Matter of Linich
2021 NY Slip Op 33834(U)
January 6, 2021
Surrogate's Court, Ulster County
Docket Number: File No. 2016-538/C
Judge: Sara W. McGinty
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STATE OF NEW YORK
SURROGATE'S COURT: COUNTY OF ULSTER

Probate Proceeding, Will of

WILLIAM G. LINICH (aka WILLAM G. LINICH, aka BILLY NAME)

DECISION/ORDER
File No. 2016-538/C
HON. SARA W. McGinty
Surrogate

Appearances:
Kelly A. Pressler, Esq. (Jacobowitz and Gubits LLP), for Dagon J. James, proponent/petitioner
Andrew P. Nitkewicz, Esq. (Cullen and Dykman LLP), for Susan Linich, objectant/respondent

McGINTY, S., J.

The decedent, William George Linich, was a photographer, filmmaker and lighting designer, known chiefly for his work with Andy Warhol. Linich marked the beginning of his life as an artist with his "reinvention" in the early 1960's, when he assumed a new professional identity: "Billy Name." As Billy Name, he chronicled the social and artistic ferment of Warhol's New York City studio known as "The Factory." Billy Name and Warhol were friends and collaborators and his photographs of Warhol, The Factory and its denizens are an important historical record of this incubator for pop art and culture.

The decedent was survived by one brother and the three children of a predeceased brother. A niece, Susan Linich ("objectant"), was the nominated executor and sole beneficiary of decedent's March 2011 will. A more recent will, dated July 16, 2015, named the decedent's agent and friend, Dagon James ("proponent"), as executor and sole beneficiary. Objectant filed a petition to probate the 2011 will and full letters testamentary were issued to her on May 8, 2017. Shortly after her appointment, objectant filed a petition for discovery under SCPA 2103, seeking the return of estate assets she believed to be in the hands of the proponent.

Objectant's discovery petition prompted the proponent in December 2017 to file a petition to probate the 2015 will. Objectant's SCPA 2103 petition was thereafter held in abeyance pending resolution of proponent's petition for probate; her letters testamentary were also limited to restrain her from disposing of estate assets or making distributions.

The objections to the 2015 will allege that decedent lacked testamentary capacity, that the will was not duly executed and that the will was procured through undue influence or fraud perpetrated by proponent. Two years of Article 14 examinations and CPLR discovery followed, culminating in proponent's present motion for summary judgment under CPLR 3212 and for sanctions or other relief for objectant's failure to turn over discovery materials in a timely manner.

Objectant initially seeks dismissal of the motion for summary judgment under CPLR 3212(a) and (b) based on the threshold issues of timeliness and formal sufficiency of the motion. She argues that the motion is facially deficient because it was made before a note of issue was filed and because it lacks the affidavit referred to in CPLR 3212(b). CPLR 3212(f) is cited as grounds for dismissal because the proponent failed to produce financial documents and emails demanded by objectant. Finally, objectant argues that the motion for summary judgment is premature because her discovery is not complete: she was not able to depose six additional non-party witnesses, nor was she able to retain a medical expert or gain access to other information essential to her case, which she alleges is in the exclusive possession of the proponent.

TIMELINESS AND FORMAL SUFFICIENCY OF THE MOTION FOR SUMMARY JUDGMENT

The language of CPRL 3212(b) makes it abundantly clear that an affidavit is not the only type of proof which may be offered in support of a motion for summary judgment. Section 3212(b) provides in part:

> [a] motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions

Affidavits from persons having personal knowledge may be a primary source of proof under CPLR 3212, but they are not exclusive: any CPLR Article 31 disclosure devices, such as depositions or documents obtained through discovery, will do (Siegel and Connors, New York Practice 281 [6th ed 2018]). This includes, "of course," depositions and other documents by persons with personal knowledge proffered by affirmation of an attorney who may have limited or no personal knowledge of the facts (*Zuckerman v. New York*, 49 NY2d 557, 563 [1980]).

The proponent's attorney affirmation is amply supported for purpose of CPLR 3212(b) by the pleadings, affidavits and depositions of attesting witnesses and the deposition of objectant. The branch of objectant's motion seeking dismissal based on a failure to proffer proof under CPLR 3212(b) is therefore denied.

The objectant also asserts, without merit, that the motion for summary judgment is untimely because no note of issue was filed. CPLR 3212(a) expressly provides that a motion for summary judgment may be filed at any time "after issue is joined" (*see, Vasquez v. Soto*, 61 AD3d 968 [2d Dept 2009]). Issue was joined in this proceeding when the objections were filed on November 2, 2018. This branch of objectant's motion to dismiss is therefore denied.

