Matter of Kronik
2019 NY Slip Op 30178(U)
January 28, 2019
Surrogate's Court, New York County
Docket Number: 2009-2812.1
Judge: Rita M. Mella

[* 1]

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

----------x

Probate Proceeding, Estate of

JOSEPH KRONIK,

Deceased.

----------x

DECISION
File No.: 2009-2812.1

M E L L A, S.:

The court considered the following submissions in deciding this motion for summary determination (CPLR 3212):

	Date Filed
1. Petitioner's Notice of Motion	May 30, 2018
2. Affirmation of Hillary A. Frommer, Esq., in Support	May 30, 2018
3. Affidavit of Marek Rozen in Support	May 30, 2018
4. Affirmation of Joseph H. Neiman, Esq., in Opposition	July 9, 2018
5. Reply Affirmation of Hillary A. Frommer, Esq., in Further Support	July 9, 2018
6. Affirmation of Glenn A. Opell, Esq., on Behalf of Public Administrator	October 5, 2018

Marek Rozen, petitioner in a proceeding to probate a June 24, 1976 instrument in the estate of Joseph Kronik, has moved for summary determination of his petition — including dismissal of objections filed on June 8, 2010 by distributees Leib Kuzniec and Helena Kronik Bartash — and the issuance of a decree admitting the June 24, 1976 instrument to probate (*see* CPLR 3212).[1]

Decedent died on March 13, 2009, at age 85, leaving a $2.5 million estate, survived by no one more closely related than first cousins. Marek Rozen, the brother of decedent's predeceased wife, filed a petition on July 31, 2009, and an amended petition on January 14, 2010, for probate of the June 24, 1976 instrument and the issuance to him of letters of administration c.t.a. The propounded instrument contains a single dispositive provision: The estate is bequeathed to

---

[1] Objections filed by the Public Administrator on July 15, 2010 were withdrawn on February 22, 2017.

decedent's spouse, but if she does not survive the decedent, then to the decedent's brother, Isaak Kronik, and to Marek Rozen, "jointly in equal shares as their joint property."

The probate petition includes a request, "That the instrument purporting to be the Decedent's Last Will and Testament, dated March 22, 2000[,] be denied probate and declared invalid." Under the March 22, 2000 purported will, the entire estate is left to the trustee of the "Joseph Kronik Trust Dated March 22, 2000."

In an August 15, 2000 bench decision, the Nassau County Supreme Court — in determining a petition that had been filed by decedent's wife on May 26, 2000 — found decedent to be incapacitated, as defined in Mental Hygiene Law § 81.02, and appointed Mr. Rozen (rather than decedent's wife) guardian of decedent's person and property and authorized Mr. Rozen as such guardian, "to apply for revocation of the [March 22, 2000 Joseph Kronik irrevocable] trust" (*see Matter of Rozen*, NYLJ, Aug. 6, 2002, at 23, col 1 [Sup Ct, Nassau County]). Thereafter, Mr. Rozen, as such guardian, sought — and obtained — from the Nassau County Supreme Court, after a jury trial, a determination that the "Joseph Kronik Irrevocable Trust Dated March 22, 2000" was invalid. The court invalidated the trust on two bases. First, the court determined that decedent had lacked capacity to enter into a trust agreement on March 22, 2000. In addition, the court adjudicated the March 22, 2000 trust instrument to be the product of undue influence exercised by one Lucy Lam.[2]

The objections to probate of the June 24, 1976 instrument read: "[S]aid Will

---

[2] The jury found that decedent lacked mental capacity to create the trust and that the trust was the product of undue influence. As to undue influence, the jury's finding was advisory and the Nassau County Supreme Court, by counter-judgment dated January 6, 2003, made an independent determination when it invalidated the trust on this ground.

was revoked by the Will dated March 22, 2000[,] and said Will does not meet the statutory requirements."[3] Invoking EPTL 3-4.1, objectants allege, in essence, that the language in the introduction of the March 22, 2000 purported will, revoking "any and all of my prior Wills and Codicils," effectively revoked the June 24, 1976 instrument. If objectants are correct, the single disposition contained in the March 22, 2000 purported will having been rendered ineffectual by the invalidation of the March 22, 2000 trust agreement, decedent died intestate.

In the instant motion, Rozen seeks dismissal of the objections, filed on June 8, 2010, to the probate of the June 24, 1976 instrument, "on the grounds that Objectants are precluded as a matter of law from arguing that the Instrument dated March 22, 2000 purporting to be the Last Will and Testament of Joseph Kronik is a valid instrument." Specifically, movant invokes the doctrines of collateral estoppel "and/or" *res judicata* and argues that, because one objectant, Lieb Kuzniec, was a party to the proceeding whereby the March 22, 2000 trust agreement was invalidated, and because the other objectant, Helena Kronik Bartash, being a distributee of decedent's estate, was in privity with decedent, both are precluded from arguing that: (1) decedent had capacity to execute the March 22, 2000 instrument purporting to be a will — including its provision revoking all prior testamentary instruments — and (2) the execution of such instrument was free of undue influence.

Collateral estoppel, a doctrine "intended to reduce litigation and conserve the resources of the court and litigants," precludes parties from relitigating issues that have been previously decided against them in a prior proceeding in which they had a fair opportunity to litigate the

---

[3] Objectants seem to contend that the original March 22, 2000 purported will has been lost or is otherwise missing.

point (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). It is well established that "[t]he doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]).

