Petitioner
1010 Northern Boulevard, Suite 400
Great Neck, New York 11021

McCallion & Associates, LLP
Attorneys for Objectant
100 Park Avenue, 16th Floor
New York, New York 10017