Objectant next contends that dismissal of the motion for summary judgment is required because material facts essential to the opposition are within the proponent's exclusive knowledge and have not been delivered to objectant despite her demands (CPLR 3212[f]). Dismissal will be granted only if objectant affirmatively demonstrates that the information sought is material, essential and in proponent's exclusive possession *(Scofield v. Trustees of Union College in Schenectady*, 267 AD2d 651, 652 [3d Dept 1999]). "Mere speculation" will not suffice for this purpose (*Svoboda v. Our Lady of Lourdes Mem. Hosp., Inc.*, 20 AD3d 805, 806 [3d Dept 2005]).

Objectant's motion to dismiss identifies two sets of essential documents which proponent has not produced. Oral demand for these documents was made during proponent's deposition on January 27, 2020. One such document is an email which may or may not have been sent by proponent to the supervising attorney to notify her of her client's death (or, she testified, it "might have been a telephone call.") Other essential documents sought by objectant consist of records of proponent's income during the 3/2 period (July 2012 – July 2016). Proponent testified that many of his personal records, including records of his transactions with the decedent, were stolen in November 2015 from the house he had shared with Paula Weber prior to breaking their engagement.

After the initial oral demand at depositions for the essential information, objectant's attorneys apparently gave the matter little thought; follow-up inquiries or demands are nowhere to be found (*Lewis v. I.K.E. Realty Associates*, 81 AD2d 711 [3d Dept 1981]). Objectant could have obtained the documents in any event from other sources: an email from proponent reporting the decedent's death could have been obtained (if it exists) from its recipient, the

supervising attorney, and subpoenas duces tecum could have been issued to banks or other institutions for records of proponent's income (*Rochester Linoleum & Carpet Ctr., Inc. v. Cassin*, 61 AD3d 1201 [3d Dept 2009]). Objectant's inability to ascertain facts in a timely manner is thus attributable in large part to her inaction, and not to proponent's exclusive possession (*Buffalo Structural Steel Corp. V. Elsand Steel, Inc.,* 159 AD2d 850 [3d Dept 1990]).

Objectant has made no affirmative showing that the information she seeks is essential, material or in proponent's exclusive possession (*Bailey v Dimick*, 129 AD3d 1165, 1166-1167 [3d Dept 2015]). There is no evidence that proponent has access to or is withholding any of the requested documents, and "a party cannot be compelled to produce documents which do not exist" (*Matter of Scaccia*, 66 AD3d 1247, 1249-1250 [3d Dept 2009]). The "mere hope" that further discovery may uncover evidence sufficient to defeat the motion for summary judgment is not enough to justify dismissal (*Clochessy v. Gagnon*, 58 AD3d 1008, 1010 [3d Dept 2009](*citations omitted*). Objectant has offered no proof of how the information she seeks, which is not in the proponent's exclusive possession, is material and essential to her case. Her motion to dismiss under CPLR 3212(f) is therefore denied.

The principal basis for objectant's position that proponent's motion is premature is the denial of a "reasonable opportunity to conduct discovery," *citing Amico v. Melville Volunteer Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]).

The parties completed Article 14 examinations in 2018 and the exchange of documents and medical records and depositions of the parties were completed by January 2020. At the February 5, 2020 conference with the parties' attorneys, objectant's attorneys asked for an additional 90 days so that they might depose non-party witnesses. May 15, 2020 was

designated for filing a note of issue, based on the assumption that all remaining discovery would have been completed a few days earlier, at the end of the 90 days allotted for that purpose. A pretrial conference was scheduled for September 9, 2020, with a jury trial to begin on September 14, 2020. The jury trial has now been adjourned indefinitely as a result of Covid-19 related constraints on Court operations.

A few weeks after the February 2020 conference, objectant's attorneys advised opposing counsel that they intended to conduct depositions of Paula Weber and three non-party witnesses who had initially appeared on proponent's list of witnesses.

There is no evidence that objectant took steps to conduct discovery after her February 2020 letter to proponent's attorneys. Even after being served with proponent's motion for summary judgment in late August 2020, the objectant failed to raise outstanding discovery demands, seeking only to adjourn her time to answer by a few weeks. Objectant finally raised this issue in her attorney's October 1, 2020 affirmation, but even now does not seek a continuance to permit additional time for discovery (*see Wilmington Sav. Fund Socy, FSB v McKenna*, 172 AD3d 1566, 1567-68 [3d Dept 2019]).

The February 5, 2020 scheduling order was issued with the consent of the parties and included, at objectant's behest, an additional 90 days for her attorneys to conduct non-party depositions (*Lisa I. v. Manikas*, 2020 NY App Div LEXIS 6648, *5 [3d Dept]). Three of those witnesses were then known to the objectant. Objectant thus "had an opportunity to complete discovery and failed to take appropriate measures to extend the deadlines to complete nonparty depositions" (*Lisa I. v. Manikas,* 2020 NY App Div LEXIS 6648, *5).

