SURROGATE'S COURT : STATE OF NEW YORK
COUNTY OF WESTCHESTER
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DECISION and ORDER

Probate Proceeding, Will of

File No. 2007/227

MARIA DEL CARMEN ROCHE DE CORREA a/k/a MARIA DEL CARMEN ROCHE Y MARTINEZ a/k/a CARMELITA R. CORREA a/k/a MARIA DEL CARMELA ROCHE MARTINEZ DE CORREA a/k/a MARIA DEL CARMEN ROCHE DE MOLLER a/k/a MARIA DEL CARMEN (ALIAS) CARMELA O CARMELITA ROCHE MARTINEZ DE CORREA a/k/a CARMELITA ROCHE DE CORREA,

Deceased.

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SCARPINO - S.

In this contested probate proceeding: (1) petitioner Michael Loening, the attorney-draftsman and proponent of an instrument dated August 9, 1990 ("propounded instrument"), and respondent Joaquin Roche Diaz, a beneficiary under the propounded instrument, move for summary judgment dismissing the objections to probate of objectant Amira Beatrix Roche Diaz; and (2) objectant Amira Beatrix Roche Diaz cross moves to permit certain discovery. The motion is granted and the cross motion is denied.

At the time of her death in November 2006, the decedent was domiciled in Mexico. She was married twice, with both husbands having pre-deceased her. She had no children, and was survived by one sister and the issue of five pre-deceased siblings, including objectant Amira Beatrix Roche Diaz ("the objectant") and her nephew, Joaquin Roche Diaz, who is the sole surviving beneficiary of the estate of the propounded

instrument. The decedent had executed two wills: one disposing of her assets in Mexico and the instant will, which disposed of her assets located in the United States.

In January 2007, the petitioner, as the nominated executor under the propounded instrument, commenced this proceeding to have the propounded instrument admitted to probate as the decedent's last will and testament. In June 2007, the examinations of the petitioner, as attorney-draftsman, and James Kenworthy, Esq., one of the witnesses to the execution of the propounded instrument, were held pursuant to SCPA 1404. Subsequently, the objectant filed verified objections to the petition, alleging undue influence, fraud and lack of testamentary capacity.

In September 2007, the petitioner noticed the objectant's EBT for October 18, 2007 (Objectant's Cross Motion, Exhibit C), which was outside the date set by the Court in its Discovery Order for completing her EBT (Petitioner's Motion, Exhibit 7). After informing petitioner's counsel that the objectant was unavailable then due to a medical condition, in December 2007, objectant's counsel informed counsel for Joaquin Roche Diaz that the objectant would be available to be deposed in January 2008 (Exhibit F). At the same time, objectant's counsel noticed Mr. Diaz's deposition for January 4, 2008 (Exhibit G), which was also outside the date set by the Court for completing his EBT.

The petitioner and Joaquin Roche Diaz now move for summary judgment dismissing the objectant's objections to probate. In support of their motion, they submit, *inter alia,* the petitioner's SCPA 1404 deposition testimony (Petitioner's Motion, Exhibit 2).

At his examination, the petitioner testified that he had represented the decedent since about 1975 (Petitioner's Motion, Exhibit 2, p. 8, 11), and he had drafted her prior "American" will (p. 24). The decedent "spoke English well" (p. 20), and she and the petitioner communicated in English (p. 19). According to the petitioner, the decedent was "in fine health" when she executed the propounded instrument, and he did not know of her having of any medical problems (p. 27). When she executed the propounded instrument, the decedent had no difficulty in reading the document or understanding the conversation, and she showed no confusion (p. 48). The petitioner described her as "very alert" (p. 51).

The petitioner and the decedent met four or five times in the preparation of the propounded instrument, and the petitioner prepared about four or five drafts thereof in an approximately 18-month period (Petitioner's Motion, Exhibit 2, p. 20-21). After being provided with each draft, the decedent would make changes. A few months later, she and the petitioner would meet again, and she would think about it some more (p. 34-35). The petitioner reviewed the propounded instrument with the decedent prior to her executing it, particularly her choice of beneficiaries to "make sure that this is really what she wanted to do" (p. 48).

The decedent knew the names and identities of the beneficiaries of her estate, and she chose the beneficiaries herself. The petitioner testified: "She made up her mind as to what she wanted to do and told me. I did not influence what she was doing." The petitioner did not know anything about the decedent's relationship with Mr. Diaz "except that she thought very highly of him," and he thought Mr. Diaz was the son of the decedent's

favorite brother (Petitioner's Motion, Exhibit 2, p. 32-33). Additionally, she understood the nature of the power of appointment which she had over the principal of two trusts for her benefit (p. 29).

In response, the objectant opposes the motion and cross-moves to permit certain discovery, particularly the IBT of Joaquin Roche Diaz. Essentially, she asserts that the Court should deny the motion for summary judgment because facts essential to justify opposition may exist but cannot be stated because they are in Mr. Diaz's possession (CPLR 3212 [f]).

In support of her cross motion, the objectant submits a sworn statement from Allan F. Molina Lopez, a Mexican attorney. Therein, he states that a Mexican court found the decedent to be incompetent, suffering from Alzheimer's disease with late onset dementia, and in February 1999, that court appointed Joaquin Roche Diaz as her guardian. Ultimately, the Mexican court ordered Mr. Diaz to account as guardian of the decedent, and in 2007 he was removed as guardian and ordered to pay in excess of ten million pesos due to mismanagement of her assets while he was guardian.

