

<b>Matter of Menezes</b>
2013 NY Slip Op 32454(U)
September 24, 2013
Surr. Ct, Nassau County
Docket Number: 324942/C
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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In the Matter of the Account of Proceedings of  
John K. Menezes, as Executor of the Estate of

File No. 324942/C

DOROTHY MENEZES,

Dec. No. 28925

Deceased.  
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Before the court is the first and final account of John K. Menezes, as the executor of the estate of Dorothy Menezes. Objections to the account were filed by Daniel Menezes. A hearing on the objections was conducted by this court on June 19, 2012. As set forth more fully below, the objections are dismissed on the grounds that the objectant failed to meet his burden of proof.

BACKGROUND

Dorothy Menezes died on April 27, 2002, survived by her three sons, John K. Menezes, Daniel Menezes, and Thomas Menezes (“John,” “Daniel,” and “Thomas”). Pursuant to the terms of decedent’s last will and testament, dated February 5, 1990 and admitted to probate by this court on December 16, 2002, the decedent’s estate was to be divided equally between John and Daniel. Decedent nominated John to serve as the executor of her estate, and letters testamentary issued to John.

On April 7, 2010, Daniel filed a petition to compel John to account as executor.<sup>1</sup> John

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<sup>1</sup>This action was preceded by a Summons and Complaint filed by John against Daniel and his wife, Caroline Menezes (“Caroline”) in the Suffolk County Supreme Court. In that proceeding, John alleged a breach of contract by the defendants, based upon actions taken by Daniel and Caroline in connection with Independence Community Bank (now known as Sovereign Bank) account xxx3323, opened by Daniel on April 5, 2002 with \$10,000.00 of his mother’s funds, which Daniel withdrew from one of his mother’s bank accounts. The account was originally intended to pay the decedent’s expenses prior to her death. Daniel subsequently authorized the bank to add John’s name to the account, effective April 5, 2002. After John was appointed as the executor of decedent’s estate, John decided to continue using the account as the estate bank account. The complaint asserts that after payment of the estate’s obligations and the distribution of most of the estate assets, \$90,044.00 remained on deposit in the account, together

filed his account on July 14, 2010. He subsequently filed an updated account, dated May 5, 2011, and a second updated account, filed on December 14, 2011.

Court conferences were conducted on December 14, 2011 and January 18, 2012. Daniel filed objections to the account on January 13, 2012 and a third court conference was held on May 24, 2012. Following a court hearing on June 19, 2012, counsel for John filed a post-trial memorandum.

#### THE ACCOUNT

The second updated account filed by John, which covers the period from April 27, 2002 to December 1, 2011, reflects total charges of \$373,224.42, consisting of the net proceeds from the sale of decedent's home, decedent's April 2002 pension check, miscellaneous Citibank checks for earned interest, a Nassau Educator's Federal Credit Union Account, and a Prudential account. This amount was reduced by administrative expenses in the amount of \$5,863.44<sup>2</sup>, and distributions of \$368,985.98<sup>3</sup>, for total charges of \$405,546.15, resulting in a balance of negative

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with \$10,200.00 which had been deposited by Daniel to reimburse John for the purchase of electronic equipment by John for a friend of the brothers. John asserts that he was the owner of ½ of the estate assets in the account (\$45,022.00) plus the reimbursement deposit (\$10,200.00) for a total of \$55,222.00. John subsequently discovered that Daniel had withdrawn all of the funds contained in the account. John demanded an explanation. John alleges that Daniel claimed that he had only borrowed the money but that Daniel ultimately refused to repay it. In a decision dated August 18, 2010, Judge Thomas F. Whelan found that the evidence was sufficient to establish a breach of implied contract as against Daniel and Caroline, and awarded a judgment against them in the amount of \$84,089.29 plus interest. A Suffolk County clerk's judgment dated August 27, 2010 reflects the judgment amount of \$84,089.29, with interest at the legal rate of nine per cent from November 1, 2005, in the amount of \$36,484.80, together with costs and disbursements of \$1,180.00, for a total judgment against Daniel and Caroline in the sum of \$121,754.09.

<sup>2</sup>The account reflects that \$5,838.44 was paid by the executor out of non-estate assets.

<sup>3</sup>Schedule E shows distributions to Daniel in the amount of \$185,990.81, and distributions of \$182,995.17 to John.

\$32,321.73. The account also shows unpaid administrative expenses totaling \$30,696.73<sup>4</sup>. The executor seeks approval of the accounting, an order directing Daniel to reimburse John \$4,060.32, payment of \$3,500.00 in legal fees for the preparation of the account, and payment to John for the balance of the distribution due him.

