

**Matter of Forster (Bejjani)**

2023 NY Slip Op 32302(U)

July 10, 2023

Surrogate's Court, New York County

Docket Number: File No. 2009-3663/A/B/C

Judge: Rita Mella

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

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In the Matter of the Petition of Paul S. Forster, Esq., as  
Co-Administrator of the Estate of

ANDREE T. BEJJANI,

Deceased,

DECISION

File No.: 2009-3663/A/B/C

For Leave to Compromise, Allocate and Distribute the  
Proceeds Derived from Causes of Action Arising out of the  
Conscious Pain and Suffering and Wrongful Death of  
Decedent.

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M E L L A, S.:

The following submissions were considered in deciding four motions, described below:

<u>Papers Considered</u>	<u>Numbered</u>
Notice of Motion, dated August 27, 2018 and Affidavit of Paul S. Forster, Esq., in Support of Motion for Partial Summary Judgment Dismissing Objections, with Exhibits	1,2
Co-Administrator George Bejjani's Memorandum of Law in Support of Paul S. Forster's Motion for Partial Summary Judgment, dated November 30, 2018	3
Paul S. Forster's Reply Memorandum of Law in Further Support of Motion for Summary Judgment, dated November 29, 2018	4
Supplemental Opposition to Motion for Partial Summary Judgment by Joseph Bejjani, dated May 1, 2020	5
Supplemental Affirmation of Gary B. Freidman, Esq., in Support of Paul S. Forster's Motion for Partial Summary Judgment, dated May 8, 2020, with Exhibit	6
Supplemental Affirmation of Edward D. Baker, Esq., in Support of Paul S. Forster's Motion for Partial Summary Judgment, dated May 12, 2020, as amended by Affirmation dated May 21, 2020	7
Affirmation of Eric W. Penzer, Esq., in Support of Paul S. Forster's Entitlement to Statutory Commissions, dated October 14, 2020, with Exhibits	8

Affidavit of Paul S. Forster, Esq., in Further Support of his Motion for Partial Summary Judgment Dismissing Various Objections	9
Joseph Bejjani’s Supplemental Opposition to Motion for Partial Summary Judgment, dated October 30, 2020	10
Joseph Bejjani’s Affidavit Re: Attorneys Compensation, dated December 30, 2020, with Exhibits	11
Affirmation of Eric Penzer, Esq., as to Legal Services, dated December 30, 2020, with Exhibits	12
Affirmation of Tzipora Zelmanowitz, Esq., as to Legal Services, dated December 30, 2020, with Exhibits	13
Notice of Motion, Affirmation of Eric W. Penzer, Esq., dated May 5, 2021, in Support of Motion for Summary Judgment Dismissing Objectants’ Supplemental Objections and Dismissing Objectants’ Objections to the Extent not Already Resolved, with Exhibits, and Affidavit of Paul S. Forster, dated May 5, 2021	14,15,16
Affidavit of Joseph Bejjani in Opposition to Motion for Summary Judgment, dated May 21, 2021, with Exhibits	17
Supplemental Affidavit of Joseph Bejjani in Opposition to Motion for Summary Judgment, dated May 24, 2021, with Exhibits	18
Notice of Motion to Consider Evidence of Misconduct, and Affidavit in Support, by Joseph Bejjani, dated June 12, 2021, with Exhibits	19,20
Affirmation of Edward D. Baker, Esq., in Opposition to Motion, dated July 28, 2021	21
Affirmation of Tzipora Zelmanowitz, Esq., in Opposition to Motion Providing Proof of Misconduct, dated September 10, 2021, with Exhibits	22
Reply Affidavit of Joseph Bejjani in Further Support of Motions for Recusal and Providing Evidence of Misconduct, dated September 27, 2021, with Exhibits	23
Supplemental Affirmation of Tzipora Zelmanowitz, Esq., as to Legal Services, dated November 17, 2021, with Exhibits	24
Notice of Motion Seeking the Court’s Recusal, or Alternatively, to Preclude and/or Strike All Dispositive Papers Filed by Both Co-Administrators as a Result of the November 3, 2021 Decision and Order of the Court, and Affidavit of Joseph Bejjani in Support, dated December 15, 2021	25,26

