

Present: HON. ROBERT L. NAHMAN
SURROGATE

SURROGATE'S COURT: QUEENS COUNTY

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In the Matter of the Probate Proceeding,
Will of

ANN CARVELLI a/k/a
ANNA ROSE CARVELLI,

File No. 2005-3367

Deceased.
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A paper writing dated October 25, 1996 has been offered for probate as the decedent's Last Will and Testament. Objections to probate have been filed alleging, inter alia, lack of due execution, lack of testamentary capacity, fraud and undue influence purportedly exercised by the petitioner, and mistake. Petitioner moves for summary judgment dismissing the objections.

Summary judgment in contested probate proceedings is available where the proponent makes out a prima facie case for probate and the objectant fails to raise a material issue of fact (see, Matter of Coniglio, 242 AD2d 901; Matter of Parravani, 211 AD2d 965). An objectant opposing summary judgment must assemble and lay bare affirmative proof that his or her claims are real and capable of being established at trial (see, Stainless, Inc. v. Employers' Fire Ins. Co., 69 AD2d 27, aff'd 49 NY2d 924). The objectant is to be afforded every favorable inference that may be drawn from the evidentiary facts alleged (see, McArdle v. M & M Farms, 90 AD2d 538).

Liber 285 pgs. 48. - 51.

General, conclusory and unsupported allegations, however, are insufficient to defeat a motion for summary judgment (see, Iselin & Co. v. Mann Judd Landau, 71 NY2d 420).

On the issues of lack of due execution and testamentary capacity, the evidence submitted on the motion presents triable issues of fact.

Although the will was prepared by an attorney, which normally gives rise to a presumption of due execution, the attorney-draftsperson, who was also one of the two attesting witnesses, could not recall any of the specifics of the execution ceremony. The attorney testified that he could only recall what was in his notes, which appear to contain some factual inaccuracies. The other attesting witness, the attorney's former secretary, also could not recall this specific will signing. She did, however, testify as to her and the attorney's usual will execution practice.

Although the instrument contains an attestation clause which addresses the execution of the instrument, it does not contain any statement with respect to the decedent's competency. Nor are there contemporaneous self-executing affidavits relating to the issue. The second witness did testify, however, that she would have engaged in small talk with the testator before signing the instrument to determine whether she was competent.

The evidence taken as a whole raises issues of fact. Accordingly, the branches of the motion for summary judgment dismissing the objections of lack of due execution and lack of testamentary capacity are denied.

On the claims of undue influence, fraud and mistake, however, objectant has failed to sustain her burden of establishing triable issues of fact. At best, objectant has set forth contentions which are speculative in nature and do not rise to the specificity required to demonstrate her claims.

To establish fraud, objectant must prove that someone knowingly made a false statement that caused the decedent to execute a will that disposed of her property in a manner different from the disposition she would have made in the absence of that statement (see, Matter of Coniglio, supra). No such evidence has been produced or articulated.

There is also no evidence that petitioner had any direct involvement in the preparation or execution of the will, or that she exercised "a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained the testator to do that which was against [her] free will and desire" (Matter of Walther, 6 NY 2d 49, 53, quoting Children's Aid Soc. v Loveridge, 70 NY 387, 394).

Additionally, objectant has failed to set forth any evidence that the decedent mistakenly omitted to provide for three of her children and that the omission was unintentional.

Accordingly, the branches of the motion seeking summary judgment dismissing the objections of undue influence, fraud and mistake are granted.

Lastly, the remaining portions of the objections contained in paragraphs

numbered 5 and 6, which relate to the marital status of objectant's parents and its affect on title to the marital home, are not valid objections to the probate of the proffered instrument. Accordingly, they are dismissed.

Settle Order.

The Clerk of the Court is directed to mail a copy of this decision and order to the parties who have appeared in this proceeding.

Dated: December 11, 2006



SURROGATE