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

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Probate Proceeding, Estate of

MAGDOLNA GRUNWALD.

Deceased,

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DECISION and ORDER

File No. 2017-3882

M O N T A L B A N O, S.

The following papers were considered in determining this motion for summary judgment:

PAPERS	NUMBERED
Notice of Motion for Summary Judgment, Attorney Affirmation in Support, Memorandum of Law in Support, Affidavits of Victor Sutton, Sarah Stange, Lea Honigwachs, Morris Harary, Esq. Gershon Fluk, Esq....	1-8
Notice of Cross-Motion, Attorney Affirmation in Support, Affidavits of Oded Greenvald, Chaim Grunwald, Dr. Joseph Sutton, Katalin Halasz,...	9-14
Reply Attorney Affirmation in Support of Summary Judgment Reply Affidavit of Victor Sutton...	10-11

Preliminary Statement

In this contested probate proceeding, Victor Sutton (Sutton) petitions to probate a written instrument dated October 21, 2016 (propounded instrument) purporting to be the last will and testament of Magdolna Grunwald (Testator). Oded Greenvald (Oded) and Chaim Grunwald (Chaim) (together Objectants) filed objections to probate. Sutton now moves for summary judgment and Oded cross-moves to deny probate and for other relief. [1] Chaim files opposition to Sutton's motion. For the reasons set forth below, Proponent's motion is granted in part and denied in part, and Oded's cross-motion is denied in its entirety.

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[1] Oded cross-moves for summary judgment (a) directing the proponent to reimburse him for funeral expenses and (b) removal of the proponent as preliminary executor and disqualifying the proponent as a fiduciary due to his "improvidence of duty and dishonesty." The request for a judgment directing the proponent to reimburse the objectant for funeral expenses is not a form of relief available in the context of a probate proceeding. Thus, the request will not be considered. The request to revoke the preliminary letters is also not a form of relief available and will not be considered. The request is further moot since the preliminary letters have expired.

Background / Factual Allegations

The Testator died on July 30, 2017 at age 97, leaving no issue or other close family members. The Objectants are the Testator's predeceased husband's nephews, who were beneficiaries under a prior alleged will executed in 2006. The propounded instrument dated October 21, 2016 was attorney-drafted and supervised, and bears the signatures of three witnesses and the Testator. Sutton is the nominated executor, but not a beneficiary under the propounded instrument. After certain cash bequests, the residuary estate is bequeathed to Yeshivat Shaare Torah,[2] with the condition that kaddish (a Jewish prayer) be recited yearly on the anniversaries of the Testator and her husband's deaths, and that a memorial plaque be placed at the school in honor of their memory.[3]

The Objectants allege that Sutton unduly influenced the Testator to execute a will that would leave her estate to an educational institution to which she had no prior connection. The Objectants further challenge due execution and allege that the Testator lacked testamentary capacity.

Morris Harary, Esq. (Harary) submits an affidavit stating that he was the attorney-drafter and that he signed the instrument as one of three witnesses to the execution. Harary states that he had known the Testator for over 15 years and had previously drafted wills for her and her husband. Harary further states that he also drafted the 2006 will, which also nominated Sutton as the executor. Harary asserts that the Testator instructed him to completely remove Oded as a beneficiary and provide $50,000 only to each of his brothers. Harary further states that the Testator advised him that Oded had stolen her money and acted dishonestly, and she no longer wanted him to benefit from her estate. The Testator also expressed her wish to leave her estate to an institution that would memorialize and honor her and her husband, which she did not believe the beneficiaries of her prior will would do.

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[2] Yeshivat Shaare Torah is located in Brooklyn and describes itself as a "Sephardic private Jewish school" for students from elementary through high school.

[3] The propounded instrument also provides for cash bequests of $5,000 to Benjamin Deutsch (relation unknown), and $50,000 each to Chaim Grunwald, Jacob Grunwald (Objectants' brother) and Mose Herman (relation unknown).

