Estate Litigation Tidbits

BY
GARY E. BASHIAN, ESQ.
AND
ANDREW FRISENDA, ESQ. *

Surrogate's Summary Judgment Roundup – Very Interesting!

A Series of Recent Decisions from Surrogate's Throughout Metropolitan New York, Further Highlight the Increased Use of Summary Judgment in the Courts.

1. *Matter of Lubin*,[1] is instructive as it again reminds practitioners of the burdens assigned to Objectants and Proponents in a Will contest proceeding.

In regard to Due Execution: The burden is on the Proponent, but once a *prima facie* showing has been made that the instrument in question was executed with the formal requirements of the Estates, Powers, Trusts Law (EPTL), this burden shifts to the Objectant to be rebutted. Failure to refute the *prima facie* evidence offered by Proponent will lead to the dismissal of the objection.

In regard to Testamentary Capacity: Proponent here has the *prima facie* burden to establish that decedent had capacity at the time of executing the instrument. This burden then shifts to Objectant who, if they fail to offer sufficient evidence in rebuttal to Proponent's, will find their objection on this ground dismissed.

In regard to Undue Influence: Objectant bears the burden of presenting sufficient proof that there was the motive, opportunity, and an actual exertion of undue influence which led to the creation of the instrument. Unsurprisingly, the failure to submit any evidence establishing these elements, or plead them in objections, will lead to dismissal as well.

---

* Gary E. Bashian is a partner in the law firm of Bashian & Farber, LLP with offices in White Plains, New York and Greenwich, Connecticut. Mr. Bashian is a past President of the Westchester County Bar Association, he is presently on the Executive Committee of the New York State Bar Association's Trust and Estates Law Section as Vice Chair of the Estate Litigation Committee, and is a past Chair of the Westchester County Bar Association's Trusts & Estates Section. Mr. Bashian can be reached at garybashian@bashianfarberlaw.com.

Andrew Frisenda, an associate attorney at Bashian & Farber, LLP, concentrates in estate, guardianship, trust, and corporate litigation, and is a member of the Westchester County Bar Association. Mr. Frisenda can be reached at afrisenda@bashianfarberlaw.com.

2. *Matter of Terrizi,*[2] *and Matter of Bader,*[3] are concerned not only with the shifting burdens between Proponents and Objectants, but with the evidentiary standards required to prove Undue Influence.

As *Terrizi* shows, one must be mindful to plead and prove all of the elements of an undue influence claim to establish a *prima facie* case. Often, the claim, and supporting evidence of the final prong, *i.e.*: the actual exertion of Undue Influence is overlooked when pleading this objection. Moreover, despite the fact that the actual exertion of undue influence can be inferred from surrounding circumstances, proof beyond conclusory allegations and mere speculation, which are necessary to establish Undue Influence to the Court, can often prove elusive and warrant dismissal.

As is reinforced in *Bader*, speculation and mere surmise of a testator being Unduly Influenced, for example due to the close and "secret" relationship of decedent to either Proponent or Objectant, is not enough to establish a *prima facie* case of the exertion of Undue influence. Specific examples of Undue Influence, well-articulated and clear in their presentation, or facts that can similarly lead to the inference that it was exerted over the Decedent, are necessary to support the objection if it is to survive summary judgment.

Similarly, in regard to an objection based on fraud, *Matter of Gentillicore*,[4] underscores the necessity of pleading the elements of the objection to ensure that a sufficient cause of action has been stated. Sufficiency, in the case of fraud, must meet the requirements of CPLR § 3016(b), *i.e*: a detailed recitation of the who, what, when, where, and how of the fraudulent action being alleged. Without these details, dismissal of the objection on a motion for summary judgment is warranted.

3. *The evidentiary burdens of a summary judgment motion* was again addressed on appeal by the Second Department in *Matter of Delgatto*,[5] but here, from a different perspective. In *Delgatto*, it was not a failure to plead a particular objection properly, or the improper reliance on conclusory allegations, but a failure to offer proper proof in exhibit form which led to dismissal. The motion filed with the Court included in its support unsigned and unattested deposition transcripts, attorney's affirmations, uncertified medical records, and unsworn and unconfirmed physicians' reports, all of which did not conform to the requirements of CPLR § 3212(b). Practitioners must be mindful of the formal requirements to support their motion or risk immediate dismissal even before the merits are reached.

