

**Estate of Ellington v American Socy. of
Composers**

2007 NY Slip Op 31061(U)

May 1, 2007

Supreme Court, New York County

Docket Number: 0602549/2002

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03
Justice

-----X
THE ESTATE OF MERCER K. ELLINGTON, by its
Executor, PAUL M. ELLINGTON,

Plaintiff,

INDEX NO. 602549/2002

-against-

MOTION DATE _____

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, by its President Marilyn Bergman,
Defendant.

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

-----X
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND
PUBLISHERS, by its President Marilyn Bergman,
Defendant and Interpleader Plaintiff,

-against-

MERCEDES ELLINGTON, GAYE ELLINGTON and
EDWARD ELLINGTON,

Interpleaded Defendants.

FILED
MAY 04 2007
NEW YORK
COUNTY CLERKS OFFICE

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____


| PAPERS NUMBERED | |
|-----------------|-------|
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

Cross-Motion: Yes No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying
Decision and Order.

Dated: May 4, 2007



KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 3

-----X
THE ESTATE OF MERCER K. ELLINGTON, by
its Executor, PAUL M. ELLINGTON,

Plaintiff,

Index No. 602549/02

-against-

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, by its President
Marilyn Bergman,

Decision and Order

Defendant.

-----X
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, by its President
Marilyn Bergman,

Defendant and
Interpleader Plaintiff,

-against-

MERCEDES ELLINGTON, GAYE ELLINGTON
and EDWARD ELLINGTON,

Interpleaded Defendants.
-----X

FILED
MAY 04 2007
NEW YORK
COUNTY CLERK'S OFFICE

KARLA MOSKOWITZ, J.:

By this motion (sequence number 005), interpleaded defendants, Mercedes, Gaye and Edward Ellington (collectively "Ellingtons"), move for an order allocating against plaintiff, the Estate of Mercer K. Ellington ("Estate"), the \$30,000 in legal expenses that this court previously awarded defendant, American Society of Composers, Authors and Publishers ("ASCAP"). Interpleaded defendants request that, as a result of this allocation, the court require plaintiff to pay \$30,000 to the interpleaded defendants. For the reasons below, the court denies the interpleaded defendants' motion.

DISCUSSION

In January 2006, the Appellate Division, First Department affirmed this court's decision of May 13, 2004 that all the disputed royalty payments ASCAP or any nonparty music publishing company collects belong to the interpleaded defendants and not the Estate. (*Estate of Mercer K. Ellington v ASCAP*, 25 AD3d 426 [1st Dept 2006]). This court had also ordered on March 27, 2003 that ASCAP's award of \$30,000 for attorneys' fees would come from the disputed royalties that ASCAP held for the works of Duke and Mercer Ellington. According to interpleaded defendants, they have a right to all the royalties. As a result, interpleaded defendants brought this motion for the court to allocate attorneys' fees and rule that plaintiff pay ASCAP's fees because, if the royalties include the fees, then interpleaded defendants will in effect bear all these costs, even though they, not the Estate, prevailed in the underlying dispute over the royalties.

Plaintiff argues that interpleaded defendants advocate an inappropriate shifting of costs here and base their motion on "a simple 'losing party pays' rule." (Plaintiff's Opposition, p 1). Instead, plaintiff asserts that fee-shifting in the context of interpleader practice arises only when the losing party's claims have also been "adjudged groundless." (*Id.*). Because plaintiff's position is not groundless and no court has adjudged its claims groundless, plaintiff concludes that the attorneys' costs for ASCAP should come from the fund. Interpleaded defendants, however, insist that "[i]t is the interpleader practice of awarding a neutral stakeholder its legal expenses. Once that is done, the question arises, onto whose shoulders?" (Interpleaded Defendants' Reply Brief, p 2). Interpleaded defendants answer this question by claiming that "it should be the unsuccessful claimant, who in this case is the plaintiff [that should pay the stakeholder's expenses]." (Transcript of Oral Argument, dated March 15, 2007, at 4).

As part of an order of discharge for a stakeholder, "[t]he court shall impose such terms

relating to payment of expenses, costs and disbursements as may be just and which may be charged against the subject matter of the action.” (CPLR 1006[f]; *see also Rice v Chanas*, 191 Misc 2d 813, 815 [Sup Ct, NY County 2002] [“Pursuant to CPLR 1006(f), this court can award plaintiff his expenses, costs, and disbursements in this action, which can be taken from the subject matter of the action.”]). A stakeholder may recover only expenses that directly result from the interpleader action as long as the stakeholder is entitled to interpleader relief as a neutral party and the action itself is not wrongful or mistaken. (*See Lincoln Life and Annuity Co. of New York v Caswell*, 31 AD3d 1, 8-9 [1st Dept 2006]; *Natl. Cold Storage Co. v Tiya Caviar Co.*, 52 Misc 2d 289, 290 [Sup Ct, NY County 1966]; *Bank of America v Transpollux Carriers Corp.*, 26 Misc 2d 524, 529 [Sup Ct, NY County 1960]).