Harary further submits that the execution ceremony took place at the Testator's home and upon his arrival, he reviewed the terms of the propounded instrument with the Testator. Harary states that he read the instrument verbatim to the Testator before the two other witnesses and asked if the Testator understood it. The Testator stated that she understood the instrument was her will and that it expressed her wishes regarding the disposition of her estate. Harary then witnessed the Testator and the witnesses sign the instrument in each other's presence. Harary states that while the Testator had some physical limitations, she "had her wits about her." The Testator understood the extent of her property, the nature of the relationship between herself and the beneficiaries of her prior will, and she made clear what she wished to leave those beneficiaries in the propounded instrument. The Testator did not appear to be under any duress or influence of anyone.

Harary also states that the Testator retained him to commence an action to recover the funds in joint accounts she held with Oded, and to remove Oded from the accounts.[4] Harary provides a copy of the retainer agreement to that effect. Harary also asserts that he prepared an affidavit for the Testator to sign which states, *inter alia,* "Not only was/is my intent to disinherit [Oded], but I have instructed that every attempt be made to recover all of the funds he withdrew from my bank accounts for my benefit while I'm alive and for the benefit of my estate after my death."

Sarah Stange (Stange) submits an affidavit stating that she was one of the attesting witnesses to the propounded instrument.[5] Stange states that she had known the Testator for over 10 years and was her fulltime caregiver for the last 3 years of her life. Stange further states that at the time of the execution of the instrument, the Testator was an active senior and mentally sharp.

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[4] In a related proceeding, Sutton commenced an action against Oded to turnover three bank accounts to the estate, which were previously held jointly by the Testator and Oded. Sutton alleges that the accounts were hold jointly for convenience purposes only and Oded alleges that the accounts were held with right of survivorship. In motion papers in that proceeding, Oded admitted that all of the funds in the accounts, totaling approximately $1,200,000.00, were deposited by the Testator; and that he only made a withdrawal from the accounts on one occasion, when he received a call that the Testator was in "desperate need of funds." In response, Oded contacted the bank and withdrew only $2,000.00 to send to the Testator.

[5] It appears that the third witness, Malik Hatten, was not deposed and did not submit an affidavit. He did, however, sign an affidavit of attesting witnesses at the time of execution.

Stange states that she and the Testator played Rummikub and Scrabble every day and the Testator often won. The Testator also had a group of friends who came over to play cards a couple of times a week up to the time of her death. On the date of the execution, Stange witnessed the attorney drafter read the instrument out loud and the Testator expressed that she understood and was "happy with it."

In support of his motion for summary judgment, Sutton submits an affidavit stating that he knew the Testator for over 50 years as a family friend. Sutton further states that in 2016, the Testator expressed that she wished to change her prior will and that she no longer wished to leave her estate to her nephews-in-law, who were not blood relatives. The Testator was "especially upset with Oded" because she came to believe he maintained a relationship with her solely to get her money. The Testator asked Sutton's opinion as to leaving her estate to an Orthodox Jewish institution with an excellent reputation in an amount that would have a significant impact. She also expressed a desire for the institution to properly memorialize both the Testator and her husband's lives. Sutton further states that the Testator's husband lost two children in the Auschwitz concentration camps and the Testator was unable to bear children. Accordingly, the idea of leaving her estate to benefit a school for Jewish children appealed to her.

Sutton also states that he recommended Yeshivat Shaarei Torah as it is a well-known, established elementary Yeshiva founded in 1979, from which Sutton's many grandchildren graduated. Sutton asserts that the Testator was very impressed with the Yeshiva and settled on leaving her estate to the institution. Sutton further asserts that he has no financial interest in the Yeshiva and that he gains nothing from the estate, and that his only objective was to carry out the Testator's wishes. Sutton also states that at the time of the execution of the propounded instrument, the Testator was very active, had an extremely sharp mind, and was very vocal and outspoken with her opinions on matters ranging from Israeli current events and Sutton's running of his business. Sutton denies that the propounded instrument is the product of any undue influence on anyone's part.

Lea Honigwachs (Honigwachs) submits an affidavit stating that she had known the Testator for 33 years and considered her a close friend. Honigwachs states that in or about September 2016, the Testator expressed extreme distress over her discovery that Oded had been "tricking" her by having his name placed on her bank accounts, supposedly for her convenience

and safety, and then surreptitiously removing funds from her accounts. The Testator also informed that she was having trouble withdrawing funds from her own accounts because of the way Oded had set up the accounts. The Testator repeatedly asked Oded to remove his name from her accounts, but he failed to do so. Honigwachs further states that she accompanied the Testator to an attorney's office to prepare an affidavit to have Oded removed from her accounts. Honigwachs also states that the Testator was of sharp mind until the week of her death.

