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| <b>Matter of Bax</b>   |
| 2016 NY Slip Op 32759(U)   |
| December 22, 2016  |
| Supreme Court, Queens County   |
| Docket Number: 15285/06  |
| Judge: Bernice D. Siegal   |
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Short Form Order

**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**  
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25G  
Justice

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In the Matter of the Application for  
Judicial Settlement of the Final Account  
of Dimitrios Spanos, Esq., as the Guardian  
for the Property of

Index No. 15285/06  
Motion Seq. No.: 9  
Motion Date: 10/18/16

JACK BAX,  
  
Deceased.

**FILED**  
JAN 12 2016  
COUNTY CLERK  
QUEENS COUNTY

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The following papers numbered 1 to 9 read on this motion for an order pursuant to CPLR 2221(d) for leave to reargue certain aspects of this Court's Order dated June 7, 2016 on the ground that this Court may have an inadvertently overlooked certain facts or misapprehended an aspect of the law pertaining to this proceeding.

|  | PAPERS<br>NUMBERED |
|--|--------------------|
| Notice of Motion- Affidavits-Exhibits.....                 | 1 - 4              |
| Memorandum of Law in Support.....                          | 5 - 6              |
| Memorandum of Law Respecting Guardian's Motion to Reargue. | 7 - 9              |

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Counsel for the Court Appointed Guardian moves for an order pursuant to CPLR §2221(d) for leave to reargue certain aspects of this Court's Order dated June 7, 2016 on the ground that this Court may have an inadvertently overlooked certain facts or misapprehended an aspect of the law pertaining to this proceeding.

**Background/Contentions**

St. John's Hospital filed a Petition seeking the appointment of a guardian for Jack Bax. On November 22, 2006, Justice Charles J. Thomas issued an Order and Judgment appointing Henry

Orlow as Guardian of the Person and Property of Jack Bax. Orlow declined the appointment and on May 1, 2007 Justice Thomas appointed Dimitrios Spanos ("Spanos") as Personal and Property Guardian. Spanos qualified as Guardian on September 2, 2007 and filed his initial report on April 15, 2008. The Initial Report indicated that he had already facilitated Bax's move from his home in Queens, New York to Eindhoven in the Netherlands where Bax was to reside in a "guided living community." In addition, on January 24, 2008 Spanos obtained a Settlement Agreement wherein Bax's ex-wife relinquished her one half interest in Bax's real property.

On September 8, 2008, the foregoing actions were approved and ratified and the Court permitted the Guardian to proceed with the sale of Bax's realty for approximately \$1,000,000.<sup>1</sup>

The Order and Judgment dated November 22, 2006, stated that the "compensation of the guardian shall be fixed in subsequent order of the Court."

On January 14, 2010, an Order and Judgment was issued granting Spanos' request to resign as Guardian of the Person as a Personal Needs guardianship was established in the Netherlands.<sup>2</sup>

Pursuant to SCPA §2307, on April 19, 2010, Spanos was awarded commissions in the amount of \$7,535.80 for the period covering May 1, 2007 through December 31, 2008.

Bax passed away on December 28, 2014 and a Notice of Death was issued on September 16, 2015. Spanos filed his final account on February 29, 2016.

The Guardian submitted an Order settling the Final Account wherein he requested commissions in the amount of \$41,457. On June 7, 2016, this Court signed the Order settling the Final Account granting commissions totaling \$16,150.50 "as an for all statutory commissions due

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<sup>1</sup>The September 8, 2008 Order granted a legal fee of \$42,780 to Counsel for the Guardian, John Vaneria.

<sup>2</sup>The January 14, 2010 Order granted Counsel for the Guardian, John Vaneria, legal fees in the amount of \$15,452.55.

guardian pursuant to SCPA 2307.”

As more fully set forth below, the Guardians motion to reargue is denied.

**Discussion**

Pursuant to CPLR §2221(d) a motion for leave to reargue “ shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” (CPLR §2221(d)(1).) “A motion for reargument is addressed to the discretion of the court.” (*Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 [2d Dep’t 2001]; *see also V. Veeraswamy Realty v. Yenom* , 71 A.D.3d 874, 874 [2d Dep’t 2010]; *Barnett v. Smith*, 64 A.D.3d 669, 670 [2d Dep’t 2009]; *E.W. Howell Co., Inc. v. S.A.F. La Sala Corp.*, 36 A.D.3d 653, 654 [2d Dep’t 2007].) In essence, the purpose of a motion for leave to reargue is to allow a party to either demonstrate that the court misapplied the law or misapprehended or overlooked the facts in its earlier decision. (*Mazinov v. Rella*, 79 A.D.3d 979, 980 [2d Dep’t 2010]; *Barnett*, 64 A.D.3d at 670–71; *Pryor v. Commonwealth Land Title Insurance Co.*, 17 A.D.3d 434, 435–36 [2d Dep’t 2005]; *Spatola v. Tarcher*, 293 A.D.2d 523, 524 [2d Dep’t 2002]; *Murray v. City of New York*, 283 A.D.3d 560, 560–61 [2d Dep’t 2001]; *Frisenda*, 280 A.D.2d at 515; *Diorio v. City of New York*, 202 A.D.2d 625, 626 [2d Dep’t 1994].)

