

Matter of Hazel (Russo)
2016 NY Slip Op 32035(U)
August 22, 2016
Surrogate's Court, Nassau County
Docket Number: 2011-364968/A
Judge: Margaret C. Reilly
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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Accounting by Anna Marie Hazel as the Executor
of the Estate of**

**DECISION
File No. 2011-364968/A
Dec. No. 31788**

PATSY RUSSO, JR.,

Deceased.

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Petition for Judicial Settlement of Account filed November 24, 2014.	1
Accounting.	2
Affirmation to Amend Petition filed December 8, 2014.	3
Memorandum of Closing of Title filed January 15, 2015.	4
Affirmation to Amend Petition filed July 9, 2015.	5
Affirmation to Amend Petition filed April 22, 2016.	6
Affirmation of Delay filed April 22, 2016.	7
Affirmation to Amend Petition filed May 11, 2016.	8

I. PROCEDURAL HISTORY

The petitioner, Anna Marie Hazel seeks judicial settlement of her account as the executor of the estate of Patsy Russo, Jr.

II. BACKGROUND

Patsy Russo, Jr., (the decedent) died a resident of New Hyde Park, on February 5, 2011. Letters testamentary issued to Anna Marie Hazel on May 10, 2011. The account was initially filed on November 24, 2014, and was amended on: December 8, 2014; July 9, 2015;

April 22, 2016; and May 11, 2016.¹

The decedent's will provided that his residuary estate would be divided equally among his children: Patricia Bracco; Anthony Russo; Patsy Russo III; Michael Russo; and the petitioner, Anna Marie Hazel. On January 15, 2015, the decedent's children filed waivers and consents to the petitioner's account.

III. THE ACCOUNT

The account, as most recently amended, reflects principal charges from the sale of a home in the amount of \$7,864.18,² plus an anticipated return of the court filing fee of \$1,205.00³, for a total of \$9,069.18. The account shows paid legal and court filing fees of \$5,510.61 and paid creditors' claims in the amount of \$2,762.33⁴, for total credits of \$8,272.94, leaving a balance on hand shown as \$796.24. Counsel's affirmation notes that the balance is subject to the executor's claim for reimbursement of expenses of \$342.78,

¹Amendments were made in response to the court's requests for clarification and necessary changes.

²This amount is incorrectly shown on the summary statement as \$7,864.14, instead of \$7,864.18. This number reflects three items shown on the closing statement for December 5, 2011, namely, check 1208 for \$550.00, check 1205 for \$4,373.17, and check 1219 for \$2,941.01, for a total of \$7,864.18.

³The original accounting filed on November 24, 2014 shows total charges of \$520,000.00. On that basis, the executor paid the maximum filing fee of \$1,250.00 to file her account. Amendments to the account have lowered total charges to \$9,069.18, for which the minimum filing fee of \$45.00 is payable, resulting in a refundable amount of \$1,205.00.

⁴The final affirmation to amend, filed on May 11, 2016, notes that the creditors who were paid, as shown on Schedule D-1, received payment because closing of title to the decedent's realty could not be accomplished otherwise. The remaining creditors, shown on Schedule D-3, were not paid.

commissions of \$453.46, and to the proper charges of the expenses of the accounting. The total of these amounts is greater than the balance on hand.

IV. RELIEF REQUESTED

The petitioner asks the court for the following relief: (1) that the account of proceedings, as amended, be judicially settled; (2) that all unpaid creditors' claims in the sum of \$123,002.48 as presented and rejected in Schedule D-3 be rejected in their entirety; (3) that the court filing fee previously paid with the inventory of assets in the sum of \$625.00 be approved; (4) that the court filing fee previously paid to commence the instant accounting proceeding in the sum of \$1,250.00 be approved; (5) that the past reimbursement of the executor for her retainer deposit for legal services in the amount of \$1,500.00 be approved; (6) that payment to the executor in the amount of \$342.78 for reimbursement of out-of-pocket expenses be approved; (7) that previously paid attorneys' fees of \$2,135.61 for services rendered in connection with the petition for judicial settlement of the account be approved; and (8) that the executor's commission of \$453.46 be approved.