Oded argues in opposition that the Testator had absolutely no connection to Yeshivat Shaare Torah and that the school "primarily serves a Sephardic Jewish population, while [the Testator] was Ashkenazi Jewish." Oded further alleges that Sutton's nephew is a curriculum coordinator at the school and thus, the decision to bequeath the residuary estate to the school must have been due to Sutton's undue influence. Oded further argues that the alternate nominated executor, Sutton's brother Dr. Joseph Sutton, did not know the Testator well and had no prior experience in serving as a fiduciary. This, Oded argues, is further evidence of Sutton's undue influence. Oded also argues that Harary and Stange testified that the Testator did not specifically request that they witness the execution. Accordingly, that omission is a "fatal defect" pursuant to EPTL 3-2.1(4).

In support of his contentions, Oded submits an affidavit disputing the allegations with regard to the joint accounts and countering that Sutton also had joint accounts with the Testator which Sutton initially denied at his deposition. Oded also counters that Sutton's business received a loan from the Testator, apparently in 2004, and thus, Sutton did gain financially from his relationship to the Testator. Oded further submits a copy of a durable general power of attorney dated February 27, 2006, apparently appointing Sutton as the Testator's agent in all financial matters. Oded also casts aspersions on Stange's credibility.[6]

As for the issue of testamentary capacity, Oded submits a medical record indicating that the Testator had a history of a cerebral bleed and had been prescribed Trazadone, an anti-

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[6] Oded submits a copy of an email from a bank representative commenting that Stange called pretending to be the Testator and asking about her accounts, though the banker also states that she spoke with the Testator on the telephone. Oded further submits a copy of a "notice of attempted visit" dated December 22, 2016 from the New York City Adult Protective Services, but states that he is not aware of any of the circumstances behind the attempted visit. In any event, the statements contained in these exhibits are hearsay and are not factored into the analysis herein.

depressant.[7] Also submitted is an affidavit by Katalin Halasz (Halasz) stating that she worked as a part-time caregiver for the Testator from 2009 to 2010 and 2014 through March 2016. Halasz states that she got to know Oded; and that the Testator expressed many times that Oded was like a son to her, and therefore, she wished for Oded to benefit from the joint accounts upon her death. Halasz further states that toward the end of her employment in 2016, the Testator became more "feeble and confused." However, when the Testator was "clear minded," she stated her wishes that the bank accounts go to Oded upon her death.

Chaim submits an affidavit in opposition asserting, *inter alia*, that in 2016, the Testator could not hear well and had trouble speaking on the telephone. Chaim also alleges that Stange would always answer Testator's telephone and often tell him to call back. Chaim further alleges that on one occasion in October 2016, the Testator called and asked him "in a shaky voice" to visit her and stated that the cameras in the house were turned off. Chaim states that the cameras allowed him and Oded to "keep in touch" with the Testator from Israel where he and Oded reside. Chaim states that his "feeling" was that "they" were trying to cut the Testator off from him and Oded. Chaim further asserts that he then traveled from Israel to Brooklyn to visit the Testator and found her in an extremely weak physical state. Chaim also alleges that he was present when Sutton arrived at the Testator's home and that the Testator "turned white inside" and Chaim "feared for her life."

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 Const. 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

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[7] Oded provides an affidavit from a medical doctor stating that Trazadone taken in combination with Zoloft can have severe side effects and may cause a "confused state with profound agitation." However, there is no evidence that the Testator was taking Trazadone in combination with Zoloft. The only mention of Zoloft in the submissions are from a copy of a text from Stange stating that she believed the Testator needed a "stronger" medication such as Zoloft for her sleep disturbances. Accordingly, the physician's affidavit is disregarded.

motion, regardless of the sufficiency of the opposing papers. *Winegrad v. New York Univ. Med. Center*, 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 in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. *Chance v. Felder*, 33 AD3d 645 (2d Dep't 2006); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). To meet their burden, the party opposing the motion must "lay bare their proof" and demonstrate genuine triable issues of fact, supported by allegations that are specific, detailed and substantiated by admissible evidence. *Towner v. Towner*, 225 AD2d 614, 615 (2d Dep't 1996). Mere conclusory assertions or hope that a trial will adduce additional facts will not suffice. *Matter of O'Hara*, 85 AD2d 669, 671 (2d Dep't 1981); *McGahee v. Kennedy*, 48 NY2d 832 (1979).