After proving entitlement to expenses, the stakeholder then looks to the claimants for payment. Pursuant to CPLR 1006(f), a court determines the allocation of these expenses “against the subject matter of the action.” The statute offers no guidance on how individual claimants assume payment of the stakeholder’s costs, but case law indicates that, following the statute’s language, payment usually comes from the disputed funds, that are “the subject matter of the action.” “[T]he court shall impose such terms relative to the payment of expenses, costs and disbursements as may be just.” (*Bank of New York v Norilsk Nickel*, 14 AD3d 140, 149 [1st Dept 2004] [internal quotations omitted]; *see also Lincoln Life*, 31 AD3d at 9-10 [an award of attorneys’ fees under CPLR 1006(f) is “committed to the sound discretion of the court [and] [t]he statutory language, moreover, contemplates that all relevant facts and circumstances are to be considered”] [McGuire, J., concurring]; *Silber v Lachs*, 33 AD2d 544, 545 [1st Dept 1969] [court determines what is “just or reasonable” regarding payment of stakeholder’s expenses]). For example, a court may assess a stakeholder’s fees pro rata against the amounts each claimant

recovers from the disputed funds, irregardless of which claimant actually prevailed in the action. (See *Rosenthal & Rosenthal, Inc. v Billant Apparel LLC*, Sup Ct, NY County, May 16, 2006, Moskowitz, J., Index No. 603115/05, at 12 [“The court will assess the attorneys’ fees against [claimants] according to the percentage of monies upon which they have prevailed.”]).

An exception to this payment of expenses from the disputed funds arises when a claimant has no claim at all to those funds. In *Bank of New York v Norilsk Nickel*, in allocating payment of the stakeholder’s, Bank of New York’s, attorneys’ fees, the court concluded, “Given the holding above, that Monter [one of the claimants] has no claim to the attached funds, it would be unjust to impose half of the costs claimed by the Bank of New York on Norilsk [the other claimant].” (*Norilsk*, 14 AD3d at 149); see also *Fischbein, Badillo, Wagner v Tova Realty Co.*, 193 AD2d 442, 445 [1st Dept 1993] [if claimants do not establish “a clear right to the [funds in dispute],” “the award of attorneys’ fees to . . . the discharged stakeholder should be imposed equally against [the two claimants]”]). However, this result of non-payment from the disputed funds that the Bank of New York held occurred simply because the unsuccessful claimant, Monter, predicated its claim on an attachment order from a completely different case that involved affiliates of a company associated with Norilsk. (*Norilsk*, 14 AD3d at 144).

The court agrees with plaintiff and finds no indication that fee-shifting even figures into CPLR 1006(f). Certainly, the statute itself makes no mention of fee-shifting to unsuccessful claimants, and the case law, as described above, focuses on whether a stakeholder deserves an award of attorneys’ fees and then deducts these fees from the disputed funds. The omission of fee-shifting from both the statute and the case law is not surprising because courts in the state of New York repeatedly affirm the policy that parties bear their own litigation costs, unless a statute or contract authorizes the payment of attorneys’ fees. (See *A.G. Ship Maintenance Corp. v*

Lezak, 69 NY2d 1, 5 [1986] [“Under the general rule, attorneys’ fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule.”]). Given this overall conceptual approach, this court easily concludes that the payment of attorneys’ fees for ASCAP comes out of the fund and is not shifted to plaintiff.

Further, the cases that do allocate payment of attorneys’ fees to what interpleaded defendants call the “losing party” are distinguishable from this case. For example, in those cases, the losing party had absolutely no interest whatsoever in the disputed funds. (*See Norilsk*, 14 AD3d at 144; *Fischbein, Badillo, Wagner*, 193 AD2d at 442). Here, however, both Paul Ellington, as representative for plaintiff, the Estate, and the interpleaded defendants, the older children of Mercer Ellington, “agreed that Paul Ellington, Mercer’s only other child, was entitled to the remaining 40 percent [of the ASCAP royalty payments].” (Interpleaded Defendants’ Brief, p 2). The other 60 percent of these payments were the subject of this action that the court resolved in favor of the interpleaded defendants. Thus, both parties have a legitimate interest in the funds that enables the court to deduct the stakeholder’s, ASCAP’s, fees from the funds.¹

More importantly, interpleaded defendants’ argument that plaintiff should pay ASCAP’s fees because plaintiff has groundless claims fails. The cases interpleaded defendants use to flesh out their proposition (*see* Defendants’ Brief, pp 3-4) that a groundless claim is one that is invalid and that has not prevailed are older cases from either the federal courts or even the English

¹Mercer Ellington’s will made bequests of \$25,000 to Mercedes, Gaye and Edward Ellington and then left the residuary of his estate to his second wife, Lene Ellington. The will designated Paul Ellington as residual beneficiary. Paul Ellington therefore has an interest in the disputed funds not only as executor of the estate but as one of its beneficiaries. (*Estate of Mercer Ellington v ASCAP*, Sup Ct, NY County, May 6, 2004, Moskowitz, J., Index No. 602549/02, at 2).

Courts of Chancery and thus are not binding on this court (*see e.g., Globe Indem. Co. v Puget Sound Co.*, 154 F2d 249 [2d Cir 1946]; *Neiman v Stern*, 1990 WL 180576 [SDNY 1990]; *Metropolitan Life Ins. Co. v Jordan*, 221 F Supp 842 [WDNC 1963]; *Shaw v Coster*, 35 Am. Dec. 690 [1840]; *Thomson v Ebbets*, Hopk. Ch. 272 [1824]; *Richards v Salter*, 6 Johns. Ch. 445 [1822]). In addition, these cases simply do not support an argument that a claimant with a “groundless claim” would legally be bound to pay the stakeholder’s legal fees in the context of CPLR 1006. Finally, even though plaintiff did lose the underlying case when the First Department affirmed this court’s award of the disputed royalties to interpleaded defendants, at no time did the First Department or this court deem plaintiff’s action frivolous or completely without merit. The court thus concludes that ASCAP’s award of attorneys’ fees properly comes from the disputed funds.

CONCLUSION

Accordingly, it is

ORDERED that the interpleaded defendants’ motion for an order allocating against plaintiff, the Estate of Mercer K. Ellington, the \$30,000 in legal expenses that the court previously awarded defendant, American Society of Composers, Authors and Publishers, is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 4, 2007

ENTER

J.S.C.

FILED
 MAY 04 2007
 NEW YORK
 COUNTY CLERK'S OFFICE