

Matter of Rizzo

2009 NY Slip Op 32204(U)

September 15, 2009

Surrogate's Court, Nassau County

Docket Number: 337941/2009

Judge: John B. Riordan

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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Accounting by Eric P. Milgrim, Public Administrator
of Nassau County as the Administrator of the Estate of

File No. 337941

RICHARD RIZZO a/k/a
RICHARD MICHAEL RIZZO,

Dec. No. 448

Deceased.

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Submitted for decision in this accounting proceeding are the issues of attorney fees and accountant fees. The Public Administrator also seeks approval of commissions. In addition, the Public Administrator asks for approval to disallow the claims of (i) Brunswick Hospital Center in the amount of \$250.00; (ii) C. Malhotra, M.D. in the amount of \$82.00; (iii) Nassau Healthcare Corporation in the amount of \$1,004.89; (iv) Nassau University Medical Center in the amount of \$184.50; (v) North Shore Plainview in the amount of \$250.00; (vi) North Shore CHHA in the amount of \$45.00; (vii) JP Morgan Chase in the amount of \$675.00; (viii) LVN Funding, LLC/Capital Management Services in the amount of \$5,625.66; and (ix) Cablevision in the amount of \$162.52 on the grounds that each claimant has failed to submit documentary evidence sufficient to substantiate any such claim and failed to complete and return the Affidavit of Claim provided to each claimant by the Public Administrator and required pursuant to SCPA 1803. The Public Administrator also asks for authorization to distribute the sum of \$1,781.28 to the New York State Comptroller's Office for the benefit of the unknown holder in due course of a money judgment entered by the First District Court of Nassau County on March 24, 2006, in favor of GE Money Bank. Lastly, the Public Administrator asks to be released from the surety bond.

The decedent Richard Rizzo died intestate on May 2, 2005, a resident of Nassau County. Letters of Administration issued to the Public Administrator on March 21, 2006. The decedent

was survived by three siblings, Rosemarie Alessio, Anthony Rizzo and Gina Syzdlowski. The summary statement shows charges to the accounting party of \$30,141.29.

With respect to the issue of attorney fees, the court bears the ultimate responsibility for approving legal fees that are charged to an estate and has the discretion to determine what constitutes reasonable compensation for legal services rendered in the course of an estate (*Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Vitole*, 215 AD2d 765 [2d Dept 1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). While there is no hard and fast rule to calculate reasonable compensation to an attorney in every case, the Surrogate is required to exercise his or her authority "with reason, proper discretion and not arbitrarily" (*Matter of Brehm*, 37 AD2d 95, 97 [4th Dept 1971]; see *Matter of Wilhelm*, 88 AD2d 6, 11-12 [4th Dept 1982]).

In evaluating the cost of legal services, the court may consider a number of factors. These include: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the court cannot apply a selected few factors which might be more favorable to one position or

another but must strike a balance by considering all of the elements set forth in *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb.18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3rd Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

With respect to accountants' fees, normally, an accountant's services are not compensable out of estate assets unless there exist unusual circumstances that require the expertise of an

accountant (*Matter of Meranus*, NYLJ, Mar. 31, 1994, at 37, col 2 [Sur Ct, Suffolk County]).

The fee for such services is generally held to be included in the fee of the attorney for the fiduciary (*Matter of Musil*, 254 AD 765 [1938]). “[T]he purpose of this rule is to avoid duplication (*Matter of Schoonhein*, 158 AD2d 183 [1st Dept 1990]). Where the legal fees do not include compensation for services rendered by the accountant, there is no duplication and the legal fee is not automatically reduced by the accounting fee (*Matter of Tortora*, NYLJ, July 19, 1995, at 26, col 2)” (Warren’s Heaton on Surrogate’s Court Practice §93.08 [7th ed]).

