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IN THE MATTER OF THE ESTATE OF ADOLPH RUBIN, DECEASED.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
PROBATE PART
DOCKET No. P-365-18

OPINION

Argued: October 19, 2018

Decided: October 23, 2018

Appearances: Andrew Cevasco, (Archer & Greiner, P.C., attorneys) for plaintiff; Irwin Millinger, (Greene & Millinger, attorneys) for defendants; Noah Schwartz, (Davison Eastman Munoz Lederman & Paone, P.A.) for defendants; Lynne Hilowitz, (DaSilva & Hilowitz, PLLC) for defendants; Christine Marks, (Fox Rothschild, LLP, attorneys) for defendants

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HON. EDWARD A. JEREJIAN, P.J.Ch.

This matter comes before the Court by way of Order to Show Cause filed by Archer & Greiner, P.C., attorneys for Plaintiffs Mark S. Gottlieb and Michael I. Gottlieb ("Plaintiffs") seeking relief against Defendants Paul M. Chazan and Phyllis Cunningham ("Defendants") with regard to the Estate of Adolph Rubin, deceased ("the Estate"), by way of summary action, filed on August 16, 2018. Interested Third Party Marlene Hyman, by and through counsel Davison Eastman Munoz Lederman & Paone, P.A., filed an Answer on September 21, 2018. Co-Defendant Phyliss Cunningham, by and through counsel DaSilva & Hilowitz, PLLC, filed an answer on September 24,

2018. Co-Defendant Paul Chazan, by and through counsel Fox Rothschild, LLP, filed an opposition to Plaintiff's Order to Show Cause, as well as a Cross-Motion to Dismiss the Complaint on September 24, 2018. Plaintiffs filed a reply brief and opposition to Defendant's cross-motion to dismiss on September 26, 2018.

BACKGROUND

Plaintiffs are the nephews of Jacob Gottlieb ("Jacob"), the spouse of Adolph Rubin, deceased ("Decedent") and life partner for over fifty (50) years.

Decedent executed a will in 2014 (the "2014 Will") that provided his assets would pass to Jacob unless he predeceased Decedent, which in fact occurred, and then in one-tenth (1/10) shares allocated amongst various individuals, including to each of Plaintiffs and to Defendant Cunningham. Plaintiff Mark was appointed Executor of the 2014 Will.

In 2015, following Jacob's death, Decedent executed another will, appointing Defendant Chazan as executor in place of Plaintiff Mark. Plaintiff also alleges during this time that Defendants arranged for Plaintiff to be terminated as the agent under Decedent's Power of Attorney.

In 2017, approximately one year prior to Decedent's death, Decedent executed another will (the "2017 Will"), at the age of ninety-five (95) years old. Under the terms of the 2017 Will, Defendant Cunningham's interest increased, now receiving all personal property and one-half of the residuary estate, while the interest of each of Plaintiffs was reduced from one-tenth of the residue to a specific bequest of $1,000.00 each.

Accordingly, Plaintiffs filed the aforementioned order to show cause seeking to set aside the 2017 Will, admitting the prior 2015 Will to probate, imposing a constructive trust on the Estate's assets, preliminarily enjoining and restraining all distributions from the Estate pending the outcome of the litigation, and requiring Defendants to provide an inventory and accounting of all assets of

the Estate, as well as those assets that allegedly passed outside of the Estate in the final years of Decedent's life pursuant to the Complaint.

LEGAL STANDARD FOR INJUNCTIVE RELIEF

An interlocutory injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent an irreparable injury. See Zoning Bd. Of Adjustment of Sparta Twp. v. Service Elec. Cable Television of New Jersey, Inc., 198 N.J. Super. 370 (App. Div. 1985). It must be administered with sound discretion and always upon considerations of justice, equity and morality in a given case. Id. Injunctive relief should only be entered upon a showing, by clear and convincing evidence, of entitlement to the relief. See Dolan v. DeCapua, 16 N.J. 599, 614 (1954)("Injunctive judgments are not granted in the absence of clear and convincing proof.).

The seminal case in determining whether preliminary injunctive relief should be granted in Crowe v. De Gioia, 90 N.J. 126 (1982). Under Crowe, the movant bears the burden of demonstrating: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well-settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Id. at 132-134.

The first prong of Crowe requires a showing that preliminary relief is necessary to prevent irreparable harm. Id. at 132. Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. Ibid. Here, Plaintiffs have failed to demonstrate that they will suffer irreparable harm if injunctive relief is not granted. There has been no facts alleged or evidence presented to suggest a dire need to invalidate the 2017 Will and substitute the 2015 Will at this early stage in the litigation prior to any discovery being been completed.

Next, the second prong of Crowe requires the underlying law of Plaintiff's claim to be well-settled. Id. at 133. As discussed below, although Plaintiff's claim for relief is in fact well-settled, the analysis is itself extremely fact-sensitive, which then leads in this instance to an analysis of the third Crowe factor, which is more problematic for Plaintiff.

