Matter of Samuel

2024 NY Slip Op 24014 [82 Misc 3d 616]

January 11, 2024

Graham, S.

Surrogate's Court, Kings County

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[*1]

In the Matter of Phylliscita Ismay Samuel, Deceased.

Surrogate's Court, Kings County, January 11, 2024

APPEARANCES OF COUNSEL

Law Office of Lorin O. Lewis, P.C., Brooklyn (*Lorin O. Lewis* of counsel), for Leopold Osborne.

Johnnie Woluewich, Bronx, for Morgan Samuel.

{**82 Misc 3d at 618} OPINION OF THE COURT

Bernard J. Graham, S.

In this contested probate proceeding, Leopold J. Osborne (Osborne) filed a petition to deny probate of a written instrument dated October 30, 2014, purported to be the last will and testament of the decedent. A separate petition was filed by Morgan Samuel (Samuel) seeking probate of the October 30, 2014 instrument, and objections to this petition were filed by Osborne. Mr. Osborne now moves for summary judgment and to deny probate of the propounded 2014 instrument. For the reasons set forth below, the motion for summary judgment is denied.

Procedural History

Phylliscita Ismay Samuel (decedent or Phylliscita) died on April 23, 2016. On June [*2]23, 2016, a propounded instrument dated October 30, 2014 (the 2014 instrument), was filed with the court, along with her death certificate and an affidavit of domicile. On October 26, 2016, a petition for the denial of the petition for probate and to grant letters of administration, with supporting documents, was filed by Osborne, by his attorney. Thereafter, on January 18, 2017, a notice of appearance was filed by counsel to Samuel, along with a petition seeking probate of the 2014 instrument and letters testamentary issued to Samuel.

The instant motion was filed on March 4, 2020, in which Osborne seeks dismissal of the cross-petition and summary judgment. An affirmation in opposition to Osborne's motion, dated March 22, 2020, was filed by Samuel's attorney. Thereafter, a court conference was scheduled for May 18, 2021. Another court conference was held on September 12, 2023, at which time Osborne's attorney was given a final opportunity to file a reply and another conference was scheduled for October 11, 2023, at 3:00 p.m. On October 11, 2023, at 9:16 a.m., Osborne's attorney emailed the court to inquire whether the opposition to his motion could be uploaded and he indicated that he would "file a response within 7 days." Samuel's attorney responded at 9:28 a.m. that he objected to an extension of time for the filing of a reply, asserting that "an 11th hour extension, for no justifiable reason, would be highly inappropriate and prejudicial." Samuel's counsel sent another email at 9:36 a.m. attaching verification{**82 Misc 3d at 619} that the opposition papers had been sent to Osborne's attorney no less than four times. At 10:10 a.m., the court responded that the request for an extension of time would be discussed at the 3:00 conference. At 2:20 p.m., Osborne's attorney emailed the court and Samuel's attorney a copy of his reply, the attorney affirmation in response to opposition to summary judgment, which he also uploaded to NYSCEF (New York State Courts Electronic Filing System). The conference was conducted as scheduled, and Samuel's attorney requested an opportunity to review the reply and respond as needed. This request was granted. On October 18, 2023, Samuel's attorney emailed the court and Osborne's attorney with a copy of an affirmation in furtherance of the parties' October 11, 2023 court conference, which raised the concern that the October 11, 2023 reply papers contained fake case law resulting from artificial intelligence hallucinations.

Factual Background

The decedent executed a purported prior will on May 11, 2012 (the 2012 instrument). In 2014, Phylliscita was the subject of a Mental Hygiene Law article 81 guardianship proceeding in Kings County, bearing index number 100184/2014. By order and judgment appointing guardian of the person and/or property (O&J) dated September 8, 2014, Phylliscita was adjudicated incapacitated and the court (by the Honorable Michael L. Pesce) appointed Samuel as her guardian of the person and property. Thereafter, on October 30, 2014, the decedent executed the purported 2014 will which is the subject of this proceeding.