Discussion

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 Dep't 2018). Testamentary capacity need only be shown to exist at the time the will was executed. *Matter of Anella*, 88 AD3d 993, 995 (2d Dep't 2011); *Matter of Martinico*, 177 AD3d 882, 884 (2d Dep't 2019). "[O]ld age, physical weakness and senile dementia are not necessarily inconsistent with testamentary capacity as long as the [testator] was acting rationally and intelligently at the time the [instrument] was prepared and executed." *Matter of Hedges*, 100 AD2d 586, 588 (2d Dep't 1984). "Evidence relating to the condition of the [testator] before or after the execution is only significant insofar as it bears upon the strength or weakness of mind at the exact hour of the day of execution." *Id.* Moreover, "[l]ess capacity is required to enable one to make a will than to make other contracts." *Matter of Coddington*, 281 AD 143 (3d Dep't 1952), *affd* 307 NY 181 (1954).

Here, the testimonies of Harary and Stange satisfy the initial burden of establishing testamentary capacity. *See Matter of Armato*, 199 AD3d 999, 1001 (2d Dep't 2021) (self-proving

affidavit of attesting witnesses and deposition testimony of those witnesses are *prima facie* evidence that the decedent possessed testamentary capacity at the time the will was executed). Objectants cast aspersions on Stange's credibility and there is some evidence of animosity between Objectants, Oded in particular, and Stange. However, there is no evidence that casts doubt on the testimony of Harary, a disinterested witness and attorney-drafter.

Accordingly, it is incumbent upon Objectants to set forth evidence to refute the presumption of testamentary capacity. In that regard, Oded submits the affidavit of Halasz, a part-time caregiver, alleging that towards the end of her employment in March 2016, the Testator became "more feeble and confused." Oded also submits a medical report indicating that the Testator had a cerebral bleed at some point and that she was prescribed Trazadone for depression. Chaim submits that in 2016, the Testator exhibited trouble hearing and speaking on the telephone, and that she was in an extremely weak physical state when he visited that year.

Objectants' evidence as to the Testator's general physical and mental state around the time of execution, even if true, is insufficient to overcome the presumption of testamentary capacity at the time of execution. *See e.g., Armato* at 1001 ("medical records indicating that the decedent had mild to moderate dementia consistent with Alzheimer's disease did not negate a showing that the decedent had testamentary capacity at the time the will was executed"); *Matter of Martinico*, 177 AD3d 882, 885 (2d Dep't 2019) (hospital records referring to the "decedent's episode of confusion prior to her hospital admission and a single reference to dementia" insufficient to refute testamentary capacity). Accordingly, the objection on the ground of lack of testamentary capacity is dismissed.

Due Execution

The proponent of a will bears the burden of proving due execution in accordance with the statutory requirements under EPTL 3-2.1. *Matter of Rottkamp*, 95 AD3d 1338, 1339 (2d Dep't 2012); *Matter of Collins*, 60 NY2d 466, 468 (1983). The elements of due execution include (i) the testator's signature at the end of the document; (ii) the knowledge of the testator's signature by the attesting witnesses, either by her acknowledgment thereof or by her signature in their presence; (iii) a declaration by the testator that the document being executed is her will; and (iv) the signatures of at least two attesting witnesses, who must sign at the request of the testator. EPTL 3-2.1. The proponent must prove due execution by a preponderance of the evidence. *In re*

Halpern, 76 AD3d 429, 431 (1st Dep't 2010). Where an instrument was attorney-drafted and its execution attorney-supervised, there is a presumption of regularity that the will was properly executed in all respects. *Matter of Tuccio*, 38 AD3d 791, 791 (2d Dep't 2007); *Matter of Weltz*, 16 AD3d 428, 429 (2d Dep't 2005).