In fact, Plaintiff is unable to satisfy the third prong of the Crowe analysis. A settled principle under Crowe is a preliminary injunction should not be issued where material facts are controverted. Ibid. This principle is important in light of this requirement; that is, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. Ibid.

Here, there is a clear dispute of material fact. Plaintiffs have the heavy burden to establish that the 2017 Will was the result of undue influence. In the instant Order to Show Cause, Plaintiffs have failed to meet this burden.

Plaintiffs attempt to paint a picture depicting a tight "child-like" bond between themselves and Decedent from their infancy onward in order to assist the Court in making an inference of suspicious activity that would have led to Decedent altering his Will in a manner inconsistent with such a tight bond.

This illustration, however, clearly contradicts Defendant Chazan's certification, which notes an observation of "increasing frustration with [Plaintiffs] lack of responsiveness" to the Decedent and a stark increase in a disconnect between Mark and Decedent. The blunt difference in depiction of Plaintiffs' relationship with Decedent towards the end of his life does nothing to indicate to this Court that Plaintiff will ultimately succeed on the merits, as is required under Crowe.

The Court cannot find at this time, as required by Crowe, that the material facts are not substantially disputed and that Plaintiff possesses a probability of success on the merits.

Plaintiff also cannot establish a balancing of the equities in in its favor.

Based on this analysis it is clear not one of the Crowe factors are proven by clear and convincing evidence.

Therefore, for the foregoing reasons, Plaintiff's order to show cause seeking preliminary relief is denied in its entirety.

DEFENDANT'S CROSS-MOTION TO DISMISS

Defendants argue that Plaintiffs' complaint should be dismissed, as they are unable to establish the presence of circumstances representative of undue influence at this time.

"It is well settled in this state that every citizen of full age and sound mind has the right to make such disposition of property by will or by deed as he or she in the exercise of individual judgment may deem fit." In re the Will of Liebl, 260 N.J. Super. 519, 525 (App. Div. 1992) (internal citations omitted). Thus, our courts attempt to preserve the right of a decedent to dispose of his property as he sees fit, while imposing a heavy burden on contestants attempting to prove undue influence. See In re Gotchal's Estate, 10 N.J. Super. 208, 212 (App. Div. 1950).

Undue influence prevents the testator from following the dictates of her own mind and accepting instead the domination and influence of another person. In re Neuman's Estate, 133 N.J. Eq. at 534. It is "a mental, moral or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets, generally by means of a will." In re Estate of Stockdale, 196 N.J. 275, 303 (2008). Coercion of domination must be exerted upon the testator's mind to a degree sufficient to turn the testator from disposing of her property according to her wishes by substituting the wishes of another. In re Will of Liebl, 260 N.J. Super. at 258. As a general rule, the will contestant has the burden of proving that a testator has been subjected to undue influence, which must be clearly

established. In re Livingston's Will, 5 N.J. 65, 71 (1950).

In its cross-motion to dismiss, Defendant Chazan contends that Plaintiffs' have failed to demonstrate a *prima facie* case of undue influence that would shift the burden of proof to the defendants. Specifically, Defendant disputes the undue influence allegations by attempting to show that Decedent received independent legal advice regarding his 2017 Will, and voluntarily and of his own will changed his Will to decrease the amount Plaintiffs were to receive.

A motion to dismiss under R. 4:6-2(e) for failure to state a claim upon which relief can be granted must be evaluated in light of the legal sufficiency of the facts alleged in the complaint. Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005) (internal citations omitted). The claimant's obligation on a motion to dismiss is "not to prove the case but only to make allegations, which if proven, would constitute a valid cause of action." Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). In ruling on a motion made under R. 4:6-2(e), "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Polk v. Schwartz, 166 N.J. Super. 292, 299 (App. Div. 1979).

Here, after accepting the allegations in Plaintiffs' Complaint as true and drawing every reasonable inference in their favor, the Complaint has alleged sufficient facts to state a valid cause of action. For instance, the terms and distribution of the 2017 Will differed substantially from the terms of Decedent's earlier Wills as applied to Plaintiffs' respective shares – decree sing from approximately $400,000.00 under one-tenth of the estate to just dual specific bequests of $1,000.00 – while Defendant Cunningham's share apparently increases from approximately $400,000.00 to roughly $2.3 million. Further, the various changes in the Estate administration and Decedent's Power of Attorney all occurred when Decedent was ninety-five (95) years old and under the stress of having just lost his spouse and life partner. In addition, Defendant Chazan clearly shared a

confidential relationship with Decedent, as they stood in a fiduciary relationship as counsel and agent under Power of Attorney.

Accepting the abovementioned allegations as true and drawing every reasonable inference in favor of the Plaintiff, the Court finds that Plaintiff has alleged sufficient facts to state a valid cause of action of undue influence.

Therefore, for the foregoing reasons, Defendant's cross-motion to dismiss the complaint is denied without prejudice.