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2013 IL App (4th) 121117-U

NO. 4-12-1117

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 24, 2013
Carla Bender
4th District Appellate
Court, IL

In re: the Estate of FRANCES LUCILLE BILLBE,)	Appeal from
Deceased,)	Circuit Court of
FRANCIS BELL,)	McLean County
Petitioner-Appellant,)	No. 10P239
v.)	
TERESA J. MONICAL, Executor of the Estate of)	Honorable
FRANCES LUCILLE BILLBE, Deceased,)	Elizabeth A. Robb
Respondent-Appellee.)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting the estate's motion for summary judgment on count I of the will-contest petition alleging testator lacked the mental capacity to execute the March 2008 will. However, the court did not err in granting the estate summary judgment with regard to count II of the will-contest petition alleging undue influence.

¶ 2 On October 18, 2012, the trial court granted the estate of Frances Lucille Billbe's motion for summary judgment on Francis Bell's petition contesting Billbe's March 2008 will. Bell appeals, arguing the court erred in granting the estate's motion for summary judgment. We affirm in part, reverse in part, and remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 On August 24, 2010, the last will and testament of Frances Lucille Billbe dated March 11, 2008, was filed with the McLean County Circuit Clerk. On October 5, 2010, Teresa J.

Monical filed a petition for probate of Billbe's will and for letters testamentary. Monical requested independent administration. On October 8, 2010, the trial court admitted the will to probate and appointed Monical as independent executor.

¶ 5 On April 8, 2011, petitioner Francis Bell, Billbe's nephew, filed a two-count petition contesting the will. Count I of the petition alleged Billbe lacked the mental capacity to execute the will. Bell alleged he had spent many years caring for Billbe, providing for her day-to-day care, medical needs, and other personal concerns. During that time, he observed her medical and mental condition on a regular basis. In 2004, Billbe executed a will leaving property to Bell in an amount greater than the will dated March 11, 2008.

¶ 6 According to Bell's petition, Billbe was "under doctors' care for mental and medical issues, including but not limited to Alzheimer's disease, and other related conditions causing or contributing" to the deterioration of her mental capacity and medical condition. Doctors had also prescribed medications to Billbe to treat Alzheimer's disease, memory deficiencies, and other related mental capacity concerns. Bell alleged these medications interfered with Billbe's "ability to maintain the requisite mental capacity and further caused or contributed to the deterioration of her mental status."

¶ 7 According to Bell's petition, Billbe did not have the mental capacity to understand and appreciate the nature and extent of her property, "did not have the mental capacity to formulate decisions regarding the bequeathing of her property; and further did not have the mental capacity to identify her heirs and or legatees or the natural objects of her bounty," and "did not have the mental capacity to understand and determine the disposition of her property in accordance with any plan in her mind."

¶ 8

Count II of the petition alleged Monical exercised undue influence on Billbe.

According to the petition, Billbe had to rely on others, including Monical to assist her with transportation, home chores, finances, and other personal concerns and considerations. In and around March 2008, Monical and others were spending a lot of time with Billbe helping her with her day- to-day needs and were influencing Billbe's "thoughts, ways and wishes." Bell alleged Monical, and others known to her, knew they were exercising undue influence over Billbe and knew by caring for and assuming Billbe's day-to-day obligations Billbe would become more and more dependent on them. The petition alleged:

"20. That Teresa J. Monical did exercise undue influence on and against FRANCES LUCILLE BILLBE, including but not limited to influencing FRANCES LUCILLE BILLBE to change her Last Will and Testament to provide for bequests to persons other than Petitioner, FRANCIS BELL, which undue influence caused FRANCES LUCILLE BILLBE to execute an invalid will on March 11, 2008, as FRANCES LUCILLE BILLBE was acting under the undue influence of others, including Teresa J. Monical, when she purportedly executed the Will admitted to probate on October 8, 2010.