V. APPROVAL OF REJECTION OF CLAIMS

Schedule D-3 of the account as amended by affirmation filed July 9, 2015, and not amended further by the subsequent affirmations, lists the following unpaid claims and asks the court to approve rejection of these claims:

(1) Bally's Park Place Inc. (gambling debt)	\$ 25,000.00
(2) Boardwalk Regency Corp. (gambling debt)	\$ 15,000.00
(3) Memorial Sloan Kettering Medical Service xx8270 (medical)	\$ 1,509.06
(4) Capital One xx5150 (consumer debt)	\$ 12,410.23

(5) Bank of America xx3491 (consumer debt)	\$ 12,001.70
(6) Chase Bank xx2338 (consumer debt)	\$ 11,104.21
(7) Chase Bank xx3148 (consumer debt)	\$ 15,792.45
(8) Bank of America xx 7008 (consumer debt)	\$ 14,424.92
(9) Home Depot xx6607 (consumer debt) (shown as deleted)	\$ 2,575.28
(9) [sic] Citibank (Ascension Point) xx 9574 (consumer debt)	\$ 7,214.24
(10) Discover Bank xx3302 (consumer debt)	<u>\$ 8,545.67</u>
TOTAL	<u>\$123,002.48⁵</u>

Four of these creditors have filed claims with the court in connection with this account:

Capitol One Bank xx5150	filed November 15, 2011	\$12,410.23
Bank of America xx3491	filed August 23, 2011	\$12,001.70
Bank of America xx7008	filed September 1, 2011	\$14,424.92
Discover Bank ⁶	filed June 2, 2011	\$ 8,545.67

All of the creditors, with the exception of Home Depot, were served with citation issued on July 9, 2015, and none appeared on the return date of September 16, 2015. In connection with the claim of Home Depot, shown as the first Item (9) on Schedule D-3, the petitioner submitted an unsigned document, labeled "Release of Claim" under letterhead reading "NASSAU COUNTY PROBATE COURT" but which was not issued by this court. The document states that the claim "on behalf of Citibank NA in the amount of \$2,575.28 for account number xx6607 has been otherwise settled or compromised for \$0.00 and this Release of Claim is executed to acknowledge discharge of the claim, and to release the Estate

⁵This totaled amount omits the claim of Home Depot in the amount of \$2,575.28, discussed below and shown by the executor as released.

⁶This claim was filed on June 2, 2011 in the amount of \$8,554.64 but subsequently amended on March 8, 2013 to \$8,545.67.

and Personal Representative of the Estate from all further liability with respect thereto.”

According to the affirmation to amend the petition filed on July 9, 2015, this unsigned document is a release for the claim of Home Depot. However, unless the court receives an original copy of this document properly executed, this claim must be restored to the list of unpaid claims and jurisdiction over Home Depot is incomplete.

VI. APPROVAL OF FILING FEES

Although the petitioner seeks approval of the court filing fees, there is no need for the court to approve the fees paid by the petitioner with the filing of her inventory of assets or the petition for judicial settlement of her account. The executor is directed to delete this request for relief from her amended account.

As to any fee that was overpaid and has not yet been refunded, the petitioner may seek a refund of the overpayment by submitting a State of New York Unified Court System Request for Refund of Fees. The form should be signed and returned to Michael J. Murphy, the Chief Clerk of this court.

