

<b>Matter of Sanzoverino</b>
2010 NY Slip Op 31743(U)
May 26, 2010
Sur Ct, Nassau County
Docket Number: 324964
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 Joyce Encarnacion and Jane Tenaglia,  
as Administrators c.t.a. of the Last Will and Testament of

File No. 324964

ANTHONY SANZOVERINO  
a/k/a TONY SANZOVERINO,

Deceased.

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In connection with the contested final accounting filed by Joyce Encarnacion and Jane Tenaglia, as administrators c.t.a. of the last will and testament of Anthony Sanzoverino, and the two stipulations signed by the interested parties to the accounting, this court previously issued a decision (No. 738) dated February 20, 2009, in which the attorneys for the petitioners were directed to submit an executed copy of the second stipulation and their affidavits of legal services. The requested documents have now been filed. The sole issue currently before the court is the approval of legal 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 the administration 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 [2d Dept 1991]). This remains true even in the event that the parties have consented to the requested fee (*Matter of Stortecky v Mazzone*, 85 NY2d 518, 525 [1995]; *Matter of Phelan*, 173 AD2d 621, 622 [2d Dept 1991]). The Surrogate is obligated to limit the attorney's fees to reasonable amounts regardless of any agreement made by the attorney with the interested party (*Stern & Greenberg v. Doris Duke Charitable Foundation*, 297 AD2d 469 [1st Dept 2002],

*aff'g* NYLJ, May 3, 2000 at 28, col 6 [Sur Ct, New York County] [Surrogate Preminger thorough analysis]; *Matter of Cook*, 41 AD2d 907 [1st Dept 1973], *aff'd* 33 NY2d 919 [1973]) or the existence of a retainer agreement (*Matter of Gluck*, 279 AD2d 575 [2d Dept 2001]; *Matter of Driscoll*, 273 AD2d 381 [2d Dept 2000]; *Matter of Pekofsky v Estate of Cohen*, 259 AD2d 702 [2d Dept 1999]; *Matter of Stern*, 227 AD2d 636 [2d Dept. 1996]; *Matter of Bobeck*, 196 AD2d 496 [2d Dept 1993]). The retainer agreement is merely some evidence of the reasonable value of legal services (*Matter of Lerner*, 52 Misc2d 967 [Sur Ct, Kings County 1967]). 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]). Moreover, when multiple attorneys are employed by the fiduciary of a decedent's estate, the aggregate fee should approximate what one attorney would charge (*Matter of Leopold*, 244 AD2d 411 [2d Dept 1997]; *Matter of Mattis*, 55 Misc 2d 511 [Sur Ct, New York County 1967]). Some overlap in services may necessarily occur (*Matter of Patchin*, 106 AD2d 730 [3d Dept 1984]), and should be a factor when considering the aggregate fee (*see Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *aff'd*, 207 AD2d 453 [2d Dept. 1994]). There can be some exceptions or stretching of this rule, for example, where the separate counsel does separate work, where counsel are under time pressures, or where there are complex or exceptional circumstances (*Matter of Duke*, NYLJ, May 3, 2000, at 28, col 6 [Sur Ct, New York County]).

In evaluating the cost of legal services, the court may consider a number of factors.

These factors include:

1. the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]);
2. the complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]);
3. the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]);
4. the amount and complexity of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]);
5. the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]);
6. the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and
7. the customary fee charged by the Bar for similar services (*Matter of Freeman*, 34 NY2d 1 [1974]; *Matter of Potts*, 241 NY 593 [1925]).

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* (241 NY 593 [1925]), as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Moreover, it is well-settled that time spent is, in fact, the least important factor considered by a court in fixing reasonable compensation (*see Matter of Snell*, 17 AD2d 490, 494 [3rd Dept 1962]; *Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *aff'd* 241 NY 593 [1925]; *Matter of Kentana*, 170 Misc 663 [Sur Ct, Kings County 1939]).

A sizeable estate permits adequate compensation, but nothing beyond that (*Matter of Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *aff'd* 16 NY2d 594 [1965]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]; *Matter of Reede*, NYLJ,

Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]). A large estate does not, by itself, justify a large fee (*Matter of Young*, 52 Misc2d 398 [Sur Ct, Suffolk County 1966]). Moreover, the size of the estate can operate as a limitation on the fees payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *aff'd* 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*, 241 NY 593 [1925]; *see Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]). In the absence of contemporaneous time records, little weight is given to estimates of time after the services have been performed (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

The affidavits filed with the court reflect legal services provided by three different law firms, each of which will be addressed separately.