In addition to summary judgment, Osborne seeks dismissal of Samuel's petition and denial of the propounded 2014 instrument, alleging that the decedent lacked capacity at the time of execution, and that the instrument was procured as a result of fraud, duress and undue influence by Samuel and others.[*3]

Discussion

Allegations of Use of Artificial Intelligence

At the outset, the court is compelled to address the allegation that Osborne's attorney submitted reply papers which contain fictional and/or erroneous citations as a result of his reliance on a website which contained information created by generative artificial intelligence (AI). While this issue is one of first impression for this court, other courts have addressed similarly problematic filings. {**82 Misc 3d at 620}

Even without definitive proof that AI was used to prepare the reply, or an admission by Osborne's counsel, or in fact any acknowledgment by him of the allegations raised by Samuel's attorney whatsoever, it is evident that five of the six cases cited in his reply are either erroneous or nonexistent.

Although the court is dubious about using AI to prepare legal documents, it is not necessarily the use of AI in and of itself that causes such offense and concern, but rather the attorney's failure to review the sources produced by AI without proper examination and scrutiny. In his haste to submit a response, Osborne's attorney took no steps to ensure that the information and citations that he was presenting to the court were legitimate and factual, and he certified and affirmed under penalty of perjury "to the best of his knowledge, information and belief, formed after inquiry reasonable under the circumstances, that the presentation of the paper or the contentions herein are not frivolous as defined in Subsection C of 130-1.1 of the Rules of the Chief Administrator of the State of New York." A simple Lexis search of the cases cited, which takes mere seconds, shows that the cases and citations contained within the response are incorrect or fake and nonexistent. Had counsel taken the minimal time and effort needed to cross-check this information, he would have realized this as well.

> "Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system." (*Mata v Avianca, Inc.*, 2023 WL 4114965, *1, 2023 US Dist LEXIS 108263, *2 [SD NY, June 22, 2023, 22-cv-1461 (PKC)].)

The court has determined that the penalty for committing this fraud upon the court should include striking the pleading from the record and the scheduling of an appearance before the court to address whether of the imposition of economic sanctions is warranted. These consequences are similar to the penalties imposed by an Ohio court upon violation of the artificial intelligence provision established in its standing order {**82 Misc 3d at 621} governing civil cases, which prohibits the use of AI in the preparation of any filing submitted to the court. (*See Whaley v Experian Info. Solutions, Inc.*, 2023 WL 7926455, 2023 US Dist LEXIS 205468 [SD Ohio, Nov. 16, 2023, Case No. 3:22-cv-356].)

The New York Codes, Rules and Regulations (NYCRR) at 22 NYCRR 130-1.1 (c) states that

"conduct is frivolous if:

"(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

"(2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or

"(3) it asserts material factual statements that are false.

"Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall [*4]consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

[1] The court finds that counsel's conduct was frivolous since his reply asserts material factual statements regarding the case law and court holdings that are false. He had ample time available to investigate the legal and factual bases of the contents of his reply, as over three years had elapsed since the filing of his own motion and Samuel's opposition in March 2020. Furthermore, Osborne's attorney was explicitly provided an additional and final opportunity to file the reply during the court conference held on September 12, 2023. Lastly, as previously noted, it should have been apparent to counsel that his research was completely erroneous by simply checking the citations on legal search engines such as Lexis or Westlaw.

Pursuant to 22 NYCRR 130-1.1 (a),

"The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses{**82 Misc 3d at 622} reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart."

Therefore, the court would be well within its discretion to sanction Osborne's counsel for such conduct, and the appropriateness of sanctions will be addressed at a date to be set by the court.

Motion for Summary Judgment

Summary Judgment Standard of Review

Summary judgment is a drastic remedy that may be granted only where there is an absence of any material issues of fact requiring a trial. (*See* CPLR 3212 [b]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Failure to make this initial showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) In reviewing the sufficiency of the proponent's submissions, the facts must be carefully viewed in the light most favorable to the nonmoving party. (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011].)