Notice of Motion for Summary Judgment Dismissing Supplemental Objections and Affirmation of Tzipora Zelmanowitz, Esq., in Support, with Exhibits, dated December 15, 2021, with Exhibits	27,28
Affirmation of Edward D. Baker, Esq., in Opposition to Recusal Motion, dated January 12, 2022	29
Affirmation of Edward D. Baker, Esq., in Response to [George Bejjani’s] Motion for Summary Judgment, dated January 12, 2022	30
Notice of Cross-Motion to Strike and for Recusal and Affidavit by Joseph Bejjani, in Support and in Opposition to Motion for Summary Judgment, dated January 12, 2022	31,32
Supplemental Affidavit, by Joseph Bejjani, in Support of Cross-Motion, with Exhibits, dated January 14, 2022	33
Affidavit, by Joseph Bejjani, in Further Support of Recusal Motion, with Exhibits, dated January 19, 2022	34
Affirmation in Opposition to Cross-Motion and in Further Support of Motion for Summary Judgment, by Tzipora Zelmanowitz, Esq., with Exhibit, dated January 28, 2022	35
Affidavit “For All Intents and Purposes,” by Joseph Bejjani, with Exhibits, dated January 28, 2022	36
Reply Affidavit by Joseph Bejjani, in Further Support of Cross-Motion, with Exhibits, dated January 31, 2022	37

In this proceeding for leave to compromise causes of action related to decedent Andree Bejjani’s death and to allocate and distribute proceeds of the settlement of those causes of action, the court considers and determines four motions: 1) co-Administrator and Petitioner Paul S. Forster’s motion for summary judgment dismissing certain objections; 2) co-Administrator George Bejjani’s motion for summary judgment dismissing the balance of the objections; 3) Objectant Joseph Bejjani’s motion—styled as one “to consider evidence of misconduct”—but essentially seeking summary judgment in favor of his objections related to commissions and

attorneys fees; and 4) a motion by Joseph<sup>1</sup> seeking the court’s recusal, or alternatively to strike certain filings from the record, among other relief.<sup>2</sup>

On June 14, 2022, the court held oral argument by virtual means on these motions, following which, the matters were marked submitted for the court’s decision.<sup>3</sup>

### Procedural Background

Following the grievous murder of decedent Andree Bejjani on September 19, 2009, in her residence in Manhattan, her three siblings and distributees—George, Joseph, and Nada—each filed a petition for appointment as Administrator of her estate. Ultimately, the court granted the petition of George, who sought his appointment along with his designee Paul S. Forster, Esq.

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<sup>1</sup> Because of their shared surname, the court hereafter uses first names to refer to decedent’s siblings, George, Joseph and Nada Bejjani.

<sup>2</sup> Some of these motions had been partially determined by previous decisions of the court issued on July 12, 2019, September 23, 2020, November 13, 2020, April 7, 2021, and November 3, 2021.

<sup>3</sup> Oral argument on these motions had been scheduled initially, by order of the court, for April 26, 2022, but at the request of Joseph, who has appeared *pro se* for most of these proceedings, the court adjourned the argument to June 14, 2022. Notwithstanding the nearly two-month adjournment, Joseph opposed the new date on the ground that he needed more time.

On June 14, 2022, some two hours before the scheduled oral argument, Joseph sent the court a letter requesting permission to file a motion to provide “new evidence” to the court. After giving Joseph an opportunity to be heard on his application and after hearing from counsel for the other parties on this issue, the court denied Joseph’s last-minute request for leave to file the motion, finding the purported “evidence” would, at best, be cumulative or irrelevant and would not aid the court in deciding the motions—some of which had been fully briefed for a year. The court then heard oral argument on the motions.

More than three weeks later and while the motions were *sub judice*, the court received another letter from Joseph dated July 3, 2022. In this new letter, Joseph again sought permission to submit “additional new evidence” that he claimed was “material” to the pending motions. Apart from the fact that Joseph’s effort to reargue the court’s prior rejection of his efforts to supplement his motion papers is procedurally improper, the letter does not provide any more of a basis to supplement the record than his first letter. His request is thus denied.