In this case, the attorney has supplied the court with an affirmation of services and it shows that the attorney rendered approximately fifty-three (53) hours of legal services of a partner, associate and paralegal at various hourly rates. The total value of the legal services rendered by the attorney’s firm exceeds \$9,800.00. Due to the modest size of the estate, the attorney seeks a fee in the reduced amount of \$2,283.75, of which \$500.00 remains unpaid. The services provided by counsel include preparation of petition for letters of administration and related documents, preparation of final account and related papers, assisting the Public Administrator in his search to identify the holder of the outstanding money judgment against the decedent, telephone conferences with the decedent’s family members and employees of the Public Administrator’s office. The court notes that the affirmation of legal services erroneously recites that the work to be performed by counsel will include “various correspondence and conferences with the court-appointed guardian ad litem” and “review of the report of the Guardian ad litem.” A guardian ad litem was not appointed in this proceeding. The contemporaneous time records annexed to the affirmation of legal services do not include charges for these services, and, thus it appears the estate, in fact, was not billed for these

services.

Considering all these factors, the court fixes the fee of counsel for the Public Administrator in the amount of \$2,283.75, of which \$500.00 remains unpaid, as fair and proper compensation for the services rendered.

The court has also been asked to review the accountant's fee. The accountant has submitted an affidavit of services requesting a fee of \$575.00, all of which remains unpaid. The court notes that there is a discrepancy between the amount of the fee reflected in the accountant's affidavit and the citation. The citation issued December 4, 2008 asks for approval of accountant's fees in the amount of \$1,125.00 of which \$550 has been paid. The affidavit sworn to on May 28, 2009 indicates that the accountant's total fee is \$575.00, which is the accountant's fee for preparation of the decedent's final income tax return. The work performed by the accountant was not duplicative of the services rendered by the estate attorney, and the requested amount for these services is reasonable. The court approves the fee in the amount of \$575.00, all of which remains unpaid.

With respect to the claims of (1) Brunswick Hospital Center in the amount of \$250.00; (ii) C. Malhotra, M.D. in the amount of \$82.00; (iii) Nassau Healthcare Corporation in the amount of \$1,004.89; (iv) Nassau University Medical Center in the amount of \$184.50; (v) North Shore Plainview in the amount of \$250.00; (vi) North Shore CHHA in the amount of \$45.00; (vii) JP Morgan Chase in the amount of \$675.00; (viii) LVN Funding LLC/Capital Management Services in the amount of \$5,625.66, and (ix) Cablevision in the amount of \$162.52, the Public Administrator asks the court to approve the disallowance of such claims. The Public Administrator seeks to disallow the claims on the grounds that each of the claimants has (i) failed

to submit documentary evidence sufficient to substantiate any such claim and (ii) failed to complete and return the Affidavit of Claim provided to such claimant by the Public Administrator and required pursuant to SCPA 1803. All of the above-named claimants were cited and failed to appear on the return date of the citation. Based upon the failure of each claimant to substantiate their respective claim and the default on the return date of the accounting citation, each of the above claims is disallowed.

The Public Administrator also asks the court to authorize him to distribute the sum of \$1,781.28 to the New York State Comptroller's Office for the benefit of the unknown holder in due course of a money judgment entered by the First District Court of Nassau County, on March 24, 2006, in favor of GE Money Bank, a judgment creditor of decedent's estate. The Public Administrator's attorneys conducted multiple telephone conversations with six different entities, among whom the judgment was believed to have been transferred. It appears that the Public Administrator conducted a diligent, albeit, unsuccessful attempt to identify the present holder of the outstanding money judgment. Accordingly, the Public Administrator is authorized to distribute the sum of \$1,781.28 to the New York State Comptroller's Office.

Commissions are approved subject to audit.

The surety is released and discharged.

The Public Administrator is authorized to distribute the balance of the net estate in equal shares to each of Rosemarie Alessio, Gina Syzdlowski and Anthony Rizzo.

Submit decree.

Dated: September 15, 2009

JOHN B. RIORDAN
Judge of the
Surrogate's Court