21. That prior to and on March of [sic] 2008, FRANCES LUCILLE BILLBE did not have the mental capacity to understand and appreciate the nature and extent of her property; and Teresa J. Monical exercised undue influence on and over FRANCES

LUCILLE BILLBE to obtain the signature of FRANCES
LUCILLE BILLBE on the Will dated March 11, 2008.

22. That prior to and on March of [*sic*] 2008, FRANCES
LUCILLE BILLBE, did not have the mental capacity to formulate
decisions regarding the bequeathing of her property; and further
did not have the mental capacity to identify her heirs and or
legatees or the natural objects of her bounty, and the undue
influence exercised by Teresa J. Monical caused FRANCES
LUCILLE BILLBE to execute a will when she did not know and or
appreciate the nature and extent of her property, the natural objects
of her bounty and or the consequences of signing the Will dated
March 11, 2008.

23. That prior to and on March 11, 2008, FRANCES
LUCILLE BILLBE, did not have the mental capacity to understand
and determine the disposition of her property in accordance with
any plan in her mind."

¶ 9 In May 2012, Monical, as independent executor of the estate, filed a motion for
summary judgment. According to the motion, before Billbe executed the will at issue, she
executed a will on July 11, 1977, directing her assets be evenly divided among her 15 nieces and
nephews. On January 19, 2004, while Billbe was being cared for by Francis Bell and his wife,
Theresa Bell, Billbe executed a new will leaving a larger share of her assets to Bell and his wife.

¶ 10 The estate argued summary judgment was appropriate because no genuine issues

of material fact existed. According to the motion:

"The facts in this case, including the three Wills executed by the Decedent over the course of her life, the testimony of the attesting witnesses to the Will of March 11, 2008, the decedent's medical records resulting from her treatment by Dr. Hancock, and the testimony of Dr. Hancock during his evidence deposition, do not support the Petitioner's allegations that Ms. Billbe lacked mental capacity sufficient to execute a Will on March 11, 2008[,] or that Ms. Billbe was under any undue influence, either by Ms. Monical or by any other persons on that date. In fact, they undeniably show that Ms. Billbe had capacity on March 11, 2008[,] and further, that she intended from the beginning to have her property equally distributed among all of her heirs at her death."

According to the estate, the will in question provides for a fair and equal distribution of her assets among her heirs and mirrors the will she originally executed in July of 1977.

¶ 11 The motion noted Dr. Hancock testified in his evidence deposition Billbe had the requisite mental capacity to understand and make decisions during the month of March 2008. Dr. Hancock was Billbe's treating physician from July 12, 2007, until her death. He met with Billbe on seven occasions during the period of July 12, 2007, to March 10, 2008, the day before she signed the will in question.

¶ 12 The estate also attached to the motion for summary judgment the affidavits of attorney Kathleen McDonald Kraft, Susan Fitzgerald, Pamela Murphy, Jennifer Templeton, and

Teresa Monical. In her affidavit, attorney Kraft swore she represented decedent in 2008 and drafted her new will and powers of attorney for healthcare and property. Decedent's file was opened on February 26, 2008. She met with decedent on two occasions, once in an initial conference and then for decedent to sign her will.

¶ 13 Attorney Kraft swore neither Teresa Monical (who was an employee at Kraft's law firm) nor any other family member of decedent attended any conferences held between herself and decedent. According to the affidavit, Monical "was not involved in any manner concerning my representation of Ms. Billbe." Attorney Kraft also swore in her affidavit:

"5. It is my opinion that Ms. Billbe was of sound mind and memory on the two occasions that we met concerning revising her estate plan. At our initial conference, she expressed to me that it was her intent that her Will distribute her property evenly among her nieces and nephews at her death. I drafted a Will according to her wishes which provided for the distribution plan that she dictated.

6. On March 11, 2008, Ms. Billbe came to my office to sign her Will. At this appointment, she reviewed the final draft of the Will which distributed her property evenly among her nieces and nephews and agreed that it adequately expressed her wishes with regard to the distribution of her property at her death. She signed the Will in my presence and in the presences of three of my staff members (Susan Fitzgerald, Pamela Buchanan and Jennifer

Templeton acting as a notary). We then attested the Will in the presence of Ms. Billbe and of each other according to the Illinois Probate Act.