(Forster) (*see* SCPA 707[1][c]). Letters of Administration, restricting the co-Administrators' authority so that they could not compromise any cause of action without further order of the court (EPTL 5-4.6), issued in August 2010.<sup>4</sup>

In September 2017, Forster filed a petition in this court to compromise the causes of action that the co-Administrators brought against decedent's convicted killer, and various business entities that employed him or owned, operated or provided security for decedent's residence. In addition to seeking approval of the \$1,500,000 settlement of the causes of action and removal of the restrictions on the Letters of Administration in order to permit such settlement, Forster's petition sought: (1) approval of the fees and disbursements of the lawyers who represented the co-Administrators in the underlying personal injury and wrongful death action, (2) allocation of the settlement proceeds to the cause of action for decedent's conscious pain and suffering, (3) payment of statutory commissions to the co-Administrators, (4) approval of reimbursement for out-of-pocket expenses of the co-Administrators, (5) reimbursement of funeral expenses,<sup>5</sup> and (6) leave to distribute the net settlement proceeds to George, Joseph, and

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<sup>4</sup> Joseph, the only New York domiciliary of the three siblings, had initially filed a small estate affidavit and qualified as Voluntary Administrator. His petition for Letters of Administration was denied by the court in a June 19, 2010 decision, and his authority to act as Voluntary Administrator ceased with the subsequent appointment of George and Forster as co-Administrators.

<sup>5</sup> The original petition sought reimbursement of \$21,990 to George for funeral services conducted in Lebanon, where George lives and where decedent was from, based on an invoice from Societe Bejjani pour le commerce s.a.r.l., dated October 5, 2009. After protracted litigation about the validity of this funeral invoice—initiated by Joseph and Nada, who claimed it was forged and fraudulent—Forster filed an affidavit in March 2021 seeking to withdraw this request for reimbursement, which the court granted. Further discussion regarding this funeral invoice as it relates to the objections to the request for commissions and attorneys fees is found below.

Nada, in equal shares. After some motion practice and amendments to the compromise petition, objections to essentially all the relief sought were filed by Joseph and Nada (Objectants) in July of 2018. In response, Forster filed a motion for partial summary determination of certain objections,<sup>6</sup> which the court, in a decision issued on July 12, 2019, continued in order to provide Objectants an opportunity to seek disclosure (CPLR 3212[f]). In the context of Forster's motion, George, by his attorney-in-fact Peter J. Ashy, appeared by counsel for the first time in this proceeding. In November 2018, Forster, who had previously been appearing *pro se*, also retained counsel.

In a conference held after the issuance of the July 12, 2019 Decision, the parties agreed to discuss settlement and thereafter, for the balance of the year, engaged in extensive settlement negotiations with the participation of a court attorney assigned to assist with this case. During this period, Joseph moved to have the invoice, which the co-Administrators had offered to show the \$21,990 George purportedly paid for funeral services in Lebanon, declared a forgery and to compel certain discovery (the Funeral Invoice Motion). However, the parties agreed to hold the motion in abeyance, while they continued these discussions. Unfortunately, settlement efforts were unsuccessful and litigation resumed in early 2020, but was then delayed by the onset of the COVID-19 pandemic, with the court issuing a scheduling order in April 2020, containing a briefing schedule as to Forster's continued motion for partial summary judgment. That order also provided for the further adjournment of the Funeral Invoice Motion. Oral argument on Forster's motion for partial summary judgment was ultimately held in September 2020, at the conclusion

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<sup>6</sup> Forster's motion did not seek determination of the objection related to the Lebanese funeral invoice or other objections relating solely to relief in favor of George.

of which the court granted the motion in part,<sup>7</sup> and continued the rest of the motion to allow limited additional disclosure to take place (CPLR 3212[f]). The balance of the motion, as well as the Funeral Invoice Motion, which Joseph had requested to amend, were scheduled for a future return date.

The primary dispute in this litigation has been the validity of the Lebanese funeral invoice and allegations by Joseph and Nada of George's and Forster's misfeasance related thereto, which they assert should affect the commissions of the fiduciaries and attorneys fees incurred by them in the course of this litigation.<sup>8</sup> The court reserved determination of these issues until all disclosure related to the funeral invoice had concluded. Thereafter, extensive motion practice regarding disclosure continued into March of 2021.

