

Matter of Werner (Boscowitz)
2015 NY Slip Op 30310(U)
March 6, 2015
Surrogate's Court, New York County
Docket Number: 1993-2636
Judge: Nora S. Anderson
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New York County Surrogate's Court
DATA ENTRY DEPT.
MAR - 6 2015

SURROGATE'S COURT: NEW YORK COUNTY
-----X
Accounting of Paul Werner as Trustee of the
Trust under Article Ninth of the Will of

File No. 1993-2636

HERBERT HUBER BOSCOWITZ,

Deceased

-----X
A N D E R S O N, S.

The New York State Attorney General's ("AG" or "movant") seeks summary judgment on his objections to the accounting of Paul Werner ("Werner" or "Trustee"), successor trustee in the estate of Herbert Huber Boscowitz.

Decedent died on June 21, 1993, leaving a Last Will and Testament executed May 2, 1991, and a First Codicil executed August 10, 1992 ("the Will"). The Will was admitted to probate on November 18, 1993, and the three nominated executors, Lester E. Degenstein, Robert W. Sarnoff and Max Chopnick, were duly appointed. Each also qualified as fiduciaries of the charitable trust created under the Will, known as the Lillian and Huber Boscowitz Charitable Trust. Subsequently, each fiduciary died and successor trustees were appointed. Ultimately, Werner became the sole trustee.

The AG filed a petition to compel Werner to account, following his failure to file annual reports required of charitable organizations pursuant to EPTL 8-1.4. The court issued an order to compel him to account within 60 days of service of a copy of the order. The order was served on September 17, 2007. Werner did not account as directed. The AG filed a motion for contempt, returnable

January 4, 2008. Werner failed to appear. The court issued an order finding him in contempt, subject to relief upon his filing an accounting before January 25, 2008. Werner timely appeared but filed only a partial accounting. The court granted an extension to file a complete accounting by March 11, 2008. Once again, Warner failed to appear on the designated date and failed to file a complete accounting as directed. The court thus revoked Werner's letters and appointed the Public Administrator ("PA") as trustee.

Having found Werner in contempt for a second time, the court ordered his commitment to the custody of the New York City Department of Correction. Upon his release from custody, Werner filed a final accounting for the period June 21, 1993 to August 31, 2008, and an amended accounting for the same period on December 10, 2008.

Movant's objections to the final accounting are as follows:

- (1) commissions paid to a Trustee on the grounds that each trustee breached his fiduciary duty by failing to file tax returns and to exercise reasonable care and diligence with respect to trust assets;
- (2) Trustee's payment of penalties and interest on taxes due;
- (3) legal fees paid after October 10, 1996, as excessive, unreasonable and unwarranted in relation to legal services provided;
- (4) failure by Trustee to file an affirmation of legal services;
- (5) to payment of all disbursements without receipts or other proof of payment; which was withdrawn upon the Attorney General's

receipt of an affirmation of legal services, from Werner's counsel, together with documents supporting disbursements paid to date.

(6) computation of trustee's commissions.

Movant also objects to Werner's consistent refusal to answer any questions during his deposition, based on his assertion of his Fifth Amendment privilege.

After the close of discovery, the AG filed the instant motion and amended motion for summary judgment, to which the PA filed a supporting affirmation. Werner filed a memorandum of law in opposition but without a sworn statement of facts. The AG and the PA each filed a reply.

Standard for summary judgment

Summary judgment is a drastic remedy, requiring that the party opposing the motion be granted every favorable inference. The motion may be granted only if no material, triable issue of fact exists; issues of credibility must await determination by the trier of fact at trial (*Phillips v. Kantor*, 31 NY2d 307 (1972); *Westhill Exports, Ltd. v. Pope*, 12 NY2d 491 (1963); *Esteve v. Abad*, 271 AD 725 (1st Dept 1947); *Russell v. A. Barton Hepburn Hospital*, 154 AD2d 796 [3rd Dept 1989]). Courts have denied the motion where there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed facts, or where the credibility of affiants or witnesses is at issue (see, 3 Warren's Heaton §42.05[4], citing *In re Kumstar*, 66 NY2d 691(1985) and *In re Weiss*, NYLJ May 1, 1998 at 29 [Sur Ct N.Y.]).

Objections

In an accounting proceeding, the fiduciary has the initial burden of proving that he has fully accounted for all assets. *Matter of Doman*, 110 AD 3d 1073, 1074 (2nd Dept 2013). The party submitting objections must then come forward with evidence to establish that the account is inaccurate or incomplete. Upon such showing, it is the fiduciary who has the ultimate burden of coming forward with proof that the account is accurate and complete. (*Carbone v. Betz*, 101 AD 3d 866,868-9 (2nd Dept 2012), *citations omitted*).