### THE OBJECTIONS

The objections to the account raised by Daniel are:

1. Funeral expenses: Although Schedule C shows funeral expenses of \$4,238.44 paid by John, this amount was actually paid by Daniel.
2. John's legal fees: The legal fees shown on Schedule C-1 for John's attorney, in the amount of \$15,500.00, are excessive.
3. John's executor's commissions: John should not receive any commissions, and the amount shown for commissions is excessive.
4. Commission payable to Daniel: Daniel should be paid an executor's commission, as agreed to by John, in recognition of the executorial duties performed by Daniel.
5. Real estate broker's fee: Daniel should be paid a real estate broker's fee in the amount of \$18,000.00 for handling the sale of decedent's real property, as verbally agreed to by John.
6. Daniel's claims: Schedule D fails to include Daniel's claims against the estate for: (a) \$9,160.00 for the decedent's funeral expenses; (b) legal fees of \$15,300.00; (c) expenses of \$9,890.16 incurred in connection with the maintenance of decedent's real property;

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<sup>4</sup>These expenses consist of the executor's legal fees for the compulsory account, in the amount of \$15,500.00, which were paid personally by the executor, and the executor's commission of \$15,196.73.

and (d) advertising expenses of \$680.80 incurred in connection with the sale of decedent's real estate and \$814.50 paid for court reporting services.

#### THE HEARING

A hearing was conducted on June 19, 2012. Testimony at the hearing was offered by John, Daniel and Caroline. No other witnesses testified.

The following documents were submitted by John at the hearing in support of his account and in opposition to the objections filed by Daniel:

Exhibit P-1: Petitioner's brief

Exhibit P-2: Independence Community Bank monthly account history for 4/5/02 to 12/15/03.

Exhibit P-3: Authorization (handwritten) of Daniel to Independence Community Bank to add John's name to account xxx3323 as of 4/5/02.

Exhibit P-4: Bank check for \$1,000.00, payable to Nassau County Surrogate's Court; bill dated November 5, 2002 for legal services charged by Prokop & Prokop to John Menezes for the estate of Dorothy Menezes in the amount of \$1,225.00, along with check number 1705 drawn on the personal account of John in payment of the bill; correspondence dated December 18, 2002 from attorney Prokop to John with a statement for \$400.00 for preparation for and representation of the estate in court on December 11, 2002; a statement from Prokop & Prokop dated January 3, 2003 for reimbursement of the process server's fee of \$70.00, along with a follow-up letter dated March 1, 2003.

Exhibit P-5: Statements and time records dated September 2, 2010 through June 18, 2012, for legal services rendered to John Menezes and related disbursements expended by Winkler, Kurtz, Winkler & Kuhn, LLP in connection with the accounting and related

hearing in the estate of Dorothy Menezes, in the amounts of: \$2,147.00, \$32.50, \$357.50, \$227.50, \$1,072.50, \$1,690.00, \$325.00, \$845.00, \$422.50, \$6,701.50, \$45.00, and \$6,152.50.

Exhibit P-6: Summons and complaint filed in connection with the Matter of John Menezes v. Daniel Menezes and Caroline Menezes, in the Suffolk County Supreme Court on August 27, 2007; a stipulation for leave to amend the complaint; an amended complaint; an additional stipulation to deem Daniel's and Caroline's letters as an answer to the complaint; an amended answer filed on behalf of Daniel and Caroline; a decision by Judge Thomas F. Whelan which found that the evidence before him was sufficient to establish a breach of implied contract as against both defendants, and which awarded a judgment against both defendants in the amount of \$84,089.29 plus interest; a notice of entry; and a Suffolk County clerk's judgment dated August 27, 2010 reflecting the judgment amount of \$84,089.29, with interest at the legal rate of nine per cent from November 1, 2005, in the amount of \$36,484.80, together with costs and disbursements of \$1,180.00, for a total judgment in the sum of \$121,754.09.

Exhibit P-7: The HUD-1 Closing Statement for the sale of decedent's house, showing total proceeds paid to John in the amount of \$178,811.28 and proceeds paid to Daniel in the amount of \$178, 822.72.

Exhibit P-8: An email from Caroline to John dated May 15, 2006.

In support of his objections to the account, Daniel submitted the following exhibits at the hearing:

Exhibit O-1: Funeral bill in the amount of \$8,160.00, marked "Paid in Full," and a bank check drawn on April 17, 2002, from Independence Community Bank Account xxx6965

in the full amount of the invoice.

Exhibit O-2: Visa bill dated August 7, 2002 which includes a charge from Newsday for \$688.80.

