

**Matter of Gathers**

2009 NY Slip Op 33493(U)

November 10, 2009

Surrogate's Court, Bronx County

Docket Number: File No. XXXXX

Judge: Lee L. Holzman

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November 10, 2009

ESTATE OF ABRAHAM GATHERS, Deceased

In this contested accounting proceeding, the objectant, one of the decedent's sons, moves for summary judgment against the accounting party, the decedent's daughter, who is the former administratrix of the estate. The daughter prepared her account pro se and also was not represented by counsel at a pre-trial settlement conference.

The objectant, who is incarcerated, seeks the sum of \$8,122 plus interest, alleging that his sister failed to pay him this amount of his distributive share of settlement proceeds from causes of action allocated and distributed pursuant to decrees of this court while she was the fiduciary of the estate. Although a guardian ad litem was appointed for the objectant at his request, and the guardian ad litem performed legal services in the accounting proceeding and participated in the pre-trial conference during which an attempt was made to settle the issue raised by the objectant, it was the objectant who prepared all of the papers on the motion sub judice.

The daughter contended at a pre-trial conference that she made cash payments to the objectant in an amount equal to the amount

directed in the court decrees. The son appears to concede in his motion papers that he received some payments from his sister, but denies that she made all of the cash payments she alleges in her account. In any event, the daughter failed to appear on the return date of this motion. Moreover, the daughter did not file any papers in opposition to the motion notwithstanding that due to her pro se status, she received written notification that the court was extending her time to serve and file opposition to the motion.

After the dispute between the objectant and his sister arose, an administrator d.b.n. replaced the daughter as fiduciary and commenced proceedings to allocate and distribute additional settlement proceeds. The decrees in those proceedings provide, inter alia, that any share of the proceeds to which the former administratrix might otherwise be entitled were to be held in escrow pending the determination of this motion and the further order of this court (Matter of Gathers, NYLJ, Aug. 5, 2009, at 32, col 4).

Summary judgment motions cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v Joseph Kantor & Co.*, 31 NY2d 307 [1972]). The movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant has made out a prima facie case, the burden of going forward shifts to the party opposing the motion to produce evidentiary proof in admissible form

sufficient to establish the existence of material issues of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference and issues of credibility may not be determined on the motion but must await the trial (see *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The papers submitted in the summary judgment application are scrutinized in a light most favorable to the party opposing the motion (see *Robinson v Strong Mem. Hosp.*, 98 AD2d 976 [1983]).

In the absence of any opposition to the motion, and considering that the former administratrix has the burden of proving that she fully accounted for all of the assets of the estate (see *Matter of Schnare*, 191 AD2d 859 [1993], lv denied 82 NY2d 653 [1993]), the movant is entitled to summary judgment in the amount of \$8,122, the lowest amount that he claims is owed to him in this proceeding.

With respect to the movant's claim for interest, "in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion" (CPLR 5001 [a]). Here, it appears to be conceded that there were some cash transactions between the movant and his sister during her visits with him while she was the administratrix of the estate. Moreover, it is clear that the pro se administratrix is not sophisticated. Nonetheless, this does not excuse her failure to keep the records that should be maintained by a prudent fiduciary. On the other hand, the result might be different if this was not an equitable

proceeding involving issues between a fiduciary and a beneficiary, and if, instead, it was the movant rather than his sister who had the burden of proof to establish what cash transactions transpired between the two of them. Under these circumstances, the court declines awarding any interest in this equitable accounting proceeding.

The guardian ad litem filed a report indicating that she rendered 11.5 hours of legal services on behalf of the movant. Unfortunately, the court cannot compensate her at her usual hourly rate both because of the amount involved in this proceeding and because it was the movant who prepared the instant motion papers. Based upon a consideration of all of the factors enumerated in *Matter of Freeman* (34 NY2d 1, 9 [1974]), the court fixes the reasonable compensation of the guardian ad litem, inclusive of disbursements, in the sum of \$1,750, to be charged against the movant's recovery herein (see SCPA 405 [1] [b]).

This decision constitutes the decree of the court granting the motion and directing the administrator d.b.n. and his counsel to pay from the former administratrix's share of the recoveries held in escrow the sum of \$8,122 as follows: \$6,372 to the movant and \$1,750 to the guardian ad litem. In the event that the amount in escrow is insufficient to make payment in full, the guardian ad litem is to be compensated in full and the balance of the escrow funds allocated to the daughter shall be paid to the movant. Should the movant not receive the full amount directed herein, and he has not otherwise collected the balance due, such balance shall be paid from his

sister's share of any additional settlement proceeds that are to be distributed.

The Chief Clerk shall mail a copy of this decision and decree to the movant, the guardian ad litem, the former administratrix, and the administrator d.b.n.

*Lee L. Helyman*

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SURROGATE