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

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In the Matter of the Application of the Law Offices of Craig Avedisian, P.C., and Richenthal Abrams and Moss To Fix and Determine a Charging Lien pursuant To Judiciary Law § 475 and for a Money Judgment and Related Relief against William W. Koeppel Regarding The Estate of

ROBERT A. KOEPPEL,

Deceased.

And Other Proceedings.

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DECISION AFTER TRIAL
File No.: 1996-4098/A

M E L L A, S.:

This is a proceeding to fix and determine a charging lien under Judiciary Law § 475 and for a money judgment against William W. Koeppel (or "Koeppel") by his former counsel, Richenthal Abrams and Moss (the "Richenthal Firm") and the Law Offices of Craig Avedisian PC ("Avedisian" or, together, the "Firms"). The court conducted a non-jury trial to determine the "gross value" that Koeppel, as represented by the Firms, obtained or retained in a 2008 global settlement of a decade-long intra-family dispute over various New York real properties and the entities holding them (the "2008 Settlement"). This was the issue at trial in light of the parties' July 10, 2006 retainer agreement which conditioned the Firms' flat fee and performance compensation on whether the gross value Koeppel obtained or retained in that settlement was above a specified amount, which is referred to as the "trigger amount." As set forth in the retainer, that amount came to "$43,640,000" (the "Trigger Amount").[1]

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[1]The 2006 retainer provides that the flat and performance fees are "earned on the highest offer equal to or above . . . the Trigger Amount whether you [Koeppel] accept the offer or not." The amount of the flat fee varied in relation to when the settlement was offered or actually occurred. However, the Firms conceded on prior motions that the flat fee was earned in the amount of $650,000, the lowest flat fee set under the retainer. The hourly-billing portion of the 2006 retainer was resolved on prior motions and is not at issue.

At trial, the parties focused on two main components of the 2008 Settlement: the value of Koeppel's remainder interest in the trust established under the will of his father, decedent Robert Koeppel, and the value of an entity, Whitehouse Estates, LLC ("Whitehouse"). At the time of the 2008 Settlement, Robert's testamentary trust owned various entities, or portions thereof, that in turn held interests in real estate. Koeppel has the right to receive the trust's remainder if he survives his mother, Robert's widow, who is the lifetime beneficiary of the trust.[2] Under the 2008 Settlement, Koeppel retained his remainder interest in this testamentary trust and the entities that stayed in the trust after the settlement. Also as a result of the 2008 Settlement, Koeppel became the outright owner of Whitehouse in its entirety.

In granting partial summary judgment to the petitioning Firms, the court determined that the 2006 retainer requires that certain initial values be used for the entities at issue (*Matter of Koeppel*, 2016 NY Slip Op 30509[U] [Sur Ct, NY County, Mar. 25, 2016, No. 1996-4098/A]). That decision flowed from the language in the 2006 retainer requiring that, "The valuations used will be based on Mr. Von Ancken's 2004 appraisals [of the various real estate entities] adjusted only for mortgages to third parties." Consequently, this court held that the initial value for the testamentary trust remainder is $108,650,000 and the initial value of Whitehouse is $36,000,000, before addressing the parties' various contentions about the proper adjustments to these values (*see id.*).

Koeppel's basic objective at trial was to prove that the Trigger Amount was not reached by the gross value of the interests that Koeppel either obtained or retained in the 2008 Settlement

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[2]Koeppel's vested remainder interest is subject to defeasance in favor of his issue should he die before his mother (*see* EPTL 6-4.9).

and, thus, that no flat or performance fees were due under the 2006 retainer. The basic objective of the Firms, for their part, was to prove that the Trigger Amount not only was exceeded by the gross value of the 2008 Settlemnet to Koeppel, but also was exceeded by more than $10 million.[3] Before turning to the other items involved in the "gross value" of the settlement to Koeppel, the court analyzes the various issues regarding Koeppel's trust remainder interest and Whitehouse.

In this connection, the court deemed it petitioners' burden to demonstrate by a fair preponderance of the credible evidence that Koeppel obtained or retained in the 2008 Settlement a particular "gross value," as per the 2006 retainer, above the Trigger Amount (*see* PJI 1:23, 1:41).