On March 5, 2021, Forster filed an affidavit asking to amend the Compromise Petition to: 1) withdraw the request that George be reimbursed \$21,990 for payment of the Lebanese funeral expenses, and 2) reduce the requested amount of reimbursement to George for travel expenses to \$3,718.53. In an April 7, 2021 decision, the court granted this relief and resolved all relevant aspects of the then pending discovery motions. This decision also directed George to respond to

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<sup>7</sup> In the decision, dated September 23, 2020, the court approved the compromise of the causes of action for decedent's conscious pain and suffering and wrongful death, allocated the settlement proceeds to the cause of action for conscious pain and suffering, set the fees of the personal injury litigation counsel and granted the request for reimbursement for certain of Forster's disbursements.

<sup>8</sup> In December 2020, as permitted and directed by the court in its November 13, 2020 Decision and Order, supplemental objections and counterclaims were filed by Joseph, which were joined by Nada by affidavit. Therein, Objectants requested that the attorneys fees and disbursements of the co-Administrators be paid from George's distributive share, and that the co-Administrators' request for commissions be denied completely or at least that their commissions be reduced as a result of their alleged misconduct.

some of Joseph's outstanding discovery demands by a date certain and further directed that any final dispositive motions be filed no later than 45 days after George provided those responses.

Additional litigation—including a motion by Joseph seeking the court's recusal—required extension of these deadlines but, on November 3, 2021, the court issued a Decision and Order with final deadlines for motions.

### **RECUSAL**

The instant motion by Joseph seeking the court's recusal is his second. His first motion was denied by decision dated November 3, 2021, and in it, the court examined Joseph's claims of bias in detail and found them to be without merit. In this motion, Joseph alleges that the court exhibited bias since the filing of his first recusal motion. In particular, he identifies the court's rejection of a June 4, 2021 e-filing, which he asserts was improperly deleted from the record. There is no dispute, however, that Joseph was advised by the court on the record on June 4, 2021, that this document, which the court had not seen, appeared to be untimely and not allowed by any of the court's scheduling orders. Nor is there any dispute that Joseph subsequently filed the document in the context of another motion shortly thereafter, and thus it is part of the record before the court. Nonetheless, Joseph maintains that this action by the court is inconsistent with the court's allowance of an allegedly equivalent filing by Forster in October 2020, and thus constitutes evidence of bias. He also claims that, generally, his adversaries have been given courtesies and advantages not extended to him. He asks for recusal or, in the alternative, for the striking of all the motion papers filed by the co-Administrators pursuant to the court's November 3, 2021 decision, which set forth the final briefing schedule for dispositive motions.

Joseph asserts that the court's record is replete with examples of bias, all transpiring since the failed settlement negotiations in 2019 through early 2020. He asserts that his opponents have been favored in the scheduling of motions and court appearances, including the extended deadline for filing dispositive motions. He further claims that George's motion for summary judgment should be stricken because the court extended the deadline for its filing without cause. The record belies this and demonstrates that the deadline for filing of any of the "final" motions was tied to completion of certain disclosure by George, and that this timeline was extended only after Joseph, who had filed a motion to compel discovery, was given an opportunity to provide certain additional questions he wanted answered by George, which, incidentally, Joseph failed to provide.

Nothing presented in this new recusal motion, nor in the voluminous record of nearly five years of litigation in this proceeding, during which a global pandemic and the implementation of e-filing in this court transpired, supports Joseph's claims of bias and impartiality by the court. The court notes that there were numerous occasions when Joseph was permitted to file additional affidavits not provided for in the court's scheduling orders. Indeed, the record reflects the court's consistent allowance of certain latitude to ensure that Joseph's *pro se* status and unfamiliarity with and admitted lack of legal training did not frustrate his ability to make a full presentation of his case (*see Sloninski v Weston*, 232 AD2d 913, 914 [3d Dept 1996]).

Absent a basis for disqualification pursuant to Judiciary Law § 14, which does not exist here, a recusal motion is addressed to the court's discretion and its conscience (*Corsini v Corsini*, 199 AD2d 103 [1st Dept 1993]; *Orr v Yun*, 95 AD3d 661 [1st Dept 2012]; *see* 22 NYCRR 100.3[E][1] ["A judge shall disqualify . . . herself in a proceeding in which the judge's

impartiality might reasonably be questioned”]). On this motion and upon review of the court’s record, there continues to be no aspect of the handling of these proceedings that brings the court’s impartiality into question and warrants recusal (*Matter of Alizia McK.*, 25 AD3d 429 [1st Dept 2006]).

