Matter of Goldfarb
2015 NY Slip Op 31871(U)
October 8, 2015
Surrogate's Court, New York County
Docket Number: 2011-3829/D
Judge: Nora S. Anderson

SURROGATE'S COURT : NEW YORK COUNTY

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In the Matter of the Application of Paralyzed Veterans of America to have Fixed and Determined the Fees of Ira Kopito, Esq., Attorney for Andrea Wolff, as Executor of the Estate of

FANNY GOLDFARB,

Deceased.

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File No. 2011-3829/D

A N D E R S O N, S .

In this SCPA § 2110 proceeding in the estate of Fanny Goldfarb, a charitable residuary beneficiary asks the court to fix legal fees and disbursements of the attorney for the executor ("Respondent"). Petitioner does not argue that Respondent's legal fee is excessive, but asks the court to order Respondent to refund fees already paid, if necessary. The Attorney General for the State of New York, on behalf of the ultimate charitable beneficiaries, however, contends that Respondent's fee is "**extremely** excessive" (emphasis in original). Respondent, for his part, argues that his fee of $278,660.93 (plus $4,864.12 in disbursements) is reasonable, and is supported by the terms of his retainer agreement. The executor, who is not a beneficiary and therefore will bear no portion of the fee, agrees with Respondent, having already paid him $236,461.06. The parties have agreed that the matter be decided without a hearing.

Decedent died on June 22, 2011, at the age of 94, survived by three first cousins once removed. Under her will, dated April 12, 2009, decedent made pre-residuary bequests of personalty and

cash totaling $544,000 to various individuals and charities and left her residuary estate equally to petitioner and two other charities. She nominated as executors the attorney-drafter and a distant cousin (the "cousin"), who also receives a pre-residuary bequest of $100,000. A petition for probate and preliminary letters testamentary was filed on October 11, 2011.

By the time preliminary letters issued, however, it had become clear that the interests of the attorney-drafter and the cousin were in conflict. The attorney-drafter states that, shortly after decedent's death, she learned that the cousin had hired counsel and that decedent's Manhattan cooperative apartment had been transferred to the cousin prior to decedent's death. The attorney-drafter then engaged Respondent, albeit without a formal retainer agreement, to represent her in administration matters concerning decedent's estate, including the procurement of information regarding the transfer of the apartment.

After the cousin failed to provide a satisfactory explanation regarding the transfer, the attorney-drafter (now co-preliminary executor) asked Respondent to broaden his engagement to include litigation to recover the apartment. Their arrangement was formalized in a retainer agreement, dated October 20, 2011, which provided for a $400 per hour fee for general estate administration matters and a contingent fee of 1/3 of any recovery relating to transfer of the apartment. The agreement

also provided that legal fees were to be paid from estate assets and that the attorney-drafter would not be personally liable for the fees.

A month after execution of the retainer agreement, Respondent obtained from this court an order to attend upon the cousin based upon a petition alleging that the cousin may have received the apartment from decedent through improper means (SCPA § 2103). The order was returnable December 6, 2011 and, within six months, the matter had been settled. Pursuant to the terms of the settlement, the cousin renounced her appointment as co-executor and agreed that the transfer of the apartment to her was void. In addition, the cousin agreed to pay $75,000 to the estate, to waive her $100,000 bequest and to waive $6,163.18 in potential receiving commissions in order to settle claims, not yet brought before the court, that she and her husband were in possession of an additional $492,166.66 of decedent's assets as a result of allegedly improper conduct during the last two years of decedent's life. Thereafter, the will was admitted to probate with the attorney-drafter as sole executor.

Approximately a year later, the executor filed her final account in this approximately $1,050,000 estate, asking the court, among other things, to fix the legal fees and disbursements of Respondent in the amount of $278,660.93 and $4,864.12, respectively. Included in such amount is a purported

$251,995.93 contingency fee on the settlement proceeds calculated as follows: one-third of the net proceeds from the sale of the apartment ($574,824.63), plus one-third of $181,163.18 (the $75,000 cash payment plus $100,000 waiver of bequest plus $6,163.18 in purported commissions waived). Before citation issued in the accounting proceeding, petitioner brought the instant proceeding, which also seeks fixation of Respondent's legal fees and disbursements. Since issue has yet to be joined in the accounting proceeding, legal fees and disbursements will be fixed in this proceeding, where jurisdiction is complete.