Objectant's attorneys explain their failure to conduct depositions or to seek an extension of their time to do so as follows: "[the] depositions have not yet been held given the Covid-19 pandemic which hit in March of 2020." Since Chief Judge DiFiore's initial order restricting court operations was issued on March 17, 2020, this Court has remained open for business and accessible by telephone, letter, email or efiling. Parties who have sought the Court's guidance in discovery matters have been directed to conduct depositions by video conference. Many New York courts have ruled that video conferencing is an appropriate instrument of discovery under these circumstances (*see, eg, Chase-Morris v. Tubby*, 2020 NYLJ LEXIS 1251* [Sup Ct Westchester Cty], citing a number of such cases in New York and federal courts). The first scheduling order issued in this proceeding in December 2018 reserved to the parties the right to conduct depositions by this mechanism.

As to the opinions of medical experts, which objectant argues are critical to her case, the Court has read with care the medical records and finds the course of decedent's decline to be comprehensively and clearly documented. Since the record is readily understood by lay readers, it is not clear how a medical expert's opinion would further objectant's case, especially since this type testimony is often described as "the weakest and most unreliable kind of evidence" and thereby insufficient to create a material issue of fact (*Estate of Van Patten*, 215 AD2d 947, 949 [3d Dept 1995], citations omitted).

Article 14 and CPLR discovery were conducted in this proceeding over a period of nearly two years. Objectant has thus by any measure been granted a reasonable opportunity to conduct discovery (*Amico v. Melville Volunteer Fire Co., Inc.*, 39 AD3d 784 [2d Dept 2007]). Certainly she has not made a showing that the period of time her attorneys obtained for her

was inadequate (*Titan Communications, Inc. v. Diamond,* 94 AD3d 740, 742 [2d Dept 2012]). Objectant failed to avail herself of the additional 90 days secured to complete discovery, and to this day she has not sought additional time to complete the task. The branch of objectant's motion seeking dismissal based on her alleged inability to complete discovery is therefore denied.

BACKGROUND

In the years preceding his partnership with proponent, decedent was living in Poughkeepsie, making art and selling some of it from time to time. When mutual friends introduced them in 1996, proponent and decedent struck up a friendship. In the early 2000's, proponent began to publish decedent's photographs.

The proponent published a series of booklets and issued a series of signed and numbered silkscreen prints in 2009 and 2010. The decedent had very high standards for the printing or other reproduction of his work. He painstakingly trained proponent on how his photographs should be printed, framed and displayed. Whenever his client's photographs were to be published, proponent would obtain proofs from the printer and would bring them to decedent, who would review and approve them individually.

When the decedent was hospitalized after a stroke in 2010, all of his negatives, a collection of original Warhol photographs and other archival articles were stolen from his apartment. Decedent believed his long-time agent was responsible for the theft. He fired his agent and replaced her with proponent in 2011. Proponent served as decedent's agent from 2011 until his death in 2016. In the aftermath of decedent's hospitalization and the discovery

of the theft, decedent also executed his 2011 will naming objectant his executor and sole beneficiary and a power of attorney naming her as his agent.

As decedent's agent, proponent was responsible for image licensing. He published decedent's work, fielded inquiries and negotiated terms of sales and licensing. In addition, proponent worked over several years to locate and acquire nearly 1,000 high-resolution images which could be used in place of decedent's stolen negatives. Proponent meticulously collected, catalogued and scanned the images to recreate decedent's stolen body of work. He also contacted a number of attorneys, police agencies and the FBI in an effort to locate and reclaim the stolen art.

The terms of proponent's representation of decedent were never formalized. From the beginning of proponent's representation, he and decedent agreed to a 50/50 split of the net proceeds of sales and appearance or other fees obtained by proponent. At decedent's request, many of his payments were made in cash.

Proponent testified that his records of his dealings with decedent were kept in a series of pocket-sized notebooks. The notebooks were among the records and property stolen in late 2015 from the house he had shared with Weber.

SUMMARY JUDGMENT

Summary judgment is designed to eliminate from the trial calendar litigation which can be resolved as a matter of law (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]).

The movant must demonstrate first a prima facie showing of its cause of action and entitled to judgment as a matter of law (*see Alvarez v. Prospect Hosp*, 68 NY2d 320 [1986]).

If the movant proves his/her prima facie case, the burden shifts to the party opposing the motion to produce admissible evidence of material issues of fact requiring a trial (*Alvarez v. Prospect Hosp*., 68 NY2d at 324 [1986]). Unsubstantiated allegations will be insufficient to defeat a motion for summary judgment (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). If the moving party fails to meet its burden of proof, summary judgment must be denied "regardless of the sufficiency of the opposing papers" (*Vega v Restani Constr. Corp*., 18 NY3d 499, 503 [2012]). The nonmoving party is not obliged to persuade the court against summary judgment (*Voss v. Netherlands Ins. Co*., 22 NY3d 728, 734 [2014]).