As for Joseph’s alternative request for relief, namely that certain filings of the co-Administrators be stricken from the record, it is denied. Joseph has provided no grounds for such relief. The court has acted throughout this litigation to ensure that applications are decided on a complete record and will continue to do so.

### **SUMMARY JUDGMENT**

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law and tender sufficient evidence to demonstrate the absence of any disputed material facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212[b]). Upon such a showing, the burden shifts to the party opposing summary judgment, who must submit evidence demonstrating the existence of a genuine issue of material fact requiring a trial (*Alvarez, supra*, at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Allegations by the party opposing the motion must be “specific and detailed, substantiated by evidence in the record” (*Matter of O’Hara*, 85 AD2d 669, 671 [2d Dept 1981]), and mere conclusory assertions, surmise, conjecture or speculation cannot serve as a substitute for evidence to defeat summary determination (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002]). All reasonable inferences, however, should be drawn in favor of the non-moving party, and the court should not pass on issues of credibility (*Matter of Llewellyn*, NYLJ,

Jan. 5, 2015, at 19 [Sur Ct, New York County], *citing Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dept 1990]).

### **PARTIES' ARGUMENTS**

The outstanding objections that are the subject of these dispositive motions relate to: 1) the commissions of the co-Administrators; 2) the request to reimburse George for expenses he incurred in the context of the personal injury litigation; 3) the attorneys fees and expenses incurred by the co-Administrators in prosecuting this compromise proceeding;<sup>9</sup> and 4) whether any or all of those fees should be apportioned against any particular distributee's share of the net settlement proceeds.

In moving for summary determination dismissing objections relating to their commissions, both Forster and George assert that they have established their entitlement to judgment as a matter of law because they are presumptively and statutorily entitled to commissions, and they have not engaged in any improper conduct, let alone acted in a manner that would warrant the loss of commissions. George further asserts that, as to his disbursements, he has provided receipts to substantiate his expenses and none of his actions in relation thereto shows misconduct that would warrant denial of his request for reimbursement. Further, with respect to attorneys fees, the co-Administrators assert that they were compelled to retain counsel in order to prosecute this compromise proceeding and respond to Objectants' many motions and applications concerning nearly every aspect of the proceeding. They assert that their attorneys

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<sup>9</sup> The request to approve these fees and disbursements was sought by "Fifth Supplemental Affidavit in Support of Compromise Petition" filed by Forster on August 15, 2019, amending the Compromise Petition.

fees were incurred as the result of the actions of Objectants and, for that reason, the estate should not bear the burden of these expenses, and instead they should be apportioned against the Objectants' shares.

In his own dispositive motion, and in opposing those of the co-Administrators, Joseph argues that commissions should be reduced or eliminated because the co-Administrators: 1) knowingly presented to the court a forged and fraudulent Lebanese funeral invoice, and then sought reimbursement to George based on it; 2) wrongfully alleged that decedent's domicile was Lebanon in the contested administration proceedings and in Forster's initial compromise petition; and 3) engaged in bad faith settlement negotiations. With respect to George's commissions in particular, Joseph argues that George requested reimbursement for improper out-of-pocket expenses and should forfeit commissions as a result. For these same reasons, Joseph argues that the co-Administrators' attorneys fees should be reduced or eliminated, and that if fees are approved, they should be apportioned against George's share of the proceeds, rather than his and Nada's. The court addresses each of these grounds for denial of the co-Administrators' commissions and attorneys fees in turn.

#### Funeral Invoice

Even though George no longer seeks reimbursement for the Lebanese funeral expenses, Joseph asserts that the commissions of both fiduciaries should nonetheless be reduced for having presented what he characterizes as a "false" and "illegal" invoice to the court. As to Forster, Joseph asserts that he put Forster on notice that the invoice was defective or false shortly after Forster's filing of the compromise petition in 2017, and that Forster's failure to investigate or immediately withdraw the request to reimburse George for this expense rises to the level of

fiduciary misconduct that should result in a surcharge, or reduction of the commissions. As to George, Joseph asserts that George either knew of and participated in the creation of the false funeral invoice presented to the court, or, at the very least, was made aware of the defect and failed to act in the manner required of a fiduciary.

The record shows that in November 2018, Nada initiated an action in Lebanon to appoint an expert to investigate the propriety of