7. I believe Ms. Billbe was of sound mind and memory on March 11, 2008[,] to know and comprehend the natural objects of her bounty and to make a distribution of that property by a plan formed in her own mind. She was not under any influence or duress on March 11, 2008[,] by Teresa Monical, or anyone else, to change her estate plan. She expressed to me that it was her intent to distribute her property evenly among her nieces and nephews at her death and the Will that she signed on March 11, 2008[,] was properly executed on March 11, 2008[,] according to Illinois law to effectuate her intent.

8. That during our conference on March 11, 2008, Ms. Billbe executed a Power of Attorney for Property. She did not execute the Power of Attorney for Healthcare at that time as she had specific concerns as to the agent's authority on life sustaining treatment. As a result of her specific concerns, we edited the Power of Attorney for Healthcare to accommodate her concerns, which she executed May 1, 2008."

¶ 14 Fitzgerald, Buchanan, and Templeton, all employees of the law firm of Thomson & Weintraub, all swore in their respective affidavits they met with Billbe and attorney Kraft on

March 11, 2008, in a conference room at the firm's office. According to the affidavits, Billbe stated the will she signed in their presence was her will. Fitzgerald and Buchanan each stated:

"I believe Ms. Billbe was of sound mind and memory on March 11, 2008[,] to know and comprehend the natural objects of her bounty and to make a distribution of that property by a plan formed in her own mind. Nothing occurred on March 11, 2008[,] that would lead me to believe that Ms. Billbe was incapable of signing a will or that she was under any influence or duress on March 11, 2008[,] by anyone else to change her estate plan."

Templeton swore in her affidavit:

"4. I assisted Attorney Kraft concerning her representation of Ms. Billbe for estate planning, including assisting Attorney Kraft in drafting the new Will and Powers of Attorney for Healthcare and for Property. I am not aware of any involvement by Teresa Monical or anyone else related to Ms. Billbe concerning the representation of Ms. Billbe or the preparation of the new Will or Powers of Attorney for Healthcare and Property.

6. I believe Ms. Billbe was of sound mind and memory on March 11, 2008[,] to know and comprehend the natural objects of her bounty and to make a distribution of that property by a plan formed in her own mind. Nothing occurred on March 11, 2008, or

at any time during our representation of Ms. Billbe, that would lead me to believe that Ms. Billbe was incapable of signing a will or that she was under any influence or duress on March 11, 2008[,] by anyone else to change her estate plan."

¶ 15 The estate also attached to its motion for summary judgment the affidavit of Teresa Monical, in which she swore:

"4. I did not influence, coerce, or even suggest that my aunt change her estate plan. My Aunt, Frances Lucille Billbe, made the decision of her own accord to seek an attorney to change her Will.

5. I did not attend any conferences with my aunt at the offices of Attorney Kraft concerning the revision of her estate plan.

6. I was not involved in any manner concerning the revision to my aunt's Will which was signed on March 11, 2008.

7. She was capable of managing her day to day affairs and ordinary business during the month of March 11, 2008."

¶ 16 In September 2012, Francis Bell filed a response to Monical's motion for summary judgment. Bell also filed an affidavit from his wife, Theresa Bell, which stated Billbe had been experiencing memory issues and confusion as early as July 2007. Further, Theresa Bell stated in her affidavit:

"18. In March of 2008, I made personal observations of Lucille at her home and during times that I was with her, I would observe her to be confused about her medications, including

whether she had taken her medication(s), confused about whether she had eaten, what she was supposed to eat, who had been to see her that day and other incidents that led me to believe that she was unable to manage her activities of daily living on her own without assistance. I also observed that she needed assistance with meal preparation, understanding where she was and who was with her and where she was going.

19. In March of 2008, I observed instances when Lucille did not know the people that were visiting her. I observed her become confused about which relative was which and where she was and what people were doing. In March of 2008, I observed similar behaviors as I had indicated in the fax to Dr. Hancock in July of 2007.