It well settled that on a motion for summary judgment, the moving party must establish a prima facie case of its entitlement to judgment as a matter of law by submitting admissible evidence demonstrating the absence of any triable issue of fact (*see Erikson v J.I.B. Realty Corp.,* 12 AD3d 344 [2004]; *Taub v Balkany,* 286 AD2d 491 [2001]). "Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers. Moreover, '[s]ince summary judgment is the procedural equivalent

of a trial, any doubt as to the existence of a triable issue, or where the material issue of fact is "arguable," the motion should be denied" (*Peerless Ins. Co. v Allied Building Prods. Corp.*, 15 AD3d 373 [2005] [citations omitted]). However, once the moving party makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof to establish the existence of material issues of fact which require a trial (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Boz v Berger,* 268 AD2d 453 [2000]).

As to the objection to decedent's testamentary capacity, the proponent must prove by a preponderance of evidence that, at the time of execution, the decedent possessed the requisite capacity to make a will by showing that she was of sound mind and memory (EPTL 3-1.1; *see Matter of Slade,* 106 AD2d 914). There is a presumption that everyone is deemed to have testamentary capacity (*see Matter of Betz,* 63 AD2d 769), and the degree of capacity required to satisfy the statute is slight (*see Matter of Codington,* 281 AD 143, *affd* 307 NY 181). Testamentary capacity may be established by evidence that the testator understood the nature and extent of her property, the natural objects of her bounty, and the provisions of the instrument (*Matter of Kumstar*, 66 NY2d 691).

Here, the petitioner has established a prima facie case that the decedent possessed testamentary capacity through his own EBT testimony (*see e.g. Matter of Betz*, 63 AD2d 769). As outlined above, his testimony establishes that the decedent knew and understood what she was signing. In response, the objectant offers no evidence to raise triable issues of fact as to decedent's ability to fully comprehend the extent of her property, the natural objects of her bounty, and the provisions of the propounded instrument at that time.

As to the objections of fraud and/or undue influence or duress, an objectant generally bears the burden of proof on these issues *(see Matter of Bianco*, 195 AD2d 457; *Matter of Evanchuk*, 145 AD2d 59; *see also Matter of Walther*, 6 NY2d 49). To establish fraud, an objectant must demonstrate by clear and convincing evidence that a false statement was made which caused the testator to execute a will that disposed of his/her property in a different manner than he/she would have if the statement had not been made (*see Matter of Beneway*, 272 App Div 463).

To establish undue influence, "an objectant has to show that the acts of the influencing party are . . . effectively mak[ing] it his [or her] will and not the will of the decedent. Hence, the influence exercised [must] amount[ ] 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 [or her] free will and desire, but which he [or she] was unable to refuse or too weak to resist. To be successful, motive, opportunity and the actual exercise of undue influence must be established" (*Matter of Greenwald,* 47 AD3d 1036, 1037 [internal quotations and citations omitted]; *see Matter of Fiumara*, 47 NY2d 845; *Matter of Walther*, *supra*).

In this case, the objectant has failed to introduce any evidence that the petitioner, Joaquin Roche or anyone else fraudulently induced the decedent into changing her previous testamentary plan or exercised *any* influence, much less undue influence, over the decedent, with respect to the propounded instrument. To the contrary, the evidence demonstrates just the opposite - that after careful deliberation, the decedent herself

directed the petitioner as to how she wanted to dispose of her American assets.

"Although determination of a summary judgment motion may be delayed to allow for further discovery where evidence necessary to oppose the motion is unavailable to the opponent (*see* CPLR 3212 [f]), a determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence. A party's mere hope that further discovery will reveal the existence of triable issues of fact is insufficient to delay determination on the issue of summary judgment" (*Lambert v Bracco,* 18 AD3d 619, 620 [internal quotations and citations omitted] [2005]; *see Pina v Merolla,* 34 AD3d 663, 664 [2006]).

Here, the objectant's mere hope that deposing Joaquin Roche Diaz will uncover some evidence in support of her objections is an insufficient basis to postpone deciding the motion for summary judgment (*see Weintraub v Levine,* 2 AD3d 664 [2005]; *Naranjo v Star Corrugated Box Co.,* 18 AD3d 545 [2005]), especially when the objectant herself does not submit an affidavit explaining what personal knowledge, if any, she had with respect to her objections (*see Rainford v Han,* 18 AD3d 638 [2005]), or setting forth any facts supporting any of her objections.

Further, the statement by Allan Molina Lopez is insufficient to raise a triable issue of fact to defeat the motion for summary judgment or to warrant ordering additional discovery pursuant to CPLR 3212 (f). That a Mexican court found the decedent to be incompetent in 1999 does not raise a triable issue with respect to her competency when the propounded instrument was executed some nine years earlier. Similarly, any

mismanagement of the decedent's assets by Mr. Diaz as her guardian does not raise any issue of fact with respect to fraud or undue influence.

Accordingly, the court grants the motion for summary judgment dismissing the objectant's objections in its entirety, and denies the objectant's cross-motion. Additionally, because the court is satisfied that the propounded instrument was duly executed in accordance with the requirements of EPTL 3-2.1, the propounded instrument dated August 9, 1990 shall be admitted to probate.

Letters testamentary shall issue to the petitioner upon him duly qualifying according to law (SCPA 708), to serve as executor without bond. The petitioner is hereby directed to settle the decree admitting the will to probate.

THIS IS THE DECISION AND ORDER OF THE COURT.

The following papers were considered:

1. Petitioner's Notice of Motion, dated December 21, 2007, including all supporting affidavits and exhibits; and

2. The Objectant's Notice of Cross Motion, dated January 31, 2008, including the supporting affirmation and exhibits.

Dated: White Plains, NY
May 20 , 2008

HON. ANTHONY A. SCARPINO, JR.
Westchester County Surrogate

MATTER OF MARIA DEL CARMEN ROCHE D CORREA
File No. 2007/227

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