Res judicata, or claim preclusion, is a broader doctrine of which collateral estoppel is a component (*Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]). It bars successive litigation based upon the same transaction or series of transactions when "(i) there is a judgment on the merits rendered by a court of competent jurisdiction, and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Matter of Spitzer v Applied Card Systems, Inc.*, 11 NY3d 105, 122 [2008]). Claims arising out of the same series of transactions are barred under *res judicata* "even if based upon different theories or if seeking a different remedy" (*Parker*, 93 NY2d at 347, quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]).

When a party establishes that a claim is barred by collateral estoppel or *res judicata*, summary judgment may be properly granted in favor of such party (*Ryan v New York Telephone Co.*, 62 NY2d 494 [1984]; *Luscher v Arrua*, 21 AD3d 1005 [2d Dept 2005]).

DISCUSSION

In rendering its advisory opinion that the creation of the March 22, 2000 irrevocable trust was the product of undue influence, the jury applied the same standard that is used to evaluate whether a will is the result of influence exerted by another and not a reflection of a testator's intent ("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, her] own wishes, because the testator was unable to refuse or too weak to resist" [PJI 7:55]). Agreeing with the jury, the Nassau County Supreme Court determined conclusively in its January 6, 2003 counter-judgment: "[T]he execution of the Trust on March 22, 2000 by Joseph Kronik was procured by the undue influence of Lucy Lam and, accordingly, the Trust is declared invalid." The question now presented is: Are objectants therefore precluded from arguing that the revocation clause in the March 22, 2000 purported will was executed by a decedent free of restraint, specifically, free of the undue influence exercised by Lucy Lam?

The March 22, 2000 purported will and irrevocable trust were integral parts of a single estate plan, one orchestrated by Lucy Lam. The two instruments were also the product of the same transaction, and the purported will was merely incidental to the trust. Although a finding of undue influence does not necessarily invalidate an entire testamentary instrument (*see Riggs v Palmer*, 115 NY 506, 512 [1889] [a particular portion of a will may be excluded from probate if induced by undue influence or the party in whose favor it is]; *Matter of von Knapitsch*, 296 AD2d 144, 148 [1st Dept 2002] [partial probate may be granted and portions of will that do not benefit party who exerted undue influence may be admitted to probate]), here the revocation clause of the March 22, 2000 purported will served the interests of the undue influencer: it — along with the sole dispositive provision of the purported will — ensured that any asset owned by decedent at his death, and subject to administration, would be disposed of in accordance with the terms of the March 22, 2000 irrevocable trust. Therefore, the issue of the invalidity of the revocation clause of the March 22, 2000 purported will was "necessarily decided and material" in the Nassau County Supreme Court proceeding (*Parker*, 93 NY2d at 349). Further, the claim that

the transaction that resulted in the creation of the March 22, 2000 irrevocable trust was procured by Ms. Lam's undue influence was conclusively decided by that court. Accordingly, any claim by objectants that the purported will and its revocation clause, which were an integral part of that same transaction, are a reflection of decedent's wishes and not the product of any restraint is barred by *res judicata* (*id.* at 347).

Objectants' arguments concerning lack of privity are easily addressed. Leib Kuzniec was a party to the proceeding to invalidate the March 22, 2000 irrevocable trust and actively litigated it, and Helena Kronik Bartash, as decedent's distributee is in privity with him. Both are bound by the determination on that proceeding (*Matter of Werger*, 64 Misc 2d 1094, 1097 [Sur Ct, N.Y. County 1970]; *Matter of Baker*, 189 Misc 159, 160-161 [Sur Ct, Bronx County 1947]).

The Public Administrator, a statutory party in this probate proceeding (*see* SCPA 1123 [2] [i] [2]), agrees with this court's conclusion concerning the preclusive effect of the Nassau County Supreme Court determination and does not oppose the petition for probate.

Despite being requested on movant's papers, the relief of admitting the June 24, 1976 instrument to probate may not be granted on the application before the court. Movant argues that objectants "do not challenge the validity of the [June 24, 1976] in any respect." The objections filed in this case, however, cite to EPTL 3-2.1 and allege, as previously stated, that the propounded instrument "does not meet the statutory requirements." To be sure, by the instant decision, this court is dismissing those objections to probate which allege that the propounded instrument was revoked by the purported March 22, 2000 will. The other objections remain and, if movant desires to seek summary determination of the validity of the propounded instrument, it is still incumbent upon him, as proponent, to make a prima facie showing that, on June 24, 1976,

decedent had testamentary capacity, duly executed the propounded instrument, and was free of undue influence or any other restraint.

CONCLUSION

Marek Rozen having established that objectants are precluded, as a matter of law, from claiming that the March 22, 2000 purported will effected a revocation of the propounded instrument, and objectants having failed to raise a material issue of fact, his motion is granted. In light of this determination, the court need not address the question of whether objectants are precluded from arguing that decedent lacked testamentary capacity when he executed the March 22, 2000 purported will. To the extent the motion sought a decree admitting the June 24, 1976 instrument to probate, it is denied without prejudice.

This decision constitutes the order of the court.

Clerk to notify.

Dated: January 28, 2019

SURROGATE