VII. APPROVAL OF REIMBURSEMENT OF RETAINER FEE AND PAYMENT OF LEGAL FEES

The petitioner seeks approval of the reimbursement she paid herself for her payment of the legal services retainer deposit of \$1,500.00, and approval of the payment of legal fees, as shown on the May 11, 2016 affirmation to amend, in the amount of \$2,135.61. However, Schedule C of the account filed on November 24, 2015 showed paid legal fees as \$10,101.90 (also shown on the closing statement) and \$5,600.00, for a total of \$15,701.90. The citation

issued on July 9, 2015 lists paid legal fees of \$15,701.90 plus another \$2,500.00, for legal fees totaling \$18,201.90. The amended accounts filed on July 9, 2015 and April 22, 2016 reflected legal fees of \$1,500.00 in the form of a paid retainer plus \$2,500.00. Counsel has not clarified why the amount of paid fees differs on each amended account. Even taking into consideration the paid legal fees of \$10,101.90 shown on the closing statement for the sale of the decedent's real estate, which was deducted from the gross real estate sales proceeds to reach the net sales amount shown on amended Schedule A, the executor has not reconciled these varying amounts. According to the amended Schedule C, all of the legal fees, now shown in the total amount of \$3,635.61, have been paid in full. No affirmation of legal services has been submitted in support of the executor's request that the court approve the fees already paid. The court may not approve the legal fees without: (1) an affirmation of legal services, including those for which payment was made out of the real estate sales proceeds; and (2) a comprehensive explanation for the varying amounts of paid legal fees shown on the different versions of the executor's account.

VIII. APPROVAL OF REIMBURSEMENT OF OUT-OF-POCKET EXPENSES

The executor seeks court approval of her out-of-pocket expenses in the total amount of \$342.78, as shown on Schedule C-1, without the submission of supporting information. The court will consider this request once the executor has provided the court with an itemized summary of these expenditures.

IX. SUPPLEMENTAL CITATION

The account has been substantially amended since the waivers were filed by the decedent's children and citation was served on the creditors (other than Home Depot). The summary statement served with the citation showed charges of \$15,063.67 and credits of \$14,369.67, and the relief reflected on the citation included approval of paid legal fees of \$15,701.90 and \$2,500.00, for a total of \$18,201.90. In contrast, the amended account filed on May 11, 2016 reflects charges of \$9,069.18 and credits of \$8,272.94, with petitioner seeking approval of paid legal fees of \$2,135.61 and reimbursement of the retainer paid to the lawyer in the amount of \$1,500.00, for a total of \$3,635.61.

The amended account constitutes a pleading that has been sufficiently modified to require that all interested parties be provided with notice as well as an opportunity to be heard. “[S]ervice of process on a party who has defaulted is required if the changes to the pleading, as they relate to the defaulting party, are substantive in nature” (*Matter of Genger*, 2014 NY Misc LEXIS 3157, 2014 NY Slip Op 31841[U] [Sur Ct, New York County]).

Accordingly, the executor is directed to file a supplemental citation for issuance by the court that will expressly reflect all of the changes made in the most recent amended accounting as well as any changes resulting from this decision. Once issued by the court, the supplemental citation shall be served on all of the decedent's children and all of the creditors, including Home Depot, together with a new summary statement reflecting the amended schedules. In the alternative, the executor may submit knowledgeable waivers and consents

or, in the case of creditors, original executed releases of claims, which shall reflect the corrected and updated data.

VIII. CONCLUSION

The petition for judicial settlement of the administrator's account is **DENIED** without prejudice. Within 60 days of the date of this decision, the executor is directed to: (1) amend her account in accordance with this decision; and (2) submit the amended account, together with: (a) a supplemental citation, or waivers and consents from the decedent's children and releases of claims from the creditors; (b) a comprehensive affirmation of legal services with a full explanation of the changes in fees that were previously shown as having been paid, and (c) an itemized summary of the executor's out-of-pocket expenditures.

This is the decision and order of the court.

Dated: August 22, 2016
Mineola, New York

E N T E R:

HON. MARGARET C. REILLY
Judge of the Surrogate's Court

cc: Law Offices of Richard Reers, P.C.
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