Testamentary Trust Remainder Interest

For purposes of background, it is noted that there were initially cross-motions for summary judgment addressed to the validity and interpretation of the 2006 retainer. In that context, this court upheld the validity of the 2006 retainer and determined that the value of Koeppel's trust remainder interest was to be included in a determination of "gross value" (*Matter of Koeppel*, 32 Misc 3d 1245[A] [Sur Ct, NY County 2011], *aff'd In re Koeppel*, 95 AD3d 453 [1st Dept 2012]).[4] Consequently, there can be no claim by Koeppel that the value of

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[3]Under the 2006 retainer, for increases in gross value that Koeppel obtained in the 2008 Settlement up to $5 million above the Trigger Amount, the performance fee is 3% of the increase, for increases from $5 million to $10 million, the percentage to be applied to calculate the performance fee is 5%, and for increases of $10 million or more above the Trigger Amount, the Firms were to receive 8% of that increase as a performance fee.

[4]The Appellate Division explained, in affirming: "William's argument that his remainder interest in his father's marital trust should not have been factored into the cumulative value of the 2008 settlement achieved on his behalf, inasmuch as he already possessed such remainder interest before the 2008 settlement was entered into, is unavailing. . . . The settlement negotiations left uncertain what assets each family member would receive upon a final agreement, . . ." (*Koeppel*, 95 AD3d at 455).

his remainder interest should not be included in determining whether the Trigger Amount was reached.

The main adjustments to the initial value of the remainder ($108,650,000) have been agreed to by the parties. The 2006 retainer itself mandates adjustments for third-party mortgages, which, for the entities held by the trust, total $27,577,134, a figure to which the parties have agreed.[5] Because Koeppel retained his remainder interest in the settlement, the value of his mother's intervening lifetime interest must also be subtracted from the initial value, and the parties have stipulated that its value is $25,000,000. Moreover, the parties have stipulated to a $4,252,411.79 reduction to the trust's remainder value.

When these agreed-to amounts (totaling $56,829,545.79) are subtracted from the initial value ($108,650,000), the result is $51,820,454.21 as the value (for the purposes of the 2006 retainer) of the remainder interest retained by Koeppel in the 2008 Settlement. Koeppel contends that the 2006 retainer requires that the value of the trust remainder must be further reduced by the sum of estate taxes for which the trust eventually might be liable at the death of Koeppel's mother. The proof at trial established that such a contention, however, is contrary to both the letter and the spirit of the retainer agreement.

"Gross value" as used in the 2006 retainer, the court holds, is not ambiguous.[6] Nor does

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[5]The third-party mortgage in respect of Whitehouse, the amount for which the parties have also agreed to, is addressed in the analysis of that entity's value below.

[6]As explained in *Uribe v Merchants Bank of New York* (91 NY2d 336, 341 [1998]):

> "Although 'ambiguities * * * are * * * to be construed against the [drafter], particularly when found in an exclusionary clause' (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398), it is well established that 'when the meaning of [a] * * * contract is plain and clear * * * [it is] entitled to [be] enforced according to its terms * * * [and] not to be subverted by straining to find an

"gross value" mean, as Koeppel asks the court to determine, "net value," that is, the value of the trust remainder net of possible estate taxes.[7] Indeed, respondent's own estate tax expert, who testified at trial, could not forecast what estate tax might eventually be due from the trust at the death of respondent's mother. No language in the 2006 retainer suggests that possible taxes of any sort were to be considered in determining "gross value." Indeed, the retainer's terms indicate the very opposite: "The valuations used will be based on Mr. Von Ancken's 2004 appraisals [of the various real estate entities] adjusted only for mortgages to third parties."[8]

> ambiguity which otherwise might not be thought to exist' (*Loblaw, Inc. v Employers' Liab. Assur. Corp.*, 57 NY2d 872, 877, *supra*)."

This is all that Koeppel seeks to do here, that is, strain to make "gross value" ambiguous.

