Matter of Isaacs
2018 NY Slip Op 33467(U)
November 19, 2018
Surrogate's Court, Nassau County
Docket Number: 2016-390661/A
Judge: Margaret C. Reilly

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

CAROLINE ISAACS, **File No. 2016-390661/A**
Dec. No. 34996

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Before the court in this probate proceeding is a motion by Roberta Levien ("petitioner"), the nominated executor of the estate of Caroline Issacs ("decedent"), which seeks an order granting petitioner summary judgment, entering a decree admitting to probate a will dated May 21, 2003 and issuing letters testamentary to the petitioner. In response, Carole Lynn Steiner ("objectant"), daughter of the decedent, filed a motion to dismiss and asks that letters of administration previously granted to the objectant be reinstated as "the Will was not proven nor decision of Court rendered, and that the case against Respondent [objectant] be dismissed with prejudice."

The decedent died on July 26, 2015. She was survived by two children, the petitioner and the objectant. On or about August 26, 2016, the Public Administrator filed a petition for letters of administration. Letters of administration issued to the Public Administrator on October 17, 2016. A petition to probate the decedent's last will and testament dated May 21,

2003 was filed on or about October 13, 2016. By order dated June 9, 2017, preliminary letters testamentary issued to the petitioner and the letters of administration issued to the Public Administrator were revoked.

Article I of the will offered for probate provides for the disposition of the residuary estate one-half to the petitioner and one-half to the petitioner's children, Gregory Levien and Denise Levien. Article II provides for the nomination of petitioner as executor. Article VII of the will provides, in part, "I make no provision for my daughter, Carole Lynn, or her issue, if any. . . I make this provision because my daughter, Carol [sic] Lynn, has effectively benefitted from the unauthorized and forced sale of my stock, the proceeds of which were used to reduce or eliminate her margin debt she incurred in her securities account."

On June 29, 2017, objections were filed. The objectant alleges, in pertinent part, that the decedent's signature on the will is not the decedent's; that the attorney drafter never met the decedent prior to the preparation of the will; that the attorney drafter notarized his own signature; that the statement that the objectant forced the unauthorized sale of the decedent's stock is fraudulent; and that the will is the product of the undue influence of the petitioner.

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, 324 [1986]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr*, 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]). Summary judgment in contested probate proceedings may be appropriate where the objectant fails "utterly to show any deficiency in the form of the [decedent'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 separate claims of undue influence and fraud (*Matter of Rosen*, 291 AD2d 562 [2d Dept 2002]).

Due Execution

The proponent has the burden of proof on the issue of due execution (*Matter of Moskowitz*, 116 AD3d 958 [2d Dept 2014]). EPTL 3-2.1 provides, in part:

> "(a) . . . every 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) The 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, within one thirty day period, 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. Also, 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]).

Examinations of the attorney drafter and two attesting witnesses pursuant to SCPA 1404 were conducted.

The attorney drafter was John Crabill. He testified as follows. He explained that he was referred to Tom Levien, the decedent's son-in-law, by a friend of his. Mr. Crabill told Tom Levien that he primarily practiced in the field of trusts and estates and he subsequently met the decedent at some point in 2000, when the decedent told him that her husband needed a will. He drafted a will for the decedent's husband, William Isaacs. In 2003 the decedent contacted the attorney drafter about completing her will, and he had discussions with her about how she wanted to dispose of her property. He prepared her will, and the decedent came to his office on May 21, 2003. They met and went over the will together.

The attesting witness James McCarthy, an attorney who shares office space with the attorney-drafter, reported that he did not have a specific recollection of the will execution. He acted as a witness for the attorney drafter at least five to ten times, if not more. Mr. McCarthy's recollection was that the attorney drafter followed a set procedure:

> "You would ask me to be a witness . . . It was kind of a quick thing. I would come in, and you would ask the individual signing the Will two questions as I recall. The questions are what was the document. The person would usually say that they were signing their Will. And you would ask if they want me and the other person, whoever else was there, to witness the Will. And they would say yes, and then you would proceed" (McCarthy tr at 13, lines 10-11, 17-25; at 14, line 2).

Mr. McCarthy recognized his signature as well as the signature of the other attesting witness, Loretta Zolenski. He also signed an affidavit of attesting witness.

The second attesting witness, Loretta Zolenski, was also examined. She testified that she worked with the attorney drafter since 1977. She testified that the attorney drafter called her into the conference room on May 21, 2003 to act as a witness to the execution of the decedent's will. James McCarthy, the other attesting witness, was present with her. Ms. Zolenski saw the decedent sign the will. She further stated that the decedent answered "yes" to the question of whether it was her last will and testament and that the decedent asked her and James McCarthy to act as witnesses.

The objectant argues that the decedent's will was not duly executed because the signature is not genuine. She also reports that the decedent was always known as "Caroline B. Isaacs" and she would never have approved of a document wherein she was referred to as "Caroline Isaacs." The decedent's will refers to the decedent as "Caroline Isaacs" but the decedent signed "Caroline B. Isaacs." The objectant has not offered anything beyond her own speculation and conjecture to rebut the presumption that the will was validly executed. The attorney drafter stated that he knew the decedent and represented her with regard to her husband's estate. He saw the decedent sign the will and had familiarity with her signature because of his prior representation of her.

