

Matter of Korshunova

2012 NY Slip Op 33997(U)

January 4, 2012

Surrogate's Court, New York County

Docket Number: File No. 2008-2465

Judge: Nora S. Anderson

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

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In the Matter of the Accounting of Ramsey Elkholy as
Administrator of the Estate of

New York County Surrogate's Court
DATA ENTRY DEPT.
Date: JAN 04 2014

File No. 2008-2465

RUSLANA KORSHUNOVA,

Deceased.
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ANDERSON, S.

The former administrator of the estate of Ruslana Korshunova has accounted for his proceedings during the approximately one-year period in which he served as fiduciary. The two co-administrators d.b.n. have filed objections. Petitioner has now moved for summary judgment dismissing the objections as amended. Objectants have in turn cross-moved for partial summary judgment on one of the issues and simultaneously seek, inter alia, leave to comply belatedly with petitioner's prior discovery demands.

Decedent, a fashion model born in the Soviet Union, died intestate on June 28, 2008, survived by her mother (a resident of Kazakstan) and leaving an estate of approximately \$500,000. On July 3, 2008, petitioner, who had been decedent's modeling agent, was appointed administrator as the mother's designee (SCPA 1001[6]). Within a few months, however, petitioner and the mother had become embroiled in litigation in this court, she seeking his removal and an accounting on allegations of incompetence and malfeasance, he accusing her of defaming him in the modeling community in which he made his living. By September 2009, the parties had appeared to reach some accord. Thus, pursuant to the parties' stipulation, the mother discontinued her proceeding against petitioner; petitioner resigned as administrator and was replaced by the mother and an accountant friend of the mother's to whom the court issued letters

of administration d.b.n. on September 15, 2009. Shortly thereafter, petitioner commenced the present proceeding.

It soon became clear, however, that the discord between petitioner and the mother had not abated, as evidenced by the objections filed by her and her co-fiduciary. Although the objections, as amended, are divided into eleven separately alphabetized paragraphs, they in substance fall into only four categories: first (objections A, B, and C), that the legal fees paid (some \$89,000) and unpaid (some \$54,000 for pre-accounting services and some \$134,000 for services on the accounting) are excessive; second (objections D and E), that petitioner should not receive commissions in the amounts claimed (a total of approximately \$30,000); third (objections F, G, H, I, and J), that petitioner is not entitled to reimbursement for his advances made to the estate to defray estate expenses, or to restitution of his individual funds deposited by error to the estate's bank account; and fourth (objection K), that petitioner should be surcharged for "his acts, omissions and transactions as Administrator."

To the extent that it relates to the issue of legal fees, petitioner's motion is supported by lengthy affirmations of services and contemporaneous time sheets. In substance, the motion's theme is that the total legal fee – well exceeding half the value of the estate – is a self-inflicted injury on the part of the mother, whose obstructionism and litigiousness made resort to lawyers a necessary expense at every turn. Objectants' cross-motion for its part proposes that the total legal fee should as a matter of law be capped at 25 per cent of the value of the estate, or approximately \$125,000. Failing that, the cross-motion seeks an evidentiary hearing on the issue of legal fees. In the absence of any rationale for the per se cap suggested by objectants, and in view of their unwillingness to submit the legal fee issue for summary resolution on some basis

other than a per se cap, summary judgment as to that issue is denied.

In relation to the objections concerning commissions, the parties' respective motion papers do not pause to consider whether the application of SCPA 2307, governing the commissions of fiduciaries (other than trustees), is affected by the fact that petitioner is a former administrator who has been replaced by other fiduciaries. Certainly, the account schedules I and J, as amended, reflect petitioner's assumption that he is entitled to paying out commissions as well as receiving commissions on the property that he marshaled for the estate.

