

Matter of Brown

2017 NY Slip Op 33562(U)

December 20, 2017

Surrogate's Court, Bronx County

Docket Number: File No. 2008-2223/E

Judge: Nelida Malave-Gonzalez

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FILED

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ACCOUNTING DEPT.
SURROGATE'S COURT
COUNTY OF BRONX

SURROGATE'S COURT, BRONX COUNTY

December 20, 2017

ESTATE OF HARRY BROWN, Deceased
File No.: 2008-2223/E

In this accounting proceeding, the limited administrator, a daughter of the decedent, moves, for summary judgment dismissing the pro se objections filed by two of the decedent's five distributees. The movant also requests an award of attorney's fees to be paid from the settlement proceeds to separate counsel who rendered legal services in a compulsory accounting proceeding and this pending accounting proceeding. On the return date of the motion, there was no appearance in opposition by the objectants, two sons of the decedent, and trial counsel did not file any papers in response to the service of the motion. The remaining two distributees who defaulted to the service of citation in the accounting proceeding were not served with this motion.

The decedent died on December 28, 2007 survived by the petitioner and four sons. Letters of administration issued to the daughter on

February 27, 2009. In 2010, a compulsory accounting proceeding was commenced by one of the objectants and then withdrawn. In 2012, the administrator commenced an application seeking, inter alia, permission to compromise causes of action arising from the decedent's death. However, as a final, definitive amount to be paid to this estate was not yet established in the underlying federal action, on April 3, 2013 this court modified the restrictions on the limited letters of administration to allow the administrator to receive an estimated maximum amount that could be recovered and to hold any settlement proceeds jointly with her trial counsel in a separate interest-bearing account, without bond.

It appears that upon receipt of the settlement award, the funds were instead placed in a separate attorney escrow account, without the protection of a bond, and certain distributions were made equally to the decedent's five distributees, the alleged sole pecuniary beneficiaries, without court authorization. The administrator and two distributees accepted the distribution without objection; however, the two objectants were not satisfied with their distributions, so another proceeding was commenced to compel an accounting. The administrator alleges that, as the trial counsel did not provide her with representation in the compulsory accounting proceeding and had not completed all its obligations in accordance with the April 3, 2013 order of this court, she was required to obtain the services of another law firm to represent her, not only for the compulsory accounting proceeding, but also to file this accounting proceeding. As a result, she also seeks

compensation for this separate counsel to be paid from the settlement proceeds. Despite numerous conferences with members of the court's law department in both compulsory accounting and this accounting proceeding, the parties could not resolve their differences. Subsequently, a second amended account (the account) was filed on February 24, 2017 and amended objections (the objections) were filed on May 31, 2017, and this motion ensued.

Pursuant to the World Trade Center litigation settlement process, the Garretson Resolution Group (GRG) was appointed as the Allocation Neutral by the federal judge of the United States District Court for the Southern District of New York to supervise the allocation of the proceeds among the numerous plaintiffs, including setting attorneys fees and disbursements. Attached to the motion are copies of the most recent affidavits by GRG summarizing the funds allocated to the decedent's estate, one of which indicates that, as of October 5, 2016, attorney fees and disbursements were set at the sums of \$106,079.15 and \$8,444.18, respectively, and the net amount to be distributed to the distributees is \$336,398.43, and proof of payment of the five checks, copies of which were filed with the original account each in the sum of 62,414.97 payable to the five distributees. In the account: Schedule A states the combined total principal is \$450,921.76; Schedule B lists attorneys fees of \$106,079.15 and disbursements of \$8,444.18, all of which apparently were paid to the trial counsel; Schedule C provides that the net distributable proceeds of

\$336,398.43 are to be paid equally to the five distributees less the sum of \$62,414.97 each already was paid and, subject to the request for attorney's fees by the administrator's present counsel, there is a balance remaining so that two distributees are to receive the sum of \$4,864.71 and three distributees are to receive the sum of \$4,864.72.

In their objections to the account, the objectants contend that Schedules A and C contain conflicting information and are missing information. While the objectants allege there is conflicting information, they acknowledge that Schedule A lists the combined total settlement proceeds of \$450,921.76, Schedule B lists \$106,079.15 for attorneys fees and \$8,444.18 for disbursements. Nevertheless, they contend that the net distribution amount in Schedule C conflicts with the information contained in GRG's affidavit, sworn to January 23, 2017, and the federal court order of June 25, 2010. GRG's affidavit indicates that trial counsel was to receive a total payment of \$114,523.33 for attorneys fees and disbursements, and paragraph 4 of the federal court order indicates that the attorney's fees were reduced from 33.3% to 25%. Accordingly, the distributees should receive three times "the attorney total fees". Therefore, the total net settlement amount to the distributees should be the sum of \$343,569.99 (75% of \$450,921.76), rather than the amount listed in Schedule C, resulting in a difference of \$7,171.56 owed to the distributees.

The objectants contend that schedules A and C are missing information because: (1) this court's April 30, 2013 order directed that the

settlement proceeds be collected and held jointly with the administrator and her counsel in a separate interest bearing account, which was not done; (2) according to a trial counsel email correspondence to the administrator, which she forwarded to the distributees, a bank account number of xxxxx941 had an initial net amount of \$310,001.18 on September 25, 2013, and another email on October 24, 2013 indicates that a statement would be provided to the administrator. Accordingly, the objectants assert that trial counsel was to provide additional information which never occurred, demonstrating information is being withheld in bad faith, and making it difficult to ascertain the accuracy of the account.