[7]The English language includes certain words that can, depending on context, mean one thing or, indeed, its opposite, e.g., sanction or cleave. "Gross" is not such a word. Similarly unpersuasive is Koeppel's argument that "gross value" was meant to refer to what was "gross to him." While the court, in an excess of caution, permitted Koeppel (and the Firms for that matter) to present evidence at trial as to his interpretation of "gross value" and as to possible estate taxes due, that presentation only compels the conclusion that any future estate taxes could not be determined without complex or even speculative calculations that would not have been within the contemplation of an "ordinary businessperson" executing this retainer (*see Uribe*, 91 NY2d at 341; *see also Matter of Milliette*, 123 Misc 745 [Sur Ct, Clinton County 1924]). In other words, even if the term "gross value" was ambiguous, which is not the case here, the credible evidence at trial did not substantiate the meaning of "gross value" that Koeppel, self-servingly, sought to ascribe to it (*see Matter of Bernstein*, 185 Misc 2d 493 [Sur Ct, Bronx County 2000]; *cf. Nawi v Dixon*, 59 AD3d 363 [1st Dept 2009]; *CV Holdings, LLC v Artisan Advisors, LLC*, 40 AD3d 1322 [3d Dept 2007]). Moreover, Koeppel's attempt at trial to portray himself as an unsophisticated person – rather than an ordinary businessperson, who requested a revised retainer and actively negotiated the retainer at issue with the assistance of his accountant and had the opportunity to consult separate counsel regarding it – was simply not credible.

[8]The fact that, to calculate the value of the trust remainder, it was necessary to reduce the value of the trust by the value of the lifetime beneficiary's intervening estate does not violate this quoted directive in the 2006 retainer. "Gross value" within the meaning of the 2006 retainer referred to those interests that Koeppel obtained or retained in the 2008 Settlement. The value of the trust remainder that he retained was, by definition, the value of the trust net of his mother's intervening life estate.

Accordingly, the court finds and determines that, pursuant to the parties' 2006 retainer, the gross value of the remainder interest retained by Koeppel in the 2008 Settlement was $51,820,454.21.

The Value of Whitehouse

The issues at trial regarding adjustments to the initial value ($36,000,000) of Whitehouse were two-fold. One was as to the percentage of Whitehouse owned by Koeppel prior to the 2008 Settlement. The other was as to the method for valuing the added interest in Whitehouse that Koeppel obtained as a result of the 2008 Settlement, which necessarily entailed the valuation of his pre-settlement interest in Whitehouse as well as any other appropriate adjustments to the initial value of Whitehouse.

On the first issue, despite having had ample opportunity to substantiate his pre-settlement ownership interest at trial, and as limited by his post-trial submission, Koeppel claims that his pre-settlement interest in Whitehouse was 30.98%. He bases that figure on a stray statement in the court's decision on the prior cross-motions for summary judgment (*Koeppel*, 32 Misc 3d 1245[A], at *16). In this connection, that decision stated the obvious: that the pre-settlement ownership interest could not be considered a part of what he obtained in the settlement (*id.*). And while that decision mentioned the figure, it was clear from the parties' papers and the decision itself that the precise percentage owned by Koeppel pre-settlement was not then being determined, but rather was an issue for trial.

At trial, petitioners' evidence established that Koeppel's pre-settlement ownership interest in Whitehouse was 30.44%. The parties then turned to the second issue.

The Firms argued that, because Koeppel had owned only a minority interest in Whitehouse prior to the 2008 Settlement, the value of that interest had to reflect a discount. The

Firms presented expert testimony as to the need for and the extent of such discount. Koeppel, for his part, argued that no discounting of the interest was appropriate, since the valuation was not being made for the purposes of an open-market sale. He further argued for reducing the value of the full ownership interest that he had acquired in Whitehouse (as a result of the 2008 Settlement) by, dollar-for-dollar, the total indebtedness in favor of his father's estate that Whitehouse had incurred as an element of the 2008 Settlement.[9]

None of these arguments has merit because they are contrary to the clear terms of the retainer, which require that the valuations used should be adjusted only for third-party mortgages. Since neither a minority-interest discount nor the debt Whitehouse incurred to Robert's estate qualifies as such third-party mortgage,[10] they need not be taken into consideration in determining the gross value to Koeppel under the 2006 retainer.

The court thus assesses the value of the interest in Whitehouse that Koeppel obtained in the 2008 Settlement as follows. From the initial $36,000,000, 30.44% of the value (or $10,958,400) is deducted to account for Koeppel's pre-settlement interest in Whitehouse, leaving $25,041,600. From that amount, the third-party mortgage of $3,008,086 is deducted, which yields the sum of $22,033,514 as the value Koeppel obtained in the 2008 settlement for

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[9]Pursuant to the 2008 Settlement, Whitehouse was required to give promissory notes in favor of Robert's estate in the total amount of $16,856,119. Koeppel contends that this sum was lost by him when he acquired Whitehouse in the settlement and, therefore, must be deducted from the value of the interest that he acquired in Whitehouse.