20. From the period of July 12, 2007[,] up to the date I last saw Lucille in August of 2010, I never observed her making any improvement in her cognitive function and I observed her actions and statements on a regular basis during that period of time; and her condition did not improve and continued to deteriorate from the condition I described in my fax to Dr. Hancock after July of 2007 and up to her death.

21. That based on my personal observations and impressions of Lucille in March of 2008, I do not believe she

appreciated the identity of her heirs and I do not believe that she was able to consider and determine the nature and extent of her property and assets."

¶ 17 In October 2012, the trial court granted the estate's motion for summary judgment by written order, without explanation of its rationale for doing so.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Bell raises two issues on appeal. First, Bell argues the trial court erred in granting the estate's motion for summary judgment because the affidavits and other evidence presented by Bell called into question Billbe's testamentary capacity to execute the will. Second, Bell argues the court erred in granting the estate's motion for summary judgment because the affidavits and other evidence he presented called into question whether Billbe executed her will as a result of Monical's undue influence.

¶ 21 Summary judgment is a drastic remedy and may only be granted when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). In ruling on a motion for summary judgment, the trial court must construe the pleadings, depositions, and affidavits in the light most favorable to the nonmoving party. "A trial court may not weigh evidence set forth in opposing affidavits, thereby denying a right to a jury trial." *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510, 611 N.E.2d 1278, 1282 (1993).

¶ 22 In ruling on a motion for summary judgment, courts must remember the party

moving for summary judgment is the burdened party for purposes of the motion and must meet both the initial burden of production (see *North American Insurance Co. v. Kemper National Insurance Co.*, 325 Ill. App. 3d 477, 482, 758 N.E.2d 856, 860 (2001)), and the ultimate burden of proof. See *Pecora v. County of Cook*, 323 Ill. App. 3d 917, 933-34, 752 N.E.2d 532, 545 (2001); *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688-89, 737 N.E.2d 662, 668 (2000); see also Barbara A. McDonald, *The Top 10 Ways to Avoid Losing a Motion for Summary Judgment*, 92 Ill. B.J. 128, 128–30 (2004). Once a movant produces evidence that, if uncontradicted, would entitle it to a directed verdict at trial, the burden of production shifts to the party opposing the motion for summary judgment, and the party may not simply rely on his pleadings to raise an issue of material fact. *Larson v. Decatur Memorial Hospital*, 236 Ill. App. 3d 796, 801, 602 N.E.2d 864, 868 (1992).

¶ 23 We review a summary judgment ruling *de novo*. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556, 866 N.E.2d 149, 153 (2007).

¶ 24 A. Billbe's Testamentary Capacity

¶ 25 In Illinois, a testator is presumed competent to execute a will. *Kuster v. Schaumburg*, 276 Ill. App. 3d 220, 227, 658 N.E.2d 462, 467 (1995). A party challenging a testator's capacity to execute a will bears the burden of proving lack of capacity. *Id.* This court has stated:

"Testamentary capacity has been defined as 'the ability to know and understand the natural objects of one's bounty, the nature and extent of one's property, and to make a disposition of property according to some plan formed in the mind.' [Citation.] To be

relevant, evidence of a lack of testamentary capacity must relate to a time at or near the execution of the will. [Citation.] Although the relevant time period has not been defined, the supreme court has held that proof of the mental condition of a testator two years before the execution of a will was properly received." *Id.* (citing *Manning v. Mock*, 119 Ill. App. 3d 788, 805, 457 N.E.2d 447, 457 (1983)).

¶ 26 Based on the record in this case, it appears the estate met its initial burden of production with regard to establishing Billbe's testamentary capacity. The estate attached the affidavits of attorney Kathleen McDonald Kraft, Susan Fitzgerald, Pamela Murphy, and Jennifer Templeton. According to these affidavits, Billbe was of sound mind and memory when she signed the will in question. The affidavits also stated Billbe was of sound mind and memory on March 11, 2008, to know and comprehend the natural objects of her bounty and to make a distribution of that property by a plan formed in her own mind.

