

Matter of Lawrence v Miller

2015 NY Slip Op 30220(U)

February 11, 2015

Sur Ct, NY County

Docket Number: 1982-175

Judge: Nora S. Anderson

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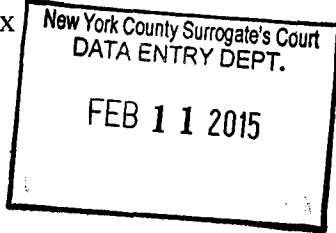
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of a Petition to Compel Payment of Legal Fees
for Services Rendered in Connection with the Estate of

SYLVAN LAWRENCE,

Deceased.



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RICHARD S. LAWRENCE and JAY L. WALLBERG,
as Executors of the Estate of Alice Lawrence, Deceased,

File No. 1982-175

Plaintiffs,

- against -

GRAUBARD MILLER, C. DANIEL CHILL,
ELAINE M. REICH, and STEVEN MALLIS,

Defendants.

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ANDERSON, S.

In these consolidated matters, on remittitur by the Court of Appeals, petitioner (a law firm) and defendants (three of the firm's partners) have submitted a proposed decree, and respondents/plaintiffs (fiduciaries of the deceased client's estate, who are hereafter referred to as "the executors") have submitted a proposed counter-decree. The parties' competing submissions raise two separate issues, *i.e.*, 1) the extent to which statutory interest should be added to the monetary relief granted petitioner by the Court of Appeals' decision and 2) the extent to which the Court of Appeals' decision contemplates taxation of costs. In view of the magnitude of the principal sums recoverable (*i.e.*, attorneys' fees in the amount of \$44 million and gifts in the total amount of \$5.05 million), the high interest rate claimed (*i.e.*, nine per cent), and the length of time during which interest is claimed to have accrued (*i.e.*, nearly a decade), the first issue vastly overshadows the second in practical importance (the second issue involving a claim to

approximately \$1 million in total costs).

The full background of the proceeding and action has been discussed at great length in numerous decisions at the trial and appellate levels and requires only limited repetition for present purposes. The current issues have their roots in a petition filed by the law firm in this court and in a complaint filed thereafter by the client in Supreme Court (New York County), but eventually transferred to this court as a related matter. The petition sought alternative types of relief with respect to the firm's retainer for legal services in connection with the client's decades-long litigation against the fiduciary of her deceased husband's estate. One of the firm's requests for relief was a staple under SCPA 2110, *i.e.*, that the court in its discretion fix and determine the reasonable compensation to be paid the firm from the husband's estate (*see Matter of Freeman*, 34 NY2d 1; *Matter of Potts*, 213 AD 59 [4th Dept. 1925]); but that portion of the petition was eventually discontinued. The firm's other request was that, in the alternative, the court "enforce" the firm's contractual rights to a 40 percent contingency fee from the client under its retainer (as revised in January 2005). In the transferred action, the client sought restitution of sizeable cash gifts that she had made to the three partners individually, her complaint based on the theory that, in substance, the partners' retention of the sums in question would be inequitable.

Following trial of these matters before a special referee, this court ruled that the retainer was unconscionable and therefore unenforceable, but awarded the firm compensation on a theory of quantum meruit. This court further ruled that the client was entitled to full restitution as to the gifts. On appeal, the Appellate Division agreed that the retainer was unconscionable, but it afforded the firm a different remedy, awarding it compensation in accordance with its time charges (as had been contemplated under the original retainer). The Appellate Division affirmed

this court's ruling as to the gifts. The Court of Appeals, however, reversed the decision below as to both the retainer and the gifts, ruling that the firm was entitled to enforcement of the revised retainer and ruling further that restitution of the cash gifts was unavailable, as time-barred. The Court of Appeals' decision also directed that reversal of the decision below was "with costs."

The first issue raised by the competing proposed decrees concerns whether pre-verdict interest is payable by the executors to the firm and to the partners individually as a matter of law (and thus at the statutory rate) or, instead, as a function of equity (and thus subject to the court's discretion). The issue also requires the court to identify the dates from which and to which such interest runs. Resolution of these questions turns on provisions of chapter 50 of the CPLR.

Section 5001 of the CPLR provides that, "Interest [to verdict] shall be recovered upon a sum awarded because of a breach of performance of a contract ..., except that[,] 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." Section 5004 of the CPLR directs that, except as otherwise provided, "Interest shall be at the rate of nine per centum per annum" In view of the ultimate appellate ruling that the firm is entitled to a fee pursuant to the terms of its revised retainer, it would ordinarily appear to be obvious that such statutes mandate pre-verdict interest at the annual rate of nine per cent on the unpaid fee. Indeed, apart from the extraordinary size of the fee thus validated by the Court of Appeals, this case presented a fairly standard instance of damages awarded for breach of contract. However, the identity of this matter as one at law – thus involving a sum subject to the first clause of section 5001 – is somewhat obscured by the fact that the firm's pleading was couched in equitable terms, *i.e.*, a "petition" requesting "enforcement" of the fee as opposed to a complaint demanding relief as of right. But an order

enjoining the client or her successors to pay the fee to the firm would not have been appropriate, since it would have amounted to a grant of specific performance, an equitable remedy available only if money alone cannot make the claimant whole (*see Fox v Fitzpatrick*, 190 NY 259). Thus, although the Court of Appeals' ruling as to the fee is based upon a petition calling for enforcement, the remedy it affords is nevertheless in the nature of damages, and interest thereon under section 5001 therefore must be at the statutory rate.

