Matter of Mirabella

2011 NY Slip Op 30414(U)

February 22, 2011

Sur Ct, Nassau County

Docket Number: 338296/A

Judge: Edward W. McCarty III

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

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Accounting by John Castellano as the Executor of the Estate of

ROSALIE MIRABELLA,

Deceased.

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File No.: 338296/A

Dec. No.: 26996

Before the court is the first and final account of John Castellano as ancillary executor[1] of the estate of Rosalie Mirabella. The court is asked to approve: (i) attorney's fees; (ii) commissions; (iii) reimbursement of expenses; and (iv) the settlement of the account.

The decedent, Rosalie Mirabella, died on May 3, 2004, leaving a will dated February 13, 2001. At the time of her death, the decedent was domiciled in Florida. Ancillary letters testamentary issued to John Castellano on July 18, 2005. The accounting covers the period May 3, 2004 to April 21, 2009. An amended accounting covering the period May 3, 2004 to December 22, 2009 was filed on February 5, 2010. The amended accounting shows principal charges to the accounting party of $829,804.35.

Objections to the accounting and the amended accounting were filed by Vincent Castellano, a $10,000.00 legatee and the beneficiary of fifty percent (50%) of the residuary estate. The ancillary executor is the beneficiary of the other fifty percent (50%) share of the residuary estate. By instrument dated December 2, 2010, Vincent Castellano withdrew his objections to both the first account and the amended account.

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[1] Ancillary letters testamentary issued to the petitioner by decree dated July 18, 2005. The caption on the accounting and related papers refers to John Castellano as the executor rather than ancillary executor.

With respect to the issue of attorneys' 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 [3d 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 disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of

overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]; Warren's Heaton on Surrogate's Court Practice §106.02 [2] [a] [7th ed]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance.

The attorney has submitted an affirmation of legal services, without contemporaneous time records. According to the attorney's affirmation, he spent 171.1 hours on this matter at the hourly rate of $275.00 per hour for a total fee of $47,052.56, $25,435.00 of which has been paid and $22,117.00 of which remains unpaid. The attorney also charged a $500.00 flat fee to handle and supervise the delivery and inspection of oil paintings. The attorney also seeks $45.00 for expenses, but has not provided any detail as to the nature of the expenses.

It has consistently been held that the court has the discretion to review the reasonableness of an attorney's fee on an accounting whether or not anyone objects to the fee (*Matter of Stortecky v. Mazzone*, 85 NY2d 518 [1995]; *Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]; *Matter of Ver Planck*, 151 AD2d 767 [2d Dept 1989]). Here, the services performed by counsel as recited in his affirmation include time spent on the preparation of his affirmation of legal

services. Time spent by counsel supporting his fee is not compensable *(Matter of Gallagher*, NYLJ, Feb 2, 1993, at 22, col 4 [Sur Ct, Bronx County]). In addition, the time spent on some services appears excessive. For example, counsel claims to have spent in excess of twenty-three hours preparing Federal and New York State estate tax returns. The affirmation includes generalized descriptions of services such as 17.8 hours on "meetings concerning renunciation by residuary beneficiary and primary Executrix-client and estate beneficiaries meetings, correspondence, telephone calls." In addition, counsel charged for work done in connection with the Florida probate proceeding which is duplicative of the work performed by Florida counsel. Counsel also billed for attending an open house for the Bayville property and communicating with the alarm company, both of which are executorial in nature and not compensable. It is a general rule that an attorney will not be allowed legal fees for performing executorial services (*Matter of Jones*, 168 AD2d 448 [2d Dept 1990]). Accordingly, for the above reasons, the court fixes the fee of counsel in the amount of $35,000.00. The request for $45.00 in expenses is disallowed since counsel has failed to identify the nature of the expense.

The accounting also includes a request for reimbursement to the ancillary executor for expenses and mileage for trips to the Bayville property in an amount in excess of $3,000.00 (12/30/2006 - "estate expense reimbursement" $1,290.50; 04/18/2005 - "estate expense reimbursement, mileage for trips to Bayville to maintain and sell house and other administration matters" $1,032.00; 12/31/2005 - "estate expense reimbursement, mileage for trips to Bayville to maintain and sell house and other administration matters" $1,035.66). The court notes that the objectant was represented by counsel and voluntarily withdrew his objections to these expenses.

Nevertheless, the court declines to approve these expenses, which appear excessive and for which no supporting documentation is provided.