¶ 27 However, Bell did not rest on his pleadings. In response to the estate's motion for summary judgment, he attached the affidavit of his wife, Theresa Bell. In her affidavit, Theresa testified Billbe had been experiencing problems with her memory and confusion as early as July 2007. Further, Theresa stated she had personally observed Billbe in March 2008 to be confused with regard to her food and medicine to the extent Theresa was concerned Billbe was unable to manage her daily living activities on her own without assistance. Theresa also stated on occasion Billbe did not know people visiting her and confused relatives. In addition, Theresa stated Billbe's condition continued to deteriorate after July 2007 up to her death. According to Theresa,

based on her personal observations and impressions of Billbe in March 2008, Billbe did not appreciate the identity of her heirs and was not able to consider and determine the nature and extent of her property and assets.

¶ 28 Based on the affidavits of Theresa Bell, attorney Kraft, the women who work for attorney Kraft, and the evidence deposition of Dr. Hancock, a material question of fact exists with regard to Billbe's testamentary capacity in March 2008. While a fact finder might find the observations of some witnesses more credible than others, the trial court can not make credibility determinations in ruling on a motion for summary judgment. It is the function of the finder of fact and not a judge ruling on a motion for summary judgment to resolve a conflict in evidence when the parties submit conflicting affidavits.

¶ 29 The record does not contain the trial court's reasoning for granting the motion for summary judgment. The court might have felt it could only consider evidence regarding Billbe's capacity on the day she actually signed the will. However, this is not the case. "It is well established that proof of the mental condition of the testator a reasonable time either before or after the execution of the will is competent and will be received when it tends to show mental condition at the time of making the will." *Trojczak v. Hafliger*, 7 Ill. App. 3d 495, 499, 288 N.E.2d 82, 85 (1972). As a result, the trial court erred in awarding the estate summary judgment on this claim.

¶ 30 B. Undue Influence

¶ 31 Count II of Bell's petition to contest Billbe's March 2008 will alleged Monical exercised undue influence on and against Billbe, including but not limited to influencing Billbe to change her last will and testament to provide for bequests to persons other than Bell. Our

supreme court has stated:

"undue influence which will invalidate a will is ' "any improper *** urgency of persuasion whereby the will of a person is over-powered and he is induced to do or forbear an act which he would not do or would do if left to act freely." [Citation.]' To constitute undue influence, the influence ' "must be of such a nature as to destroy the testator's freedom concerning the disposition of his estate and render his will that of another." [Citation.]'

What constitutes undue influence cannot be defined by fixed words and will depend upon the circumstances of each case. [Citation.] The exercise of undue influence may be inferred in cases where the power of another has been so exercised upon the mind of the testator as to have induced him to make a devise or confer a benefit contrary to his deliberate judgment and reason. [Citation.] Proof of undue influence may be wholly inferential and circumstantial. [Citation.] The influence may be that of a beneficiary or that of a third person which will be imputed to the beneficiary." *In re Estate of Hoover*, 155 Ill. 2d 402, 411-12, 615 N.E.2d 736, 740 (1993) (quoting *Franciscan Sisters Health Care Corp. v. Dean*, 95 Ill. 2d 452, 460, 448 N.E.2d 872, 875 (1983)).

¶ 32 In certain situations, undue influence is presumed. According to our supreme court:

"It is well settled that a presumption of undue influence will arise under certain circumstances and one such circumstance is where (1) a fiduciary relationship exists between the testator and a person who receives a substantial benefit from the will, (2) the testator is the dependent and the beneficiary the dominant party, (3) the testator reposes trust and confidence in the beneficiary, and (4) the will is prepared by or its preparation procured by such beneficiary. [Citations.] Proof of these facts standing alone and undisputed by other proof entitles the contestant of a will to a verdict [citation], but the presumption can be rebutted if there is strong enough evidence in contradiction. *DeHart v. DeHart*, 2013 IL 114137, ¶ 30, 986 N.E.2d 85.