1. Legal fee of Hynes & Chu, LLP and Robert K. Howard, of counsel

Robert K. Howard, of counsel to the law firm of Hynes & Chu, LLP, filed an affidavit of services on April 16, 2009, with billing statements and time sheets attached, and he filed a supplemental affidavit of services on May 21, 2009. The affidavit of services pellucidly clarifies the complex administration issues raised in connection with decedent's estate, including the taxation of non-probate assets. It sets forth each of the goals and accomplishments of legal counsel on behalf of the fiduciaries, which ultimately led to a settlement among the parties as

well as a satisfactory resolution with the taxing authorities. Pursuant to the first settlement agreement, dated August 20, 2003, a copy of which is affixed to the amended account as exhibit A, it was determined by the parties that estate legal fees would be fixed at a total of \$75,000.00, with \$50,000.00 payable to Hynes & Chu, LLP, and \$25,000.00 payable to Salvatore Diliberto, as counsel for the objectant, Louella Sanzoverino. It was further agreed that the fixed amount of the fee payable to Hynes & Chu, LLP would not include services rendered in connection with a contested probate proceeding, an audit of the estate tax returns, or objections to the account. Rather, these services would be billed at agreed upon hourly rates. The preliminary executor and the objectant each agreed to be responsible for his or her proportionate share of these fees. The record reflects that the federal estate tax return was the subject of an examination, the New York estate tax return was subjected to audit, and objections were filed to the account; as a result, the estate incurred additional legal fees. Mr. Howard points out that no additional fees were charged by Hynes & Chu, LLP in connection with the appointment of the co-administrators which was necessitated by the death of the preliminary executor during the course of the estate administration.

A supporting affidavit was also filed by Thomas A. Hynes, of Hynes & Chu, LLP, dated July 20, 2009, in which Mr. Hynes notes that he consulted with the preliminary executor before his demise and with the co-administrators on several occasions. Mr. Hynes also indicates that he conducted research of the questions presented in this matter, spending a total of 11.25 hours on this estate. His affidavit also offers support for the affidavit of services filed by Mr. Howard.

As reflected on Schedule C-1 of the amended account, \$16,666.67 of the agreed upon fee of \$50,000.00 payable to Hynes & Chu, LLP remains unpaid. More than 250 hours of legal

services were performed by the firm in connection with this fee. The actual value of the services provided exceeds the amount being charged. At the same time, Schedule C-1 also reflects that a fee of \$10,560.00 was consented to for services rendered in connection with the estate tax returns. This amount remains unpaid. There are also time sheets reflecting services provided in connection with the preparation of the judicial account, which result in billable time of more than \$16,000.00; the attorney has voluntarily agreed to limit this fee to \$4,945.33, which is the expected balance on hand after payment of the settlement amount due to decedent's wife and after payment of unpaid legal fees and disbursements as reflected in the account.

The only parties interested in this estate are the co-petitioners and decedent's wife, each of whom has signed the second stipulation finalizing the agreement reached between them, an executed copy of which was filed with the court on May 12, 2009. After reviewing (1) the two settlement agreements; (2) the amended account; (3) the time sheets submitted; and (4) the affidavits submitted by Mr. Howard and Mr. Hynes, the court approves the outstanding fees and reimbursement of expenses payable to Hynes & Chu, LLP and Mr. Howard as reflected in Schedule C-1 of the amended account.

## 2. Legal fee of Waller, Mitchell & Barnett (Florida counsel)

Mr. Howard filed a supplemental affidavit of services on May 21, 2009, in support of the legal fee of \$1,500.00 plus disbursements paid to the law firm of Waller, Mitchell & Barnett for services rendered in connection with the ancillary probate of decedent's will in Florida. Services provided by Florida counsel included preparing and submitting (1) a petition for an ancillary proceeding in Florida; (2) a Florida estate tax return; (3) an inventory; (4) a petition for discharge; and (5) a personal representative's deed. Schedule C of the account and counsel's

billing statements, annexed to the account as exhibit A, reflect additional reimbursements of \$37.00 paid to Waller, Mitchell & Barnett. The court approves the fee paid to Florida counsel in the amount of \$1,500.00 and the related costs, all of which have been paid.

3. Legal fee of Salvatore Diliberto

In his supplemental affidavit, Mr. Howard notes that the legal fee paid to Salvatore Diliberto, as attorney for decedent's wife, was not payable from estate assets but rather by Mr. Diliberto's client, who was the objectant to the account. This fee will not be reviewed by the court.

A decree has been settled. Attorneys for the administrators c.t.a. are directed to file an affidavit bringing the account down to date within 45 days of the date of this decision, after which the decree will be signed if it is found to be in order.

This decision constitutes the order of the court.

Dated: May 26, 2010

JOHN B. RIORDAN  
Judge of the  
Surrogate's Court