Strictly speaking, a fiduciary who has resigned is not entitled to statutory commissions, but instead may be awarded compensation on the basis of quantum meruit, as determined in the court's discretion (*see Matter of Allen*, 96 NY 327, 330). As a practical matter, however, such a fiduciary is customarily allowed commissions calculated in accordance with the statutory formula (*see Matter of Berg*, 91 Misc 2d 939 [Surr Ct, New York County 1977]), but not exceeding the compensation payable under the statute (*id.*). Even so, it is noted that such allowance does not include paying out commissions on the property that a resigned fiduciary has merely transferred to his successor (*see Matter of Hurst*, 111 AD 460, 462 [2d Dept 1906]). Thus, to the extent that petitioner has claimed paying out commissions on property transferred to the co-administrators d.b.n., his motion to dismiss the objections concerning commissions is denied, and objectants' cross-motion for summary judgment disallowing such amount is granted.

It is further noted that the amended account claims commissions on decedent's funds in a Paris bank account, which petitioner undisputedly attempted, without success, to marshal. In Schedule J, petitioner suggests that he should be allowed commissions on the fund despite his failure to collect it in view of the pains to which the mother put him in his efforts to take

possession of the fund. In this connection, it should be enough to note that the compensation of a fiduciary in this State is not a function of the degree of ease or difficulty posed by his responsibilities, but rather, the value that his services have conferred on the estate, as is very roughly estimated by the statutory formula (*see Matter of Schinasi*, 277 NY 252, 259). In short, petitioner cannot be allowed commissions on property that he did not “receive” within the meaning of the statute (*see Matter of Hurst, supra*, at 461-62).

Objection H, concerning petitioner’s charge against the estate for some \$6,500 in funeral expenses, has been mooted by the filing of petitioner’s amended account, from which the charge has been deleted. As for the balance of the objections (Objections F, G, I, , J, and K), there is little to be said in view of (1) the documentary evidence that supports petitioner’s motion (*see* exhibits to “Affirmation [of Jill L. Miller] in Support of Petitioner’s Motion ...”) and (2) objectants’ submissions in response. All but one of the objections in question consist of challenges to petitioner’s claims for reimbursements of his separate advances to the estate of \$9,479.23 and \$6,800 to cover certain expenses; and his claim to \$3,677.76 deposited by error to the estate’s bank account rather than to his individual account.¹ As to these, objectants have failed to lay bare their proofs establishing the existence of material questions of fact, which they are obliged to do in order to resist a summary determination of the issues (*see Matter of Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979])

The same evidentiary deficiency in objectants’ submissions is fatal to Objection K as

¹This item is the subject of Objections I and J, which in substance appear to be entirely duplicative of one another.

well. Apart from the unsupported allegations discussed above, Objection K turns chiefly on objectants' theory that petitioner mishandled the estate's tax issues.² But objectants' submissions – including the affidavit of the co-administrator who is a C.P.A. – fail to support the proposition that there was any estate tax filing to be made, much less a closing letter to be received, for an estate of this size, or that there was any injury caused by petitioner in relation to the estate's liabilities with respect to decedent's or its own income taxes.

Based upon the foregoing, petitioner is granted summary judgment with respect to Objections F, G, H, I, J, and K, as amended, which are dismissed. Petitioner is denied summary judgment as to Objections D and E. Both parties are denied summary judgment as to Objections A, B, and C, as amended, which are reserved for an evidentiary hearing. Objectants' request that they be allowed to cooperate belatedly in the discovery process is moot in light of the fact that petitioner seeks no further discovery for his case. The parties will be notified of the hearing date

²To the extent that Objection K alleges malfeasance on petitioner's part in addition to the wrongdoing alleged in the other objections, it may be adverting to a conversation between petitioner and the mother as alleged in objectants' motion papers. The allegation – that petitioner suggested to the mother that they cash a \$20,000 check and divide the proceeds although the check was an estate asset – is raised only in the affidavit of the mother's co-fiduciary, who does not purport to have been present during the conversation in question. In the absence of any allegation of resultant injury to the estate that might provide a basis for surcharge, much less any competent evidence in this connection, the subject is deemed a nullity for purposes of this proceeding.

in due course.

This decision constitutes the order of the court.

Dated: January 4, 2012


SURROGATE