This court has stated a fiduciary relationship may either be presumed from the relationship of the parties, *i.e.*, an attorney-client relationship, or "may be found to exist by the facts of a particular situation, such as a relationship where trust is reposed on one side and there is resulting superiority and influence on the other side." *Hensler v. Busey Bank*, 231 Ill. App. 3d 920, 928, 596 N.E.2d 1269, 1274-75 (1992). The party seeking relief has the "burden of pleading and proving the existence of a fiduciary relationship *** and where the alleged relationship does not exist as a matter of law, facts from which a fiduciary relationship arises must be pleaded and proved by clear and convincing evidence." *Hensler*, 231 Ill. App. 3d at 928, 596 N.E.2d at 1275.

¶ 33 Bell did not allege in his will-contest petition Monical had a fiduciary relationship with Billbe prior to the execution of the March 2008 will. Further, Theresa's affidavit does not

state Monical had a fiduciary relationship with Billbe prior to the date the March 2008 will was signed. In his brief to this court, the only rationale Bell provides for finding a fiduciary relationship is "Monical was related to the Testator and had known the Testator for many years and had more recently managed many of the Testator's financial affairs and medical-related matters." Bell argues this is enough to establish a fiduciary relationship pursuant to *In re Estate of Dossett*, 159 Ill. App. 3d 466, 512 N.E.2d 807 (1987). However, *Dossett* is easily distinguished from the situation in the case *sub judice*. One of the individuals accused of undue influence in *Dossett* had a power of attorney for the testatrix leading up to and at the time the testatrix signed the will in question. *Dossett*, 159 Ill. App. 3d at 468, 512 N.E.2d at 808. From the record, it does not appear Monical had a power of attorney for Billbe at any time before the will in question was signed.

¶ 34 As previously stated, once a movant produces evidence that, if uncontradicted, would entitle it to a directed verdict at trial, the burden of production shifts to the party opposing the motion for summary judgment, and the party may not simply rely on his pleadings to raise an issue of material fact. *Larson*, 236 Ill. App. 3d at 801, 602 N.E.2d at 868. The affidavits attached to the estate's motion for summary judgment entitled the estate to summary judgment on the undue influence claim if uncontradicted by Bell.

¶ 35 In Monical's affidavit, she swore she "did not influence, coerce, or even suggest that [Billbe] change her estate plan." According to the affidavit, Billbe decided to hire an attorney and change the will on her own. In addition, Monical swore she did not attend any conferences with Billbe at attorney Kraft's offices. Finally, Monical swore she had no involvement in the revision to her aunt's will signed on March 11, 2008.

¶ 36 Attorney Kraft swore in her affidavit she and Billbe met alone or only in the presence of staff members from her office. According to attorney Kraft's affidavit, "At no time during my representation of Ms. Billbe did Teresa Monical or any other family member of Ms. Billbe attend any conferences held between myself and Ms. Billbe." Kraft swore Monical had no involvement in her representation of Billbe. According to Kraft's affidavit, "[Billbe] was not under any influence or duress on March 11, 2008, by Teresa Monical or anyone else, to change her estate plan."

¶ 37 In their respective affidavits, Susan Fitzgerald, Pamela Buchanan, and Jennifer Templeton each swore "[n]othing occurred on March 11, 2008[,] that would lead me to believe that Ms. Billbe was incapable of signing a will or that she was under any influence or duress on March 11, 2008, by anyone else to change her estate plan."

¶ 38 Bell introduced no evidence to contradict these affidavits. As a result, summary judgment was appropriate as to Bell's undue influence claim as the evidence did not show the existence of a question of material fact.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's order granting the estate's motion for summary judgment with regard to count II (undue influence) of Bell's petition contesting the March 2008 will. However, we reverse the court's order granting summary judgment with regard to count I (lack of mental capacity) of Bell's petition and remand this case for further proceedings on that count.

¶ 41 Affirmed in part; reversed in part and remanded.