Pursuant to Mental Hygiene Law §81.28(a):

“The court shall establish, and may from time to time modify, a plan for the reasonable compensation of the guardian or guardians. The plan for compensation of such guardian must take into account the specific authority of the guardian or guardians to provide for the personal needs and/or property management for the incapacitated person, and the services provided to the incapacitated person by such guardian.”

In the Law Revision Commission Comments relating to MHL §81.28(a), the Commission

states that "...the court is not, and should not consider itself, bound by that scheme in all cases, particularly where the primary responsibilities of the guardian involve personal care."

"The comments of the Commission make clear that the court retains *discretion* to adopt any compensation plan it deems appropriate to the extent that the guardian exercises powers of fiscal management." (Emphasis added.) (*Matter of Sehr*, 169 Misc.2d 543, 545 [Sur. Ct. NY Co. 1996].)

"A court is authorized to award 'reasonable compensation' to a guardian of the person or property of an incapacitated person for services rendered in caring for the personal needs and managing the property of the incapacitated person (citations omitted), and it is within the court's *discretion* what, if any, compensation is due such a fiduciary." (Emphasis added) (*In re Frank C.*, 102 A.D.3d 683, 684 [2<sup>nd</sup> Dept 2013] citing *In re Joshua H.*, 80 A.D.3d 698 [2<sup>nd</sup> Dept 2011].)

Pursuant to SCPA §2307(1), a guardian of the property of an incapacitated person, like any other "fiduciary", "is entitled to a commission for receiving and paying out sums of money." (*In re Yolanda T.M.*, 137 A.D.3d 1280, 1281 [2<sup>nd</sup> Dept 2016])[remitting the matter to the Supreme Court, "to set forth its calculations and the reasons for its determination with respect to the appellant's request for an award of guardianship commissions pursuant to SCPA §2307(1)."]

Herein, The Guardian seeks a final commission in the amount of \$37,428 and annual commissions for 2014 in the amount of \$4,029. The net effect of this type of an award would be to allow the Guardian to "double-dip" on his annual commissions.<sup>3</sup>

In determining the Guardian's commission, the court added to the initial funding of the estate all principal charges, all income received in the course of the guardianship, all disbursements made in the course of the guardianship, and the balance on hand totaling \$1,225,862. The court then

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<sup>3</sup> As set forth later in this decision, the annual commissions are not the exclusive form of compensation available for the Guardian.

applied SCPA §2307(1)(a) through (e) percentages to that total and calculated the “Receiving Compensation” of \$19,823.28<sup>4</sup>. The court then calculated the awarded “Disbursement Compensation” totaling \$19,533.20<sup>5</sup> which accounts for all commissions. The court then added the “Receiving Compensation” to the “Disbursement Compensation” (totaling \$39,356.48) and then subtracts the actual annual commissions of \$23,205.98 from \$39,356.48, resulting in the Guardian Final Commission of \$16,150.50.

The court’s calculation balanced the interests of the Incapacitated Person’s estate and his/her ultimate beneficiaries with those of the Guardian’s right to fair compensation. (See *In re Frank C.*, 102 A.D.3d 683.)

Accordingly, the Guardian failed to establish that the court misapplied the law or misapprehended or overlooked the facts in its earlier decision.

However, “[i]n addition to awarding a commission for services rendered as guardian of the person or property, reasonable compensation may be awarded in an appropriate case for extraordinary services rendered.” (*In re Frank C.*, 102 A.D.3d at 684.) Herein, the Guardian made annual trips to Holland to visit his ward but has yet to apply for extraordinary services covering the expenses for the visits.

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| <sup>4</sup> Compensation on Receipts: | \$100,000 x 2.5%  | = \$2,500           |
|  | \$200,000 x 2%    | = \$4,000           |
|  | \$700,000 x 1.5%  | = \$10,500          |
|  | \$225,862 x 1.25% | = <u>\$2,823.28</u> |
|  |                   | \$19,823.28         |

|   |                      |                     |
|---|----------------------|---------------------|
| <sup>5</sup> Compensation on Disbursements: | \$100,000 x 2.5%     | = \$2,500           |
|   | \$200,000 x 2%       | = \$4,000           |
|   | \$700,000 x 1.5%     | = \$10,500          |
|   | \$202,656.02 x 1.25% | = <u>\$2,533.20</u> |
|   |                      | \$19,823.20         |

**Conclusion**

For the reasons set forth above, the Guardian's motion to reargue is denied.

Dated: *December 22, 2016*

*Bernice D. Siegal*  
Bernice D. Siegal, J. S. C.

**FILED**  
JAN 12 2016  
COUNTY CLERK  
QUEENS COUNTY