It also appears from Schedule C of the account that the ancillary executor took an advance payment of commissions in the amount of $12,594.50 without prior court approval. The objections filed sought the denial of commissions to the ancillary executor in their entirety for mismanagement of the estate and did not include a specific objection to the advance payment.

Commissions are not ordinarily payable until the entry of a decree settling a fiduciary's account (SPCA 2307 [1]; 2308 [1] and 2309 [1]; *Matter of Worthington* 141 NY 9 [1894]; *Beard v Beard*, 140 NY 260, 264 [1893]; *Matter of Stalbe* 130 Misc 2d 725 [Sur Ct, Queens County 1985]; 7 Warren's Heaton on Surrogate's Court Practice §103.06). Taking a commission prior to the settlement of an account without securing court approval pursuant to SCPA 2310 or SCPA 2311 exposes the fiduciary to the danger of being surcharged (*Matter of Hildreth*, 274 App Div 611 [2d Dept1949], *affd* 301 NY 705 [1950]; *Matter of Crippen*, 32 Misc 2d 1019 [Sur Ct, New York County 1961]; Turano, McKinney's Practice Commentaries to SCPA 2310 at 487-488). Usually the court allows the commissions but surcharges the fiduciary the amount of interest the estate lost because of payment, most commonly the statutory interest rate under CPLR 5004, from the date the unauthorized commissions were taken until the entry of the decree settling the account (*Matter of Dubin*, 166 Misc 2d 971, 972 [Sur Ct, Bronx County 1995]; *Matter of Mattes*, 12 Misc 2d 502 [Sur Ct, New York County 1958]; *Matter of McKee*, 147 Misc 889 [Sur Ct, New York County 1933]; *Matter of Bosch*, 201 Misc 890 [Sur Ct, Kings County 1952]; *Matter of Arkinson*, NYLJ Sept. 6, 2002 at 25, col 1 [Sur Ct, Westchester County]; *Matter of Dickman*,

NYLJ, Aug. 8, 2000, at 28, col 3 [Sur Ct, Nassau County]; see generally, 7 Warren's Heaton on Surrogate's Court Practice §103.06 at footnote 5).

There is some division between the Surrogates on the issue of whether there must be an interest surcharge on the advance payment of commissions even where all of the beneficiaries consent to approval of the advance in a nunc pro tunc order (*Matter of Penn*, NYLJ, Jan. 13, 1999, at 31, col 2 [Sur Ct, Suffolk County]; *Matter of Arkinson*, NYLJ, Sept. 6, 2002, at 25, col 1 [Sur Ct, Westchester County] [where Surrogate Scarpino took the position that while "commission are allowable...the executor must pay interest at the legal rate from time of taking"]; *Matter of Conroy*, NYLJ, Apr, 18, 2001, at 23, col 4 [Sur Ct, Westchester County] [holding that SCPA does not provide for nunc pro tunc approval of advanced commissions]; contrast *Matter of Schmitt*, 65 Misc 2d 1021 [Sur Ct, Nassau County 1971]; Turano and Radigan, NY Estate Administration §15:05 "If no one objects, the court may waive such interest").

An intermediate position was taken by then Surrogate Prudenti who held that a fiduciary's violation of SCPA 2310 and 2311 cannot be condoned and will ordinarily result in surcharge for the unauthorized payment at the legal rate of interest in order to protect the rule and deter advances without court orders, but such advances can be excused in certain extraordinary circumstances (*Matter of Gesswein*, NYLJ, May 28, 1998, at 31, col 4 [Sur Ct, Suffolk County]; *Matter of Heuser*, NYLJ, Mar. 27, 1998, at 33, col 4 [Sur Ct, Suffolk County]).

This court has generally taken the position that the taking of advance commissions without prior court approval is grounds for "automatic surcharge at the statutory rate of interest

of 9%" (*Matter of Moro*, 10 Misc 3d 1075A [Sur Ct, Nassau County 2006]).

Considering all the circumstances in this case and the above principles, the court surcharges the ancillary executor 9% statutory interest on the amount paid of $12,594.50 from the date taken of January 3, 2006 until the date of the decree. The surcharge shall be charged against the balance of the commissions due the ancillary executor.

In all other respects, the accounting is approved. A proposed decree has been submitted to the court and will be signed if found to be in proper form. This is the decision and order of the court.

Dated: February 22, 2011

Edward W. McCarty III
Judge of the
Surrogate's Court