Exhibit O-3: A copy of check dated July 28, 2011 payable to the law firm of Siben & Siben for \$1,500.00 and a receipt for same; a copy of a check dated July 21, 2011 payable to the law firm of Mahon, Mahon, Kerins and O'Brien for \$5,000.00; an invoice from Siben & Siben, LLP, dated March 24, 2011, addressed to Daniel Menezes, for \$1,732.50, showing a credit of \$2,000.00; invoices from attorney Stephen J. Caputo, P.C., dated May 28, 2008, September 30, 2008, December 16, 2008, April 7, 2009, addressed to Daniel and Caroline Menezes for \$3,277.50; \$600.00, and \$1,912.50; and retainer agreements between Daniel and Caroline Menezes and (a) Siben & Siben, LLP and (b) Stephen J. Caputo, P.C.

Exhibit O-4: A list of checks issued between July 1, 2002 and June 26, 2003, apparently from Independence Community Bank account xxx2046 in the name of Daniel Menezes, in the total amount of \$6,319.55.

Exhibit O-5: The checkbook and handwritten checkbook register for Independence Community Bank account xxx2046 in the name of Daniel Menezes, indicating that checks were written in the total amount of \$6,319.55, which corresponds to O-4 above.

Exhibit O-6: A bill dated February 11, 2003, marked paid, from G.H. Cody Plumbing and addressed to Daniel Menezes at 378 Latham Road, Mineola, New York, in the amount of \$353.03.

## BURDEN OF PROOF

In a contested accounting proceeding, the fiduciary submitting the account has the burden of proving that he or she has fully accounted for all the admitted assets of the estate and that the accounting itself is complete and accurate (*Matter of Schnare*, 191 AD2d 859 [3d Dept 1993], *lv denied* 82 NY2d 653 [1993]). The fiduciary's burden is usually met by simply placing the account into the record. Consequently, once the accounting party has made a prima facie showing of having discharged his or her duty to the estate by offering the account into evidence, the objectant bears the affirmative burden of coming forward with evidence to establish that the account is inaccurate or incomplete (*Matter of Gallagher*, 81 AD2d 825 [2d Dept 2011]). Upon introducing sufficient evidence to meet that burden, the burden of going forward shifts back to the accounting party to prove by a fair preponderance of the evidence that the account is accurate and complete (*Matter of Taylor*, 79 AD3d 766 [2d Dept 2010]; *Matter of Schnare*, 191 AD2d 859 [3d Dept 1993]).

## ANALYSIS

### Funeral Expenses (Objection 1)

John does not dispute that Daniel paid the funeral expenses, but John asserts that the bill was paid out of \$15,478.00 of decedent's funds which Daniel transferred from the decedent's accounts into account xxx3323 at Independence Community Bank during decedent's lifetime by using a power of attorney granted to him. Exhibit O-1 reflects that the funeral bill was paid by bank check from Independence Community Bank account xxx3323. Daniel later added John's name as a signatory to this account, further reflecting that these were not Daniel's personal funds. Accordingly, this objection to Schedule C is dismissed.

John's Legal Fees (Objection 2)

Daniel argues that the executor's legal fees of \$15,500.00, as shown on Schedule C-1, are excessive. The fees shown were paid by John to Winkler, Kurtz, Winkler & Kuhn, LLP. No objection was filed to the legal fee paid to Prokop & Prokop as reflected on Schedule C.

Regarding the fee of the attorney for the estate, 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]). 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]).

In the course of this estate administration, John was represented by two different law firms, Prokop & Prokop and Winkler, Kurtz, Winkler & Kuhn, LLP. The court must admeasure the fees to be paid to each of these firms.

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, e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992], *affd* 207 AD2d 453 [2d Dept 1994]).

(A) Prokop & Prokop

John has submitted adequate documentation in support of the fees paid to this firm,

including billing statements which contain descriptions of the services provided. The services include meeting with the executor; reviewing decedent's will; discussing administration matters; filing the original will and death certificate; preparing and circulating waivers and consents; preparing and procuring witness affidavits; preparing and filing the probate petition; and representing the estate on the court return date.

The fees appear reasonable and no objections have been filed. Accordingly, the fees of Prokop & Prokop are approved in the amounts paid. If any of these amounts were paid personally by John and not yet reimbursed to him, the court directs that John be fully reimbursed from the estate for these amounts.

(B) Winkler, Kurtz, Winkler & Kuhn, LLP

The court has also received documentation in support of the fee charged by the law firm of Winkler, Kurtz, Winkler & Kuhn, LLP. This includes all of the billing statements and underlying time records, which reflect legal services billed at \$19,302.50 and disbursements of \$716.00.

The court has carefully reviewed the time records submitted to the court. 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]). The many services provided by the attorney included preparing and filing the answer to the petition for a compulsory accounting; appearing in the Surrogate's Court for conferences; preparing, amending and filing the accounting; scheduling, rescheduling and supervising the examinations of parties; drafting and sending letters regarding outstanding discovery; preparing a motion to compel or preclude; preparing a motion to strike; reviewing respondent's deposition

transcript; preparing for trial; reviewing responses to subpoenas; preparing a statement of issues; preparing trial exhibits; and researching applicability of doctrines of unclean hands and laches.