In support of her motion for summary judgment dismissing the objections, the administrator asserts that: (1) the amended account is complete; (2) the account accurately sets forth the receipt of all settlement proceeds in the total sum of \$450,921.76, as well as attorneys fees of \$106,079.15 and disbursements of \$8,444.18 as determined by GRG as the Allocation Neutral; (3) each of the distributees have received \$62,414.97; (4) the balance to be distributed to the distributees in the account is correct; (5) the account is supported by appropriate proof; and, (6) the objectants have failed to supply any proof in support of their allegations.

Summary judgment cannot be granted unless it clearly appears that no material issues of fact exist (see *Phillips v. Joseph Kantor & Co.*, 31 NY2d 307 [1972]; *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The movant must make a prima facie showing of entitlement to

judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issue of fact (see *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals, Inc. v. Associated Fur Mfrs. Inc.*, 46 NY2d 1065 [1979]). When the movant makes out a prima facie case, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment is a drastic remedy which requires that the party opposing the motion be accorded every favorable inference, and issues of credibility may not be determined on the motion but must await the trial (see *F. Garofalo Elec. Co. v. New York Univ.*, 300 AD2d 186 [1st Dept 2002]).

In an accounting proceeding, the initial burden is on the fiduciary to prove that she has fully accounted for all of the estate assets and expenses (see *Matter of Carbone*, 101 AD3d 866, 868 [2nd Dept 2012]). Thereafter, the objectant bears the burden of showing that the account is inaccurate or incomplete. If the objectant is able to show, by a fair preponderance of the evidence, the lack of sufficiency of the account as a matter of law, the burden then shifts back to the fiduciary to prove that the account is accurate and complete (see *id.*; see also *Matter of Schnare*, 191 AD2d 859, 860 [3rd Dept 1993]). If the court finds a breach of duty, it may surcharge the fiduciary, if appropriate (see *Matter of Gourary*, 94 AD3d 672, 673 [1st Dept 2012]). However, as a general rule, not every surcharge results in a denial of statutory commissions unless there is a complete indifference

to fiduciary obligations that constitutes malfeasance (see Matter of Tydings, 32 Misc 3d 1204 [A], 2011 NY Slip Op 51177 [U], *30 [Sur Ct, Bronx County 2011]).

At the outset, the court does not condone the manner in which the trial counsel has acted in any of these proceedings. In any event, the account lists the total sum collected, attorneys fees in the sum of \$106,079.15 and disbursements in the sum of \$8,444.18, and equal advance distributions to each distributee, all of which are supported on this motion by the affidavits of GRG and proof of payment of advanced distributions to the five distributees. The sum of \$114,523.33 was deducted from the Schedule A amount as the total of attorney fees and disbursements awarded trial counsel by the federal court appointed Allocation Neutral, GRG, and the remaining balance is to be distributed whereby two distributees are to receive the sum of \$4,864.71 and three distributees are to receive the sum of \$4,864.72, subject to the claim for legal services rendered by separate counsel. The objectants' allegation that trial counsel's fees were to be 25%, leaving 75% net to be distributed is correct on its face as a proposition; however, it appears that the objectants compute the 75% on the gross settlement, rather than on the gross settlement minus attorney disbursements in the sum of \$8,444.18. As such, the gross settlement, the sum of \$450,921.76, minus disbursements of \$8,444.18, results in a net settlement amount of \$442,477.58, and 75% of this amount equals \$331,858.18. The account provides an even higher amount for the net

distributable proceeds to be distributed in the sum of \$336,398.43 because, for whatever reason, the litigating attorney's fees were actually set at less than 25%. As no proof is attached to the filed objections to support the allegations contained therein, most of them are speculative in nature, at best, and the objectants defaulted on this motion and failed to establish that the account is not accurate and complete, the objections must be dismissed.

The request seeking an additional attorney's fee for the legal services rendered by the administrator's present counsel to be paid from the remaining settlement proceeds is granted to the following extent. A bill, dated September 25, 2017, is attached to the motion indicating a balance due of \$17,611.25; however, the timesheet submitted by present counsel covers only the period from January 6, 2015 to April 6, 2015, indicating 16.34 hours rendered at a rate of \$250 per hour for total sum of \$4,085, which is in accord with the retainer agreement. On this record, the court can award legal fees only for the period from January 6, 2015 to April 6, 2015 in the sum of \$4,085, which appears to be fair and reasonable compensation for the 16.34 hours of legal services rendered, as the criteria for awarding counsel fees includes, inter alia, the time and labor required (see *Matter of Freeman*, 34 NY2d 1, 18 [1974]). This determination is without prejudice to counsel seeking compensation for services rendered after April 6, 2015 by making an appropriate application.

Accordingly, the motion seeking summary judgment dismissing the objections is granted. The request for an award of legal fees to present

counsel to be paid from the settlement proceeds is granted only to the extent that the sum of the sum of \$4,085 is awarded as reasonable compensation for the period of January 6, 2015 to April 6, 2015, which sum shall be deducted from the settlement proceeds, without prejudice to present counsel seeking additional compensation for services rendered after April 6, 2015 by making an appropriate application, which might include contribution from trial counsel.

The administrator shall update her account in accordance with this decision, which constitutes the order of the court, and serve a copy of this decision and order, and the updated account, upon the objectants and the trial counsel. Upon the filing of proof of service of same, the application in chief will be ready for determination.

Proceed accordingly.



HON. NELIDA MALAVE-GONZALEZ
SURROGATE