In this process, evidence is "viewed in the light most favorable to the nonmoving party, who is afforded the benefit of every reasonable inference" (*Hall v. Queensbury Union Free Sch. Dist.*, 147 AD3d 1249, 1250 [3d Dept 2017]). If the nonmoving party fails to establish a material triable issue of fact, summary judgment is appropriate (*Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft*, 26 NY3d 40, 49 [2015]). The Court's sole task on such motions is to confirm the existence of issues of fact, not to resolve them (*Barr v. County of Albany*, 50 NY2d 247, 254 [1980]).

The evidence offered by the parties with respect to decedent's capacity and undue influence allegedly wielded by proponent consists largely of the deposition testimony of proponent and objectant, affidavits of decedent's family and acquaintances , and records of decedent's medical care beginning in September 2014 and ending at his death in July 2016. The conversations recounted by the parties and affiants are hearsay and may be considered in this proceeding only in opposition to the motion for summary judgment, and then only if there is "some additional competent evidence to support [the hearsay] or an excuse for the failure to

present proof in admissible form" (*Saint James' Episcopal Church v. FOCUS Found*., 47 AD3d 1058, 1059 [3d Dept 2008]).

At trial, the parties will face an additional bar to their testimony about interactions with the decedent: as parties interested in these proceedings, their testimony about such interactions are subject to the "Dead Man's Statute" found in CPLR 4519. As is the rule for hearsay in general, evidence excludable at trial under the Dead Man's Statute may be used to defeat a motion for summary judgment, but only if bolstered by additional competent evidence (*Zupan v Price Chopper Operating Co., Inc.,* 132 AD 3d 1211, 1213 [3d Dept 2105]).

DUE EXECUTION

In contested probate proceedings like this one, the burden of proof falls on proponent to establish a prima facie case for probate (*Matter of Scaccia*, 66 AD3d 1247, 1250 [3d Dept 2009]). In this effort, proponent is aided by a series of presumptions arising from the involvement of an attorney in the execution of the will and the observance of execution protocols established under EPTL 3-2.1.

The will submitted for probate was drafted by an attorney, who then supervised its execution (the "supervising attorney"), creating a presumption arises that the will was properly executed (*Matter of Buchting*, 111 AD3d 1114, 1115-1116 [3d Dept 2013]). The attestation clause signed by the witnesses also establishes that the requirements of EPTL 3-2.1 were satisfied and creates a further presumption of due execution and "constitutes prima facie evidence of the facts therein attested to by the witnesses" (*Matter of Cameron*, 126 AD3d 1167 [3d Dept 2015]).

Proponent has established a prima facie case for probate of the 2015 will, shifting the burden of proof to the objectant to offer "positive proof" that the formal requirements of EPTL have not been satisfied (*Matter of Cameron*, 126 AD3d at 1168). Objectant has offered no evidence on this point.

The Court finds no triable issue of fact with respect to due execution and proponent is therefore is entitled to summary judgment on this issue.

TESTAMENTARY CAPACITY

The attestation clause and the affidavits of attesting witnesses create a presumption of testamentary capacity (*Estate of Leach*, 3 AD3d 763, 765 [3d Dept 2004]). The burden is therefore shifted to objectant to prove that decedent lacked any of the following: (1) understanding of the nature and consequences of executing a will; or (2) comprehension of the nature and extent of the property he was disposing of; or (3) knowledge of those who would be considered the natural objects of his bounty (*In re Estate of Kumstar*, 66 NY2d 691, 692 [1985]).

In support of her claim that decedent lacked testamentary capacity, objectant cites decedent's intermittent bouts of confusion and "altered mental status"[1] in 2014, 2015 and 2016. For many years before that, decedent had suffered from depression, incontinence and type II diabetes. His uncontrolled diabetes and the disastrous fluctuations in his blood sugar levels brought him to what objectant aptly terms a "health crisis" in 2014 and 2015.

[1] "Altered mental status" is a group of symptoms found most often in older adults, ranging from confusion and forgetfulness to coma. Causes of altered mental status include low or high blood sugar levels, urinary tract infections or dehydration, but does not include dementia (https://www.drugs.com/cg/altered-mental-status.html).

On September 17, 2014, objectant was summoned to her uncle's apartment by his landlord, who had reported that his tenant seemed confused. Objectant brought the decedent to the emergency room of a local hospital the following day. Hospital personnel found decedent to be suffering from "decreased mental status," confusion and incontinence. Decedent believed his confusion was caused by high blood sugar and acknowledged that he was non-compliant with his diet and medications for diabetes. On discharge, decedent was diagnosed with low blood sugar and low sodium.

Little more than a week later, objectant's brother Carl Linich, Jr. again found their uncle in a dire state. A psychiatric examination on September 29, 2014 attributed decedent's impaired attention, concentration, insight and judgment to depressive disorder and diabetes mellitus. A CT scan of decedent's brain found that the diffuse cerebral cortical atrophy shown was dismissed as merely "age anticipated." On discharge, decedent was diagnosed with uncontrolled diabetes with altered mental status and depression.