Movant's objection to payment of trustee's commissions is based on respondent's failure to file tax returns timely, failure to provide a supporting affirmation of legal services in support of the payments and failure to pay trustee's commission in accordance with statutory rates. SCPA 2309. Rather than providing support for his calculations, respondent instead cited the statute which sets forth the procedure for calculating Trustee's commissions, complaining that movant had failed to specify the correct calculations. However, Objectant has no duty to present such calculations, only to show that the accounting is incomplete or inaccurate. *Carbone, id.* Further, respondent's behavior in asserting his Fifth Amendment privilege to all questions posed at his deposition fails to meet the standards required of a fiduciary to act with "undivided and undiluted loyalty to those whose interests . . . he is to protect." (*Matter of Wallens*, 9 N.Y. 2d 117, 122, (2007) *citations omitted*). "It is well-settled that where one party to an action, knowing the truth of a matter in controversy and

having the evidence in his possession, omits to speak, every inference against him warranted by the evidence may be considered." (*Crowder v Wells & Wells Equip.*, 11 A.D. 3d 360 361 [1st Dept 2004] citation omitted). The court grants movant's motion for summary judgment on objections 1 and 6, based on respondent's failure to meet the respective burdens of proof.

Movant also objects that respondent was required to pay penalties and interest, based solely on his failure to file returns in a timely manner. His response to this objection is the equivalent of an orphan seeking sympathy after murdering her parents. Respondent's entreaty that he might have been able to negotiate or even abate these charges if his letters had not been revoked is simply self-serving speculation unworthy of consideration. His contention that movant failed to set forth a theory or precedent for this objection strains credulity. It is eminently plain that trust funds were depleted to the detriment of beneficiaries because respondent failed to file timely returns and thus incurred unnecessary interest and penalties. His repeated assertion of his Fifth Amendment privilege, particularly with respect to his refusal to explain late filings, renders facts offered by movant as undisputed. Thus, summary judgment is granted to movant on his second objection.

The court now turns to the matter of attorneys' fees (Objection 4). The authority of a court to "fix and determine" fees for services rendered to a fiduciary is set forth in SCPA 2110(1). The specific factors to be considered include:

time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved.

In re Freeman, 34 NY 2d 1 [1974], citations omitted.

While respondent initially failed to file an affirmation of services, he eventually filed a supporting document signed not by him but rather by his counsel, who appended a record of respondent's time charges to his affirmation. The attorney's affirmation was specifically made "upon information and belief". "Statements in an attorney's affirmation not based on personal knowledge are insufficient to raise a factual issue". (*Steinbarth v. Otis Elevator*, 269 A.D. 2d 751, (4th Dept 2000), citations omitted). Counsel's affirmation is therefore a nullity.

Movant points out that time charges submitted by respondent do not comport with the actual amount paid. Schedules of the Accounting and the Amended Accounting merely identified money paid to respondent's firm as "Counsel Fees," absent any explanation of the nature or duration of counsel's work. Similarly, the Amended Accounting listed "Accounting Services", but failed to detail the nature or duration of such services. This, among other things, precludes a determination of whether the alleged services were legitimate or duplicative or otherwise improper.

Specifically, movant pointed to respondent's payment to himself of \$95,000 for legal work purportedly rendered for the period June 1,

2003 to December 23, 2003. However, the subsequently filed affirmation of services could only support, at a maximum, \$31,808.93. This is true only if movant concedes, which he does not, that respondent's 2003 hourly rate of \$550 was appropriate, or if he accepts the claim that respondent actually spent time on the matters asserted. Again, no support is found in the record that respondent's firm was entitled to payment from the trust for "counsel fees." Respondent mistakenly refers to movant's claims as mere opinion. Indeed they are factual assertions which remain unrebutted by respondent. The court approves the attorney's fee of \$31,808.93 and directs return of the balance of the amounts paid to Werner and his firm to the trust, with six percent interest accruing from the date of payment of such fees to December 31, 2014. Excepting the above reduced fee, summary judgment is granted to movant on Objections 3 and 4.

Conclusion

Summary judgment is granted to movant on objections 1, 2, 3, 4, and 6. Werner is surcharged for his abject failure to fulfill his fiduciary obligations as follows: \$110,450 for trustee commissions; \$39,397.35 for failure to file required tax returns; and \$818,618.44 for failure to support his claims for legal fees.

USA

S U R O G A T E

Dated: *March 6, 2015*