4. *In re Pannone*[6] reminds practitioners of another procedural requirement when moving for summary judgment, *i.e.*: that it is procedurally defective not to attach a copy of the underlying pleading to one's motion. Fortunately for Objectant in *Pannone*, the Court considered the motion despite this deficiency, as dismissal on procedural grounds was subject to renewal. Accordingly, in the interests of judicial economy, the merits of the motion were considered. Unfortunately for Objectant though, the Court was nevertheless unpersuaded by their argument objecting to due execution, and denied the motion finding that triable issues of fact on this issue prevented its grant.

5. *Matter of Demis*,[7] offers yet another approach to summary judgment. Demis involved a will contested by eight of decedent's children. The will offered contained a self-proving affidavit, whose affiants were called for deposition. Upon providing testimony, the witnesses and draftsman stated that they did not believe the attached will was the instrument of which they witnessed the execution. Citing a different font typeface than the affidavit, and duplicative original wills, two characteristics outside of office protocol and procedure, the Court was convinced that the will offered for Probate was not the same as that executed before the attesting witnesses. Accordingly, Objectants were granted summary judgment, and the Petition for Probate of that instrument was dismissed.

The Noisy, but Silent, Withdrawal of Counsel

On a somewhat different note, attorneys are often forced to balance the practical and ethical demands of advocating for a client, with their duty of candor toward the Court. Commonly, this tension can be diffused by simply informing a client that the attorney will not be associated with any course of conduct that is either inappropriate or unethical. However, where a client might insist on a course of action that, as an attorney and officer of the Court, the attorney knows cannot be facilitated or furthered, there remains a problem: how to best protect the client while refusing to compromise one's ethical standing with the Court itself.

Thankfully, as the *McQuillen*[8] matter makes clear, the "noisy withdrawal" still affords a viable, if not perfect, solution to this problem. In *McQuillen*, over the objections of a guardian *ad litem* asserting that his client would be harmed if the Court allowed it, opposing counsel was granted leave to withdraw representation of an administratrix as she was, by counsel's determination, engaging in inappropriate activity.

Importantly, counsel was permitted to withdraw without disclosing the nature of the client's improper acts, thus preserving 1) the client's right to absolute confidentiality and privilege, 2) counsel's ethical standing with the Court, and 3) ensuring that the attorney would not be made a party to a fiduciary's improper acts.

Obvious Unprivileged Communications

Alternatively, as bears repeating in the context of estate litigation, not all attorney client privilege is sacrosanct. As we are reminded, in *Matter of Axinn*,[9] where a husband and wife consult with counsel regarding a joint Estate plan, privilege cannot shield the work product or conversations in later litigation, should it be between themselves or their decedents. The Court's analysis in *Axinn* is simply that when such an Estate plan is developed in tandem, no reasonable expectation of privacy can be assumed or anticipated at a later time. Therefore, after an *in camera* Court review of the documents at issue, discovery was ordered of un-redacted materials operative to the will contest. The protective order requested to prevent full access to these documents was denied.

Retaliatory Strike by a Fiduciary, a la *Hyde*

Lastly, *Matter of Herrlin*,[10] offers a warning to litigants who seek to use the power of the Courts improperly and without merit. Where it can be shown, or determined by the Court, that a Court proceeding has been brought in retaliation for some act against a fiduciary, the aggrieved fiduciary can apply to the Court to have the fees incurred in defense of the retaliatory proceeding paid by the share of the party levying such claims. Although the facts and circumstances necessary to prove retaliation and warrant allocation will be determined on a case by case basis, *Herrlin* is reflective of the burgeoning willingness of the Court since the *Hyde* decision to effectively penalize frivolous and vexatious claims in an effort to curtail and deter their filing.

Endnotes

1. *Matter of Lubin*, 30 Misc. 3d 1234A (Bronx County Surrogate's Court 2011).
2. *Matter of Terrizi*, NYLJ 3/10/11 37:6 (Richmond County Surrogate's Court 2011).
3. NYLJ 2/3/11 29:3 (NY County Surrogate's Court 2011).
4. *Matter of Gentillicore*, NYLJ 2/3/11 34:2 (Kings County Surrogate's Court 2011).
5. *Matter of Delgatto*, 919 NYS 2d 391 (App. Div. 2nd Dept. 2011).
6. *In re Pannone*, NYLJ 7/13/11 at 30 (Kings County Surrogate's Court).
7. *Matter of Demis*, 30 Misc. 3d1220A (Albany County Surrogate's 2010).
8. *In re McQuillen*, NYLJ 3/23/11 32:2 (Richmond County Surrogate's 2011).
9. *Matter of Axinn*, NYLJ 2/8/11 25:2 (Nassau County Surrogate's Court 2011).
10. *Matter of Herrlin*, NYLJ 12/29/10 (Suffolk County Surrogate's Court).