Decedent was discharged to a nursing home on September 30, 2014. Non-compliance with medical and dietary protocols was noted throughout his stay at the nursing home. Decedent's uncontrolled type II diabetes would continue to plague him over his remaining years, as his blood sugar levels periodically careened from catastrophically high at 486 to a near-fatal low of 48 (bloodsugareasy.com/blood-sugar-486/; https://medlineplus.gov/encyclopedia.html).

Decedent was discharged to an assisted-living facility on November 1, 2014. He lived there until his death on July 18, 2016.

Decedent's health continued its fitful decline at his new home. He was seen in the local emergency room or admitted to the hospital in May, June, July, September and November 2015. With the exception of the May 2015 admission, which was precipitated by a fall, each occasion ended with a diagnosis of urinary retention, urinary tract infection or acute UTI. In each case, the altered mental status observed in decedent at the time of admission was later attributed to UTI.

It was during the decedent's health crisis that proponent and objectant became acquainted. They emailed frequently during this period, which coincided with the publication of a large-format book of the decedent's photographs in November 2014 (Billy Name: The Silver Age).

As decedent's health worsened, proponent urged him to formalize their arrangement so that he could serve as his agent if he became disabled. In 2013, the subject turned to estate planning and proponent urged the decedent to authorize him to continue to publish, show and sell his work after his death. Proponent made no secret of his earnest desire to continue his work as the decedent's agent. His goal was plainly and repeatedly stated to the decedent and others concerned with his welfare: the objectant, Paula Weber and David Weber. Proponent made these statements openly and unapologetically, without intimidation or threat.

Decedent outlined his testamentary plan at this time in many conversations with Paula Weber and in at least one email to objectant: he wished proponent to continue his work after decedent's death, with the proceeds of proponent's work to be split equally between him and decedent's family. Decedent must also have discussed his plan with proponent too, because proponent summarized it in his notebook on January 14, 2013 and decedent signed the entry.

Independent of his niece and his agent, the decedent found a lawyer to prepare a new will for him in July 2015. The proponent drove him to his first appointment with the supervising attorney some weeks before the will was signed. In her Article 14 testimony, the attorney reported decedent to be at all times alert, well-groomed and that he spoke “clearly and forcefully” about his testamentary plan. Although the decedent told his attorney he owned nothing, he took pains to recount the theft of his body of work and a related FBI investigation, telling his attorney that he expected the proponent to “follow through” on recovering the stolen property after his death. The decedent also reported that he had consulted another lawyer for a new will but had been very unhappy with him because, contrary to decedent’s wishes, he insisted on drafting an instrument that benefitted decedent’s family. Decedent had rejected this plan out of hand, he explained, because he “didn’t trust his family members,” they “never came to see him” and “[didn’t] care about him.”

The decedent told the supervising attorney that he wanted to leave his estate to proponent, whom he described as a friend. When his attorney pressed him to name a contingent beneficiary, decedent provided the name of his brother Carl and also named him as successor executor. There was no testimony that decedent offered objectant’s name in either capacity.

The fundamental weakness in the objectant’s case is the absence of evidence of decedent’s capacity proximate in time to the July 16, 2015 will-signing. Each of the affidavits offered by the objectant affirm in unison their *belief* that they did “not believe [decedent] was mentally capable” of making a valid will on July 16, 2015, but none offer personal observations or interactions with the decedent *at or near the time that the will was signed*, which is at the

heart of every inquiry into testamentary capacity (*Matter of Prevratil*, 121 AD3d 137, 141 [3d Dept 2014]).

In contrast, the testimony of the supervising attorney establishes that decedent knew who the natural objects of his bounty were --- and emphatically did not wish to include them in his will. Decedent knew that the nature and extent of his assets consisted of his body of work, much of which had been stolen from him. He also understood the nature of the document he signed, in that its central function was to provide for the promotion and preservation of his artistic legacy. He was both "lucid and rational" at the critical time when he signed his will (*Matter of Paigo*, 53 AD3d 836,838 [3d Dept 2008]), expressed his wishes clearly and forcefully, free of the confusion and altered mental status that bedeviled him from time to time before and after he signed the will. He justified the departure from his prior testamentary plan in conversation with the supervising attorney, a departure that was consistent with his interest in preserving his work (*see, Matter of Stafford*, 111 AD 3d at 1218 [2013]). By leaving his estate to proponent, he not only rewarded proponent for friendship and service, he also entrusted his artistic legacy to the person most likely to preserve it.