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 objectant has not alleged that the decedent lacked testamentary capacity. Further, the attorney-drafter in answer to a question from the objectant regarding the decedent's

capacity stated:

> "[w]hen she came in to sign her Will on May 21, 2003, she was perfectly competent. She read the Will. Every provision of her Will that disposed of her property she wanted. She knew that she lived in a house in Great Neck. She knew the extent of her property, her assets. She would tell me how she got stock and how her husband had stock often in certificate names in the house and eventually they deposited that stock in your brokerage firm that you worked for, U.S. Securities. She knew the extent of her property. She read that Will. She wanted that Will signed by her so it would dispose of that property. She was perfectly competent in my opinion to sign a valid Will" (Crabill tr at 25, lines 24-25; at 26, lines 2-17).

There is therefore no question that the decedent possessed testamentary capacity.

Fraud

The objectant bears the burden of proof on the separate issues of fraud (*see Matter of Rottkamp,* 95 AD3d 1338 [2d Dept 2012]) and undue influence (*Matter of Mele,* 113 AD3d 858 [2d Dept 2014]). To prove fraud, the objectant "must demonstrate by clear and convincing evidence that the proponent of the will knowingly made false statements to the testator to induce the testator to make a will disposing of his or her property in a manner contrary to that which the testator would have effected" (*Matter of Ranaldo,* 104 AD3d 857, 859 [2d Dept 2013][internal citations and quotations omitted]).

In the instant proceeding, the objectant argues that the provision of the will - "I make this provision because my daughter, Carol [sic] Lynn, has effectively benefitted from the unauthorized and forced sale of my stock, the proceeds of which were used to reduce or eliminate her margin debt she incurred in her securities account" was a fraudulent statement. She alleges in her objections that her mother had stock in her name when she died therefore she, the objectant, did not cause her mother to lose all of her shares. She writes in her objections:"[t]herefore, stock that belonged to my Mom is now either in my sister's name or

one of her family! My sister used this bogus situation to get me cut out from mom's will. My mom's stock was NOT lost due to me! It certainly is, though, in either my sister's name or that of my brother-in-law, niece or nephew" (Objections ¶ 5).

With regard to the stocks and the transactions in question, the attorney drafter, in his affirmation in support of the motion, sets forth the following: the decedent maintained an account at U.S. Securities where the objectant worked; on or about September 2001, the decedent called the attorney drafter and reported that many of her stocks were missing from her account at U.S. Securities. The attorney drafter called U.S. Securities and was informed that the decedent's account was linked to the objectant's account, that the objectant's account was a margin account, and that the decedent's securities, totaling $420,000.00 were transferred to the objectant's account so that the margin debt would not be called. According to the attorney drafter, the decedent had no idea that her account was linked, it was not authorized by her and she demanded that her stocks be transferred back into her account. As a result of the dispute and according to the attorney drafter, the decedent hired a separate attorney with experience in securities law who confirmed that the decedent's stocks were transferred into the objectant's account to satisfy a margin call. The objectant's securities would be sold first and then the decedent's securities would be sold to satisfy the balance of the margin debt. On or about October 9, 2001, U.S. Securities sold $267,236.99 of the decedent's stock in the objectant's account and returned 3,700 shares of the decedent's Exxon Mobil stock to her account. The attorney drafter's notes show that the total value of the decedent's stock used to satisfy the objectant's margin debt was $268,591.12. Thereafter, the attorney drafter assisted the decedent in closing the account at U.S. Securities and transferring it into a new account.

The objectant has not sustained her burden of proving that fraudulent statements were made to the decedent, that the petitioner knew they were false, and that they caused the decedent to change her will (*Matter of Eastman,* 63 AD3d 738 [2d Dept 2009] [internal citations omitted]). Accordingly, the motion granting summary judgment dismissing the objection as to fraud is **GRANTED**.

Undue Influence

"To be 'undue,' the influence exerted must amount to mental coercion that led the testator to carry out the wishes of another, instead of [his or her] own wishes, because the testator was unable to refuse or too weak to resist" (*Maisannes v Ryan,* 34 AD3d 212, 213 [1st Dept 2006], quoting PJI 7:55). 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]; *Matter of Favaloro,* 94 AD3d 989 [2d Dept 2012]). Among the factors that may be considered are (1) the testator's physical and mental condition (*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 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]; *Maisannes v Ryan,* 34 AD3d 212 [1st Dept 2006]); 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]).

The objectant alleges in her opposition papers that fourteen years of undue influence was practiced by the petitioner on the decedent "who was secluded away from her lifetime home in Great Neck . . ." (Opposition Response ¶ 7). She alleges in her response to the motion that the petitioner would not allow the objectant to talk to her mother on the telephone and that the decedent's spiritual advisor, Rabbi Widom, called the decedent over the fourteen years and never had his phone calls returned. The objectant claims that the decedent was elderly and could not reside alone, shop for food, and was dependent upon others.

The objectant has offered nothing beyond conjecture on her objection that the petitioner or someone acting on her behalf unduly influenced the decedent. The motion for summary judgment dismissing the objection on undue influence is **GRANTED**.

The objectant's motion to dismiss is **DENIED**. She has alleged no grounds to sustain a motion to dismiss.

This constitutes the decision and order of the court.

Settle decree.

Dated: November 19, 2018
Mineola, New York

E N T E R:

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

cc: John C. Crabill, Esq.
10619 Metropolitan Avenue
Forest Hills, New York 11375

Carole Lynn Steiner
220-55 46th Avenue, #15V
Bayside, New York 11361