The determination of reasonable legal fees is within the sound discretion of the Surrogate *(see e.g. Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Marsh*, 265 AD2d 253 [1st Dept 1999]). Such "authority rests with the Surrogate regardless of the terms of a retainer agreement" (*Matter of Gluck*, 279 AD2d 575, 576 [2d Dept 2001], *citing Matter of Lanyi*, 147 AD2d 644 [2d Dept 1989]). In such connection, time expended has some relevance, but it is hardly determinative. Indeed, hours spent may be less important than other relevant factors. These factors include 1) the value of the assets involved, 2) the difficulty of the questions presented, 3) the skill required to handle the matter, 4) the attorney's experience, ability and reputation, 5) the benefit resulting to the estate from the services rendered and 6) the certainty of compensation (*see Matter of Freeman*, 34

NY2d 1 [1974]; *Matter of Potts*, 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; Uniform Rules for Surrogate's Court [22 NYCRR] § 207.45).

As noted above, the claims to legal fees and disbursements are $278,660.93 and $4,864.12, respectively. The executor has already paid Respondent all of his disbursements as well as $236,461.06 of the legal fees. According to Respondent's submissions, the legal fees can be broken down as follows: for non-litigation matters outlined in the retainer agreement, $26,665 (61.6 hours at $400 per hour plus $2,025 for the closing of decedent's apartment) and, as a contingency fee on the settlement of the turnover proceeding discussed above, $251,995.93.

We begin with an examination of the non-litigation services, which related to commencing the proceeding to probate the 2009 will, obtaining preliminary letters testamentary and performing legal services in general administration matters, including the sale of decedent's apartment. Although not dispositive, neither petitioner nor the Attorney General takes specific issue with these fees. In any event, such fees are more than adequately supported by the services provided as detailed in Respondent's submissions, including contemporaneous time records. Taking into consideration the usual factors considered in the fixation of fees mentioned above, Respondent's compensation for non-

litigation services is fixed in the amount of $26,665. In addition, disbursements are approved in the reduced amount of $4,584.12 to reflect the disallowance of $280 in mailing charges, which are not compensable under the circumstances here (*see Matter of Aitken*, 160 Misc 2d 587 [Sur Ct, New York County 1994]).

As for the litigation-related services, at issue is $251,995.93, the amount of the purported contingency fee under the retainer agreement. As Respondent concedes, the court is not bound by the terms of the retainer agreement and is charged with the duty of determining a reasonable fee based upon the factors outlined above. Nonetheless, it is important to note at the outset that Respondent's interpretation of the retainer agreement, while advantageous to him, is not supported by the agreement's plain language.

By its terms, the contingency fee arrangement was limited to the "work referred to in paragraph 1(b)." That subparagraph, however, describes legal services relating to a turnover proceeding limited to the pursuit of decedent's apartment. Indeed, the subparagraph specifically contemplates that the services covered by the contingency arrangement would be limited to "investigating the circumstances surrounding the [apartment] transfer," preparation of an order to attend requiring the cousin "to be examined ... regarding the circumstances surrounding the

transfer [of the apartment]," and legal work specifically relating to the transfer, including the issuance of a subpoena duces tecum on the cooperative and "the preparation and filing of a Petition to strike the transfer...."

Although the retainer agreement could have provided for the contingency fee to be calculated on any assets recovered or could have been amended to include a contingency on any recovery related to the additional estate assets obtained by the cousin, it did not. Respondent's misreading of the agreement (which he himself drafted) suggests a potential overcharge of more than $60,000.[1] Moreover, it cannot be ignored that the contingency fee sought by Respondent amounts to almost 25% of the gross estate and, according to Respondent's contemporaneous time records, his services in connection with the turnover proceeding would yield a legal fee of $30,880 (77.20 hours at $400 per hour).