Once a prima facie showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of material issues of fact requiring a trial of the action. (*Chance v Felder*, 33 AD3d 645 [2d Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) In order to defeat a motion for summary judgment, the respondent must "lay bare [their] proof" and demonstrate that there is a genuine triable issue of fact, by allegations that are specific and detailed and substantiated by admissible evidence in the record. (*Towner v Towner*, 225 AD2d 614, 615 [2d Dept 1996].) Mere conclusory assertions will not suffice. (*Matter of O'Hara*, 85 AD2d 669, 671 [2d Dept 1981]; *[*5]McGahee v Kennedy*, 48 NY2d 832 [1979].)

While the court has authority to grant a summary judgment motion denying probate, "occasion for granting such relief may {**82 Misc 3d at 623}be rare in a probate proceeding" (*see Matter of Pascal*, 309 NY 108, 113 [1955]).

Testamentary Capacity

The proponent of a will bears the initial burden of proving testamentary capacity, i.e., that the testator understood the nature and consequences of making the will, the nature and extent of her property, and the natural objects of her bounty (*Matter of Sabatelli*, 161 AD3d 872, 874 [2d Dept 2018]). The function of the court on a motion for summary judgment is not to resolve issues of fact nor to assess credibility, but to determine whether any triable issue of material fact exists. (*Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019].) "While summary judgment may be available in probate proceedings, that remedy is inappropriate in any case where there are material issues of fact" (*Matter of Pollock*, 64 NY2d 1156, 1158 [1985] [citation omitted]). Further, "[w]hen there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of [testamentary] capacity is one for the jury." (*Matter of Kumstar*, 66 NY2d 691, 692 [1985].)

[2] The crux of Osborne's argument that Phylliscita lacked capacity at the time of execution of her will is because she had been found to be incapacitated and was appointed a guardian. However,

capacity in the context of an article 81 proceeding is much different from the testamentary capacity needed to execute a will. Mental Hygiene Law § 81.02 (b) requires that a determination of incapacity be based upon a finding that a person is likely to suffer harm because the person is unable to provide for personal needs and/or property management, and the person cannot adequately understand and appreciate the nature and consequences of such inability. Further, Mental Hygiene Law § 81.02 (c) provides that in making a determination, primary consideration shall be given to the functional level and functional limitations of the person, including an assessment of the person's activities of daily living. Activities of daily living include tasks such as dressing, grooming, cooking, or banking, pursuant to Mental Hygiene Law § 81.03 (h). The Mental Hygiene Law does not require medical testimony in a guardianship proceeding. (*Matter of Bess Z.*, 27 AD3d 568 [2d Dept 2006].)

The standard for testamentary capacity is different from the requirements of Mental Hygiene Law article 81. It is well established that{**82 Misc 3d at 624}

> "to possess the mental capacity to make a will, a person must only 'be able to think with sufficient clarity so that without prompting he is able to understand and carry out the business to be transacted; to hold in mind the extent and nature of his property and the natural objects of his bounty and the relation of one to the other.' " (*Matter of Coddington*, 281 App Div 143, 146 [3d Dept 1952], citing *Matter of Heaton*, 224 NY 22 [1918].)

In *Matter of Strong* (179 App Div 539, 547 [3d Dept 1917]), the Court declined to decide the issue of capacity as a matter of law, despite the testator's history of convulsions, noting that "[q]uestions of fact arising in an action to determine the validity of a will are no different in this respect from questions of fact in any other case." It is an incorrect reading of the law to assert that "as a result" of the appointment of an article 81 guardian, the decedent lacked testamentary capacity with respect to due execution of the 2014 instrument.

Accordingly, the court finds that Osborne has not established a prima facie showing of entitlement to judgment as a matter of law, and that triable issues of material fact exist in this instance as to testamentary capacity. Thus, the motion for summary judgment on the grounds that the decedent lacked capacity at the time of execution must be denied.[*6]

Undue Influence and Fraud

Where undue influence is alleged, three elements of undue influence must be established: motive, opportunity, and the actual exercise of influence. (*Estate of Malone*, 46 AD3d 975 [3d Dept 2007].) To prove undue influence, the objectant must demonstrate

> "that the influence exercised amounted to 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 his free will and desire, but which he

was unable to refuse or too weak to resist." (*Matter of Walther*, 6 NY2d 49, 53 [1959], quoting *Children's Aid Socy. of City of N.Y. v Loveridge*, 70 NY 387, 394 [1877].)