It is not disputed that the firm's entitlement to interest began on July 25, 2005, the closing date of the settlement that was the basis of the firm's fee under the revised retainer. By contrast, the parties disagree as to the date on which the "verdict" occurred within the meaning of section 5001 and section 5002.¹ The court concludes that the date of verdict was October 28, 2014, *i.e.*, the date of the Court of Appeals' decision, since it was only then that the basis of the executors' liability – the client's contractual obligation -- was finally identified. None of the rulings cited by the firm supports a contrary conclusion, since, as here, the "verdict" in each such case was the point at which the defendant's liability (albeit not, unlike here, the amount of damages) had become fixed (*see Love v State*, 78 NY2d 540; *DePaolo v Wisoff*, 184 AD2d 745 [2d Dept. 1992]; *Schipani v McLeod*, 541 F3d 158 [2d Cir 2008]).

The court is mindful that, under the circumstances of the present case, application of chapter 50 results in a recovery of an immense amount of interest, but the court is not at liberty to ignore the clear dictates of statute. As for the executors' contention that the Due Process Clause of the Constitution forbids adherence to the statute, that proposition need not detain us long. If

¹In a case such as this, in which pre-verdict interest is recoverable as well as post-verdict interest, the date of the "verdict" is of import only to the extent that it triggers a recovery, under section 5002, of compounded interest.

the executors mean to challenge only the constitutionality of the statute as applied here, the challenge would fail, since the extraordinary magnitude of the interest in this case is merely a function of the size of the principal sum that the Court of Appeals determined had been wrongfully withheld from the firm by the client (and thereafter by her executors) in a breach of her contract with the firm. On the other hand, if the executors mean to challenge the constitutionality of the statute per se, that challenge also is unavailing. Precedent has implicitly recognized (*see RML Capital v Republic of Argentina*, 17 NY3d 250; *Citibank, N.A. v Barclays Bank, PLC*, 2013 US Dist LEXIS 166747 [2013], *and cases cited therein*) that section 5004 – designed to avoid the need for case-by-case determinations of interest as an incidental issue – by its nature can do no more than a rough justice, often allowing either too little or too much compensation for the sake of avoiding an oppressive burden on the court and the parties. Moreover, this court would in any event decline the executors’ invitation to, in effect, take judicial notice that a nine percent return on principal was categorically beyond the range of any rational expectation during the period in question.

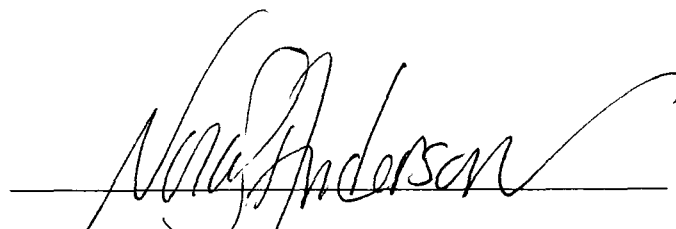
By contrast, the foregoing analysis does not apply to the sums that the three partners individually paid the executors pursuant to the prior decree of this court invalidating the gifts. Simply put, the sums in question (to be restored to the three partners in the wake of the Court of Appeals’ decision) were not “awarded” to the partners within the meaning of section 5001. To the extent that interest on such sums is allowable, it is with the equitable objective of placing the partners in the position that they would have occupied if they had not returned sums to the executors under compulsion of a decree that was ultimately ruled to have been issued in error. Thus, an award of interest in respect of the gifts returned by the partners pending appeal should

aim to compensate them for the forgone use of money that they paid pursuant to the court's prior decree (*see J. D/Addario v Embassy Indus., Inc.*, 20 NY3d 113). In the exercise of its discretion, the court has set the rate of annual interest at 5 per cent, from the respective dates the funds were surrendered to the executors to the date of the Court of Appeals decision, *i.e.*, the latter the date of "verdict" within the meaning of section 5001 (*see* 10 Weinstein Korn & Miller 5002.04).

The second issue as to costs also requires little discussion. There can be no serious disagreement on the point that a prevailing party's costs should be borne by the other party (*Matter of Grossman*, 292 AD2d 195 [1st Dept. 2002]) or that the firm and the partners, in the end, were the prevailing parties in both the proceeding and the action. Accordingly, where, as here, the Court of Appeals' ruling is "with costs," the costs in question are solely those incurred on the appeal to the Court of Appeals (*see Brocia v F Romeo & Co.*, 241 NY 505; *Matter of Abrams*, 130 NYS2d 197 [Sur. Ct., Westchester County 1954]; *Matter of Altz*, 83 NYS2d 725 [Sur. Ct., Westchester County 1948]; *Matter of Guggino*, 166 Misc 424 (Sur Ct, NY County 1936), and the term "costs" includes necessary disbursements (*see* CPLR 8301). In view of the foregoing, the printing costs of the firm and individual partners on appeal are allowed by the decree to be entered herein.

Decree signed.

Dated: February 11, 2015



SURROGATE