That is not to say that the fact of the contingency fee arrangement (as properly calculated) necessarily should be ignored. As the executor points out, at the time she entered into such arrangement, her co-fiduciary was a would-be respondent in a future turnover proceeding and therefore obtaining consent from her as co-fiduciary to fund such a litigation on an hourly

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[1] The actual difference is $60,387.72 or $191,608.21 (one-third of $574,824.63) versus $251,995.93 (one-third of $755,987.81).

basis would have been impossible. In addition, prior to the commencement of the turnover proceeding, all of the circumstances of the apartment transfer were not known. Thus, the contingency arrangement insulated the estate from having to pay legal fees in the event there was no recovery and left Respondent with the risk that the proceeding would not yield any fee, let alone one commensurate with the services that he provided.

Respondent argues that the "difficulties presented" and the results obtained in this case support his receiving the amount of the contingency fee contemplated in the retainer agreement. Although courts have found legal fees calculated under contingency arrangements reasonable, as indicated in two cases cited by Respondent, *Matter of Gargaro* (23 AD3d 1099 [4th Dept 2005]) and *Matter of Talbot* (NYLJ, Nov 19, 2012, at 27, col 5 [Sur Ct, Suffolk County 2012], *affd* 122 AD3d 867 [2d Dept 2014]), the particular circumstances must warrant such a determination. Here, they do not.

Respondent cites various "difficulties" that he faced, but significantly none discloses litigative complexities or substantive challenges or the skills required to address such circumstances, a significant consideration for the courts in *Matter of Gargaro* (23 AD3d 1099, *supra*) and *Matter of Talbot* (NYLJ, Nov. 19, 2012, at 27, col 5, *supra*). Rather, the "difficulties" upon which Respondent relies all relate to the

risk that he bore in agreeing to a contingency fee arrangement. Although a factor to consider, risk is not dispositive of reasonableness as *Matter of Gargaro* and *Matter of Talbot* make clear.

Respondent also points to the results obtained, namely a significant recovery of money for the estate, his experience as an attorney, as well as the fact that, absent the settlement, to which the residuary beneficiaries specifically consented, there would have been no funds to distribute to them. Although these are also important considerations for the court, so too are other factors. They include that the turnover proceeding did not involve motion practice or present complicated legal issues. Nor was the proceeding a drawn-out litigation as evidenced by Respondent's expenditure of 77.20 hours on the matter from inception (preparation of the petition) to conclusion (settlement). Indeed, Respondent conducted two depositions and obtained some document discovery before settling the case less than five months after the return date of the order to attend.

Moreover, Respondent does not contend, much less demonstrate, that the estate's claim to the recovered assets had been dubious or difficult to prove. It also cannot be ignored that the time spent prosecuting the estate's SCPA § 2103 claim would yield a fee that is markedly disproportionate to the contingency fee sought under circumstances where the record does

not establish that the settlement was obtained despite questionable litigation prospects for the estate. Thus, this case is unlike *Matter of Talbot* (NYLJ, Nov. 19, 2012, at 27, col 5, *supra)*, for example, where the attorney obtained a very favorable settlement in a proceeding in which the merits of his client's position were tenuous at best, and in which the contingency arrangement was a function of the fact that the availability of another lawyer to press the case was itself doubtful.

Based upon the foregoing and, after careful consideration of all the criteria set forth in *Matter of Freeman* (34 NY2d 1, *supra*) and *Matter of Potts* (213 App Div 59, *supra*), the court fixes Respondent's litigation-related fees in the amount of $115,000. Such allowance recognizes that the value of Respondent's services outweighs the time he spent in the matter, yet also recognizes that the other factors discussed above do not support a fee that, as the Attorney General notes, would make Respondent "in effect the major beneficiary of the estate." Respondent is directed to return the funds he received in excess of the total amount fixed above for non-litigation and litigation-related services, including disbursements, without interest,[2] within 45 days after service of a copy of this

[2] Petitioner did not request that Respondent be ordered to pay interest on any overpayment of his fee, and the court, in its discretion, declines to award interest in the circumstances here.

decision, which constitutes the order of the court, with notice of entry.

Dated: ~~September~~ OCTOBER 8, 2015

SURROGATE