[10]In Koeppel's written closing argument (post-trial briefs in the form of which the court requested from both sides) in a chart (at page 10) summarizing the terms of the 2008 Settlement, he appears to concede that the debt Whitehouse incurred to the estate would add to the value of the trust remainder and, at the same time, be a charge against Whitehouse's value, i.e., that it would be a wash from a valuation perspective. In any event, as non-third-party debt it does not qualify as a proper adjustment under the 2006 retainer.

Whitehouse.

Other Items of Value Koeppel Obtained From the Settlement

All but one of the values of the additional interests that Koeppel obtained in the 2008 Settlement are undisputed. The parties agree that certain Whitehouse promissory notes had a total value of $3,413,541, that monies on deposit with the Commissioner of Finance amounted to $118,426.40, and that four other interests under the 2008 Settlement,[11] worth a total of $787,729.48, were obtained by Koeppel in the 2008 Settlement, and that the total value of all such interests was $4,319,696.88. Although the settlement refers to a release of claim, with interest, that had been made against Koeppel, the Firms did not prove the value, if any, of that item, and it is thus not included in the gross value Koeppel obtained or retained.

Conclusion

Based on the above analysis and determinations, the "gross value" that Koeppel obtained and retained in the 2008 Settlement is as follows:

Remainder interest in his father's trust:	$51,820,454.21
Whitehouse:	$22,033,514.00
Other Benefits:	$ 4,319,696.88
Total	$78,173,665.09
Trigger Amount:	($43,640,000.00)
Exceeds Trigger Amount by:	$34,533,665.09

[11]Specifically, the paragraph numbers are: 4.1(B), 4.2(B), 8.12(F), 8.12(I), and 9.1.5.

The Trigger Amount has been exceeded, so that the flat fee of $650,000 has been earned, and it has been exceeded by more than $10 million, so that an 8% performance fee on the excess has been earned pursuant to the 2006 retainer. Eight percent of $34,533,665.09 is $2,762,693.21. The total fee owed by Koeppel (flat fee of $650,000 and performance fee of $2,762,693.21) is thus $3,412,693.21.

In this amount, plus interest, the petitioning Firms shall have a money judgment against Koeppel as well as a charging lien on the settlement amounts Koeppel received in respect of Whitehouse, the revenue thereof, and "the proceeds thereof in whatever hands they may come" (Judiciary Law § 475), until all amounts due are paid.[12] Interest shall run from August 30, 2008 at the rate set in the retainer of 1% per month (12% annually) on all unpaid amounts through the date of this decision and the decree to be entered herein. Interest shall accrue at the statutory rate of 9% per year thereafter, provided however, that interest shall not accrue on any amounts paid by Koeppel to the Firms under the 2006 retainer from the date of payment, including those paid into escrow pursuant to an agreement of the parties and court orders,[13] which orders were the subject of a separate, but related, contempt proceeding (*NML Capital v Republic of Argentina*, 17

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[12]In his papers in opposition to the summary judgment motion by the Firms, Koeppel argued that a charging lien could not attach to his trust remainder interest. His attorney stated: "[T]here is nothing to which the lien can attach even if the value of Mr. Koeppel's interest is determined" (Affirmation in Opposition, dated December 10, 2015, of Anthony Genovesi, Esq., at 26, ¶ 94).

[13]Although Koeppel argues that interest should not accrue pending this court's decision, pre-judgment interest is appropriate in breach of agreements, including attorney retainers, and here the retainer expressly contemplates and requires it (*see Ogletree, Deakins, Nash, Smoak & Stewart, P.C. v Albany Steel, Inc.*, 243 AD2d 877, 879 [3d Dept 1997]; *see also Frank and North v Metnick*, 157 AD2d 616 [1st Dept 1990], *as mod. by Frank and North v Metnich*, 159 AD2d 421 [1st Dept 1990]). A different rule may obtain for client funds no longer held by the client that have been paid into escrow (*see Matter of Levin & Glasser, P.C. v Kenmore Property, LLC*, 70 AD3d 443 [1st Dept 2010]), which is noted in the court's decision here.

NY3d 250, 258-259 [2011]; *IRB-Brasil Resseguros S.A. v Portobello Intl. Ltd.*, 84 AD3d 637, 638 [1st Dept 2011]; *see* CPLR 5001, 5002, 5004).

Settle decree.

Dated: April 13, 2018

SURROGATE