Petitioner has set forth a *prima facie* entitlement to summary judgment on the issue of due execution based upon the testimony of the attorney-drafter who supervised the will execution. Objectants argue that the witnesses did not testify that the Testator specifically asked the witnesses to serve as witnesses to the execution. However, the requirements under EPTL 3-2.1 need not be followed in a precise, formulaic manner. All that is required is a "meeting of the minds between the testator and the attesting witnesses that the instrument they were being asked to sign as witnesses was testamentary in character." *Matter of Falk*, 47 AD3d 21, 27 (1st Dep't 2007) (citations and internal quotations omitted). *See also, In re Hedges*, 100 AD2d 586, 587 (2d Dep't 1984) ("the requirement of express declaration need not be followed literally as long as sufficient information is conveyed to the subscribing witnesses during the execution ceremony" that the testator is signing her will).

There is no doubt that there was a meeting of the minds between the Testator and the witnesses that the document she was signing was a will and that the witnesses were present to serve as witnesses to the signing. Objectants' argument that the Testator did not specifically ask them to serve as witnesses fails to raise a triable issue of fact as to due execution. Accordingly, the objection on the ground of lack of due execution is dismissed.

Undue Influence

Where undue influence is alleged, three elements must be established: motive, opportunity, and the actual exercise of influence. *Estate of Malone*, 46 AD3d 975 (3d Dep't 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 N.Y.2d 49, 53 (1959), *quoting Children's Aid Society v. Loeveridge*, 70 N.Y. 387, 394 (1877). "Undue influence can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his or her family relations, the condition of his or

her health and mind, his or her dependency upon and subjection to the control of the person supposed to have wielded the influences, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." *Matter of Gobes*, 189 AD3d 1402, 1404-1405 (2d Dep't 2020). When an elderly person, in need of assistance in daily living, makes a radical change in testamentary intentions, the court must carefully scrutinize the circumstances for possible undue influence. *In re Will of Elmore*, 42 AD2d 240, 242 (3d Dep't 1973).

Here, the Testator's prior will bequeathed her estate primarily to the Objectants and their brother Jacob. The propounded instrument disinherits Oded, makes modest cash bequests to Chaim and Jacob, and leaves the residuary estate to a school. There is ample evidence that the Testator had become angry at Oded for controlling her bank accounts and Oded admits that the Testator could not withdraw her own money, without him requesting the withdrawal from the bank. Particularly offensive is Oded's own admission that he received a call that the Testator was "in desperate need of funds" and only sent her $2,000.00 of her own money that totaled over a million dollars.

However, there is evidence that Sutton appeared to have some influence over the Testator who had no family, and the Testator relied upon him to help manage her affairs. Sutton also admits that he conferred with the Testator as to which Jewish institution the Testator should leave her estate, and Sutton suggested the school at which his nephew is an administrator. This is not to say the evidence suggests that Sutton morally coerced the Testator to execute a new will. Moreover, it is a stretch to conclude that Sutton unduly influenced the Testator to change her will against her own wishes, not to benefit Sutton, but a school where his nephew is employed. Further, Harary's testimony corroborates Sutton's testimony that the Testator became angry at Oded and decided her estate would be better served at a school benefiting Jewish children.

Nevertheless, the Testator was elderly and had her finances controlled by Oded and potentially by Sutton under the power of attorney. The Testator was also reliant on others, including Sutton, for management of her daily living and affairs. Additionally, the propounded instrument represents a drastic change in testamentary intent from the 2006 will. Accordingly, the court is constrained to find that the issue of undue influence under these circumstances must

be decided by a jury.[8] *See Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197, 201 (2d Dep't 2019) ("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 facts exist").

Conclusion

All other arguments have been considered and found unavailing or moot. For the foregoing reasons, Sutton's motion for summary judgment is granted to the extent that the objections on the grounds of due execution and testamentary capacity are dismissed, and denied with respect to the objection on the ground of undue influence. Objectant Oded's cross-motion is denied in its entirety.

This constitutes the decision of the court.

Dated: September 28, 2022
Brooklyn, New York

HON. ROSEMARIE MONTALBANO
Surrogate

[8] The parties did not brief the issue of whether there was a confidential relationship between the Testator and Sutton, which would affect the burden of proof on the issue of undue influence. Accordingly, that issue must also be resolved at trial.