The documents reflect that counsel billed for travel time to and from the courthouse on September 7, 2010; February 23, March 30, May 5, May 19, June 14, July 12, July 18, October 11 and December 14, 2011; and May 24, 2012. This time is not compensable (*Matter of Trotman*, NYLJ, May 13, 1998, at 32, col 2 [Sur Ct, Nassau County]).

The fee is approved in the amount of \$18,500.00, inclusive of the \$3,500.00 requested in the petition, plus disbursements. To the extent that any portion of this fee was paid personally by John and not yet reimbursed, the court directs that John be fully reimbursed from the estate.

#### John's Executor's Commissions (Objection 3)

Daniel asserts that John should not be paid commissions, and that if he does receive commissions, they should be in an amount less than that shown on Schedule I, \$15,196.73. An executor's commissions are set by statute and "must be awarded in the absence of mathematical error in their computation or allegations of misconduct amounting to dereliction, complete indifference or other comparable acts of misfeasance" (*Matter of Drier*, 245 AD2d 787, 788 [3d Dept 1997], *lv denied* 91 NY2d 812 [1997]). No evidence has been proffered to support the denial of commissions to John. The executor's commissions are approved subject to audit, and the objection is dismissed.

#### Commissions Payable to Daniel for Services Performed (Objection 4)

While Daniel asserts the existence of an agreement between the brothers for the payment of commissions to Daniel, he has offered no proof in support. This objection is dismissed.

#### Real Estate Broker's Fee (Objection 5)

Daniel asserts that John verbally agreed to pay him a real estate broker's fee for the sale

of decedent's real property. No proof was offered to support this assertion, and the objection is dismissed.

Daniel's Claims Against the Estate (Objection 6)

Daniel's first claim is for the decedent's funeral expenses. This claim is denied; as noted above, the court finds that the expenses were paid out of estate assets.

Daniel's second claim against the estate is for his personal legal fees. The court is authorized by SCPA 2110 to grant compensation for legal services rendered to an estate beneficiary (*Matter of Bellinger*, 55 AD2d 448, 451 [4th Dept 1977]). "The general rule is that, where legal services have been rendered for the benefit of the estate as a whole, resulting in the enlargement of all the shares of all the estate beneficiaries, reasonable compensation should be granted from the funds of the estate" (*Matter of Burns*, 126 AD2d 809, 812 [3d Dept 1987] [internal citations omitted]). In this instance, the legal services rendered to Daniel did not enlarge the shares of all of the estate beneficiaries or benefit the estate as a whole. Moreover, there was undisputed testimony given at the hearing that the legal services of Siben & Siben and Stephen J. Caputo were rendered in defense of Daniel and Caroline as defendants in the litigation in the Supreme Court of Suffolk County, and not in connection with the estate administration before this court. This claim is denied.

Daniel's third item concerns \$9,890.16 of expenses which he claims he incurred in connection with the maintenance of decedent's real property. The list of Independence Community Bank account xxx2046 checks and checkbook and ledger submitted as Exhibits O-4 and O-5 total \$6,319.55, but even this lesser amount is not supported by cancelled checks or other sufficient evidence. Further, Daniel's testimony regarding the source of the money in this account was confusing and evasive, as was his testimony generally. During the course of the

hearing, Daniel repeatedly admitted reimbursing himself without authorization for various amounts of monies that he were felt were owed to him by the estate. It is therefore impossible to determine which, if any, of these claimed expenses were paid from Daniel's personal funds and if so, whether Daniel previously reimbursed himself for them. Accordingly, this claim must be denied.

The fourth claim filed by Daniel is for advertising expenses incurred for the sale of decedent's home; again, Daniel offered no proof that this expense was paid out of his personal funds rather than out of estate funds. Daniel also claims that he is entitled to \$814.50 for court reporting services in connection with the examinations before trial. Both of these claims are denied.

#### CONCLUSION

The account filed by John, the objections filed by Daniel, and the transcript of the hearing and exhibits have been carefully and thoroughly reviewed. This court finds that John met his initial burden of proof by filing his amended judicial account. The court finds further that Daniel did not meet his burden of proof, which required that he offer sufficient evidence to show that the account filed by the executor was not complete or accurate.

All of the objections are dismissed.

The court approves the account filed by the executor for the period of April 27, 2002 through December 1, 2011 and grants the relief requested. The fees of the executor's attorneys are fixed as set forth above.

Within 30 days of the date of this decision, the executor is directed to file an affidavit

bringing the account down to date.

This constitutes the decision and order of the court.

Settle decree on notice.

Dated: September 24, 2013

EDWARD W. McCARTY III  
Judge of the  
Surrogate's Court