There are references to "dementia" in decedent's hospital records beginning in February 2016[2], but there is nothing in the record to indicate that was manifested in decedent's behavior or cognition. For example, the reference to "acute dementia" appears in hospital records for a February 20, 2016 admission, but an extensive psychological assessment at that

[2] On September 5, 2015, Valley Vista personnel summoned EMT's because decedent was showing signs of lethargy, general weakness and altered mental status. An EMT report included "dementia" in decedent's "past medical history." Although an EMT is not competent to render a medical diagnosis (*Abalola v. Flower Hosp*., 44 AD3d 522 [1st Dept 2007]), this first reference to dementia is the most proximate to the July 16, 2015 will-signing.

time described him as cooperative and coherent, with no disturbance to thought content. Nor were there changes in decedent's treatment protocols as a result of the diagnosis: the hospital's July 2016 list of his medications does not include any FDA-approved treatments for dementia (alz.org/media/documents/fda-approved-treatments-alzheimers-ts.pdf).

Decedent's diagnosis of dementia and his periodic confusion "does not, without more, create a question of fact on the issue of testamentary capacity" (*Matter of Prevatil*, 121 AD3d at 141 [2014]). Nor is decedent's decade-long battle with depression sufficient, standing alone, to establish an absence of testamentary capacity (*Matter of Leiter, 2017 NY Misc LEXIS 3919, *12 at 15 [Sur Ct NY Cty]).* A testator needs only a "lucid interval of capacity to execute a valid will," even if it occurs in the midst of mental disturbance (*Matter of Cookson,* 2015 NY Misc LEXIS 4507 * [Sur Ct Queens Cty]). In short, in the absence of evidence that the decedent's depression or dementia actually impaired his capacity at the time the will was signed, it is marginally relevant to this inquiry (*Matter of Giaquinto*, 164 AD3d 1527, 1529 [3d Dept 2018]; *Matter of Leiter*, 2017 NY Misc LEXIS 3919*).

Objectant has not identified a triable issue of fact with regard to decedent's testamentary capacity. The proponent's motion for summary judgment is granted on this issue.

UNDUE INFLUENCE

The finding that decedent was possessed of testamentary capacity when he signed the will offered for probate does not preclude an independent determination that he was subjected to undue influence (*Matter of Efros*, 19 Misc 3d 1113(A) [Sur Ct NY Cty 2008], *citing Estate of Donovan*, 47 AD2d 923 [2d Dept 1975]). Decedent's alcohol abuse, depression and intermittent bouts of confusion, which were insufficient to rebut the presumption of capacity, may thus be

repurposed to demonstrate his vulnerability to undue influence (Harris, New York Probate Administration and Litigation 24:249 [6th ed 2020).

The burden of proving undue influence is customarily on the objectant (*Matter of Walther*, 6 NY2d 49 [1959]). Here, however, objectant argues that proponent's role as decedent's agent and health care proxy mean that they were in a "confidential relationship." Objectant is entitled to the benefit of all reasonable inferences for purposes of this motion (*Turkow v Security Mut. Ins. Co.*, 92 AD3d 1180, 1182 [3d Dept 2012]), so the Court will proceed on the basis that a confidential relationship existed between decedent and his agent.

An inference of undue influence arises when a person in confidential relationship is the recipient of a gift or bequest from the other party to the relationship (*Matter of Henderson,* 80 NY2d 388, 394 [1992]). To rebut the inference, proponent must demonstrate by clear and convincing evidence that his dealings with the decedent were "fair, well understood and free from fraud, deception or undue influence" (*Oakes v Muka*, 69 AD3d 1139, 1140-1141 [3d Dept 2010], *app dism* 15 NY3d 867 [2010]).

The decedent suffered from depression and alcohol abuse. He often resisted his daily insulin shot and flouted the dietary restrictions prescribed for him. Undoubtedly, a degree of vulnerability resulted. Of the two joint ventures, proponent was far more skilled and experienced in commercial matters. Despite the decedent's reliance on proponent in this respect, however, there is no evidence that proponent exploited his advantage, the hallmark of a "confidential relationship."

The terms of the decedent's financial relationship with the proponent, although informal in the extreme, were identical to the arrangements the proponent had with other

photographers he represented. Proponent memorialized each transaction in his notebook and then had decedent sign at the end of the notes to confirm receipt of his share of the proceeds. One of proponent's stolen notebooks, titled "Billy Name 2012 Payments," was returned to him during his deposition and is reproduced in the exhibits to his motion. Transactions from 2012, 2013 and 2015 are recorded, reflecting cash payments to decedent of over $21,000. Payments made between May and October 2013 for a "Warhol painting" total $3,000.[3] A series of undated cash payments totaling $10,000 are entered in the notebook, but not attributed to an event or a work sold (as are the other payments). These payments are made during the period proponent was paying decedent for the Warhol work and/or follow such entries in the notebook. Receipt of each payment was confirmed by decedent's signature.