As for fraud, "[a]n objectant seeking to establish that a will is the product of fraud 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{**82 Misc 3d at 625} which the testator would have effected." (*Matter of Rottkamp*, 95 AD3d 1338, 1339-1340 [2d Dept 2012].)

[3] Although Osborne contends that "as the newly appointed guardian, [Morgan Samuel] maintained a position of undue influence over the decision making of the decedent," the court notes that an article 81 guardian appointed by the Supreme Court is not automatically deemed to be in an adversarial role or assumed to "unduly influence" their ward. Osborne also argues that the power granted by the Kings County Supreme Court does not grant the power to draft a new will. However, while the O&J conveyed certain authority to the guardian, it did not prohibit Phylliscita from executing a will or revoking a prior will. By faulting the guardian for not requesting authority from the Supreme Court to allow Phylliscita to execute a will, and alleging that the guardian acted outside the scope of his appointment, Osborne attempts to retroactively impose a burden upon the guardian which does not exist under the law. Nor would the O&J have provided for "the change, revision or removal of a previously drafted will" within the "specific guidelines for the activities, responsibilities, and duties of the appointed guardian," as Osborne seems to suggest, since no one, not even a court appointed guardian, can execute a last will and testament on behalf of another person. There is also no requirement that an attorney drafter obtain "input" from a medical professional when drafting a new will.

Osborne also suggests that undue influence "is abundantly clear" since the 2014 instrument named Samuel as executor and beneficiary, and by that time he was also acting as her court appointed guardian. However, even "hounding" a testator to make a will (*see e.g. Matter of Neuman*, 14 AD3d 567, 568 [2d Dept 2005]), or "exercis[ing] control over [a testator's] activities," does not necessarily rise to the level of undue influence (*see e.g. Matter of Klitgaard*, 83 AD2d 651, 651 [3d Dept 1981]).

The Appellate Court in *Matter of Burke* (82 AD2d 260 [2d Dept 1981]) reversed a decree and remitted to the Surrogate's Court for a new trial, in a case where a decedent executed a subsequent will while hospitalized which made a bequest to the operator of the nursing home where the decedent had been a patient and received care for some time. The *Burke* Court cited *Walther*, noting that undue influence

"must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment{**82 Misc 3d at 626} arising from consanguinity, or the memory of

> kind acts and friendly offices, but a coercion produced by importunity . . . and which could not be resisted, so that the motive was tantamount to force or fear." (*Matter of Burke*, 82 AD2d at 269.)

These criteria are questions of fact which make summary judgment inappropriate under the circumstances.

> The *Burke* Court also cited *Matter of Elmore* (42 AD2d 240 [3d Dept 1973]), which
>
> "held, with respect to the connection between a testamentary beneficiary and the attorney preparing the will, as [*7]follows: 'Where a will has been prepared by an attorney associated with a beneficiary, an explanation is called for (see *Matter of Lamerdin*, 250 App. Div. 133, 135), and *it is a question of fact for the jury* as to whether the proffered explanation is adequate.' " (*Matter of Burke*, 82 AD2d at 274.)

Osborne has argued that since Mary Katherine Brown, Esq. was the attorney who drafted Phylliscita's 2014 instrument and was also Samuel's attorney in the guardianship proceeding, she could not have believed decedent to be of sound mind or knowledgeable of the extent of her bounty or relations. The court agrees with the *Burke* Court that this too is an issue of fact for consideration by a jury.

The court therefore finds that Osborne has failed to establish a prima facie showing of entitlement to judgment as a matter of law, and that triable issues of material fact exist as to the question of undue influence.

Conclusion

All other arguments have been considered and found to be moot or without merit. For the foregoing reasons, the motion for summary judgment to dismiss the cross-petition and deny probate is denied in its entirety, and this matter shall proceed to trial. Based on the foregoing, it is hereby ordered that the attorney affirmation in response to opposition to summary judgment, dated October 11, 2023, is hereby stricken from the record; and it is further ordered that counsel for Leopold Osborne shall appear before the court on January 30, 2024, at 10:00 a.m., for further proceedings related to the improper submission that relies on what appears to be AI generated research and citations.