Decedent reposed enormous trust in proponent, but there is no evidence that the proponent misused his position of trust (*Matter of Burke*, 82 AD2d 260, 271 [2d Dept 1981]). There is no evidence that proponent lured decedent into transactions that were against his interest or that disproportionately benefited proponent. Decedent retained and exercised his right of approval over the use of his work and its reproduction (*Matter of Nealon*, 104 AD3d 1088 [3d Dept 2013]). He was actively engaged in his joint venture with proponent, even during the period that he signed his will (*Matter of Leiter*, 2017 NY Misc LEXIS 3919 * [Sur Ct NY Cty](testator, a well-known elderly photographer, "spent hours signing books" for an exhibition of his work within weeks of signing his will).

[3] These are probably associated with proponent's purchase of a Warhol photograph from decedent, which occurred in May 2013. Much testimony is devoted to the circumstances and terms of this purchase, but there is no evidence that terms of the sale were fraudulent, unfair to decedent or not understood by him.

Throughout their relationship, the decedent managed his finances and paid his bills without assistance. He used the cash received from proponent to purchase money orders to pay his bills. Before entering the nursing home, he secured rental subsidies and later maintained his Medicaid eligibility by directing the proponent to pay out his share of income in $1,000 increments. Last, there is no evidence that decedent was isolated by the proponent or "completely dependent" upon him (*cf Matter of Giaquinto*, 164 AD3d 1527, 1532 [3d Dept 2018]). Proponent did not isolate decedent or control who he socialized with. Even after he gave up living independently, decedent continued to socialize with family and friends in and outside the assisted living facility (*Matter of Walther*, 6 NY2d 49, 52 [1959]).

There is no evidence, moreover, that proponent had a role in the making of the 2015 will offered for probate. He did not draft or dictate it or convey its terms to the supervising attorney; he was not present when it was discussed with the supervising attorney or when it was signed. The supervising attorney heard from her client that proponent was to be his executor, not from proponent.

The Court finds that the inference of undue influence created by the finding of a confidential relationship is counterbalanced with evidence that the proponent's dealings with the decedent were fair and free of undue influence. The burden is therefore once again on the objectant to demonstrate by a preponderance of the evidence that "the influencing party had a motive to influence, the opportunity to influence, and that such influence was actually exercised" (*Rollwagon v. Rollwagon*, 63 NY 504, 519 [1876]). The evidence of "actual exercise" may be circumstantial, but it must be specific as to "precisely where and when this influence was actually exercised." (*Matter of Stafford,* 111 AD3d 1216, 1217 [3d Dept 2013]).

The objectant claims, without proof, that the proponent alienated the decedent from his family. The evidence is to the contrary: objectant admitted that it was decedent's practice to keep her "at arm's length." In March 2015, the decedent told objectant that he no longer wished her to serve as his health care proxy, a role she had held since 2011. At about the same time, the objectant testified, she reduced her visits to her uncle from weekly to "I can't recall." By the time that decedent signed his new will on July 16, 2015, he told the supervising attorney that his family "never came to see him."

Absent from the objectant's proof is any evidence of the circumstances most often seen in cases of undue influence, such as signs of domineering behavior on the proponent's part, as in *In re Panek*, 237 AD2d 82 [4th Dept 1997]; efforts to denigrate the objectant or her family to the decedent (*In re Estate of Antoinette*, 238 AD2d 762, 764 [3d Dept 1997]); or to isolate the decedent from his family (*Estate of Delyanis*, 252 AD2d 585[2d Dept 1998]). The proponent had no role in hiring or paying the attorney-draftsperson of the 2015 will, as in *Matter of Neary*, 44 AD3d 949 [2d Dept 2007], or conveying the decedent's wishes to the supervising attorney (*Matter of Ford*, 26 Misc 3d 1213(A)[Sur Ct Bx Cty 2010]).

Instead of these run of the mill facts and circumstances, objectant's final and novel argument alleges that the irresistible force behind the undue influence and fraud practiced on decedent was a "seductive artifice" (*Estate of Smith*, 142 Misc 583, 584 [Sur Ct Putnam Cty 1932]). She alleges that proponent "purposefully and fraudulently strung Billy along romantically and physically so as to cause Billy to have overwhelming romantic and sexual feelings" for him. As evidence of proponent's grotesque manipulation, objectant's attorneys cite the "loving email closings" that the two employed: many were signed "LOVE" or "LOVE

LOVE" or even "LOVE LOVE LOVE." The objectant also questions proponent's motivations because he was "was overtly physically affectionate" with his old friend. Paula Weber was "literally" sickened as she saw her fiancée hug decedent, rub his shoulders or once, when decedent was hospitalized, his chest. Several of objectant's submissions refer with disgust to the "honeyed" voice or tone which proponent used with decedent.

As conclusive evidence of the "overt physical affection" so disturbing to objectant, her attorneys offer a photograph of decedent and proponent seated side by side. This photograph, taken by a professional photographer, shows the decedent leaning on the proponent with both hands on his thigh. Proponent's hand rests on top. When shown the photograph at his deposition, the proponent recalled without prompting that the photographer had *directed them* to pose this way. So much for seductive artifice.

For nearly 150 years, *Children's Aid Soc'y of NY v. Loveridge*, 70 NY 387, 394 (1877) has been cited for its vivid evocation of the nature of undue influence. Most often, its language is quoted for the proposition that undue influence may be exercised through "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted." In contrast, love is cited as the instrument of undue influence here, where testator is alleged have been love-sick to the point of incapacity. Fortunately, even in 1877, the Court of Appeals made clear that love is a perfectly lawful and appropriate reason to make a bequest: "the promptings of affection [and] the memory of kind acts and friendly offices" may thus duly guide a decedent's testamentary plan without inference of coercion or relentless importunity (*Children's Aid Soc'y v. Loveridge*, 70 NY at 394).

Undue influence cannot be established "when circumstances are presented which permit conflicting inferences" (*Matter of Stafford*, 111 AD3d at 1219). The circumstances here are that decedent was in love with proponent. There is no evidence that unrequited love or desire drove him to incapacity. These circumstances demonstrate that it wasn't fear, overweening influence or coercion that impelled decedent to his final testamentary act; decedent's was a long-term plan prompted by gratitude, respect and affection for proponent and a fervent desire to secure his artistic legacy.

FRAUD. Objectant bears the burden of establishing that the will was the result of fraud. To this end, objectant must show that proponent made "a false statement caused decedent to execute a will" that disposed of property in a manner different from will he would have made in the absence of such a statement (*Matter of Clapper*, 279 AD2d 730, 732 [3d Dept 2001], *citing Matter of Coniglio*, 242 AD2d 901, 663 NYS2d 456 (4th Dept 1997)]. Objectant has not offered any "false statements" on the part of proponent whatsoever.

Objectant's speculation and conclusory allegations do not create material issues of fact with respect to undue influence or fraud. The portion of objectant's application seeking dismissal of the motion for summary judgment on these theories is therefore denied and proponent shall have summary judgment therefor.

The Court having dismissed objectant's application to dismiss the motion for summary judgment based on due execution, lack of testamentary capacity, undue influence and fraud, proponent's motion for summary judgment is hereby granted and the July 15, 2016 instrument shall be accepted for probate. Letters testamentary shall issue to proponent upon his duly qualifying.

SANCTIONS.

Objectant reported that Weber gave her many of proponent's papers in 2016. Objectant produced one of the proponent's notebooks immediately prior to his deposition, to the apparent surprise of her attorneys. It is the delayed production of this notebook and other documents that is the basis for proponent's motion for sanctions, presumably under CPLR 3126. This Court has discretion to impose sanctions under CPLR 3126 "when a party intentionally, contumaciously or in bad faith fails to comply with a discovery order" (*Puccia v. Farley*, 261 AD2d 83 at 85[3d Dept 1999]). Prejudice must, however, result to the moving party if he or she is to secure the desired result (*Puccia v. Farley*, 261 AD2d at 86 [3rd Dept 1999]). No prejudice has been averred by proponent and the Court, searching the record, finds no evidence of the same. Proponent's motion for sanctions for objectant's failure to turn over documents in discovery in a timely manner is therefore dismissed.

ORDERED, ADJUDGED and DECREED, that proponent's motion for summary judgment is hereby granted in its entirety, with the exception of his motion for sanctions against objectant, which is denied;

FURTHER ORDERED, ADJUDGED and DECREED, that objectant's petition for discovery under SCPA 2103 is hereby dismissed;

FURTHER ORDERED, ADJUDGED and DECREED, that the letters testamentary issued to Susan Linich dated May 5, 2017, as amended by decree dated April 9, 2018, are hereby revoked;

FURTHER ORDERED, ADJUDGED and DECREED, that the last will and testament of William G. Linich (aka William George Linich) dated July 16, 2015 shall be accepted for probate;

FURTHER ORDERED, ADJUDGED and DECREED that letters testamentary shall issue to Dagon J. James, who shall serve without bond;

FURTHER ORDERED, ADJUDGED and DECREED, that Susan Linich shall within 60 days of the notice of entry of this Decision/Order, efile a petition to judicially settle her account and deliver to proponent's attorneys the estate bank account checkbook maintained by her or by her attorneys on her behalf and all bank statements issued for such account.

This constitutes the decision of the Court. All papers, including this Decision/Order, are hereby entered and filed with the Clerk of the Surrogate's Court. Counsel is not relieved from the applicable provisions of CPLR Section 2220 relating to service and notice of entry.

DATED: January 6, 2021

ENTER:

SARA W. McGINTY

Papers considered:

1. Notice of Motion by Kelly A. Pressler, Esq. filed August 24, 2020.
2. Affirmation in Support of Motion by Kelly A. Pressler, Esq. filed August 24, 2020.
3. Affirmation in Opposition to Motion by Andrew P. Nitkewicz, Esq. filed October 2, 2020.
4. Reply Affidavit by Kelly A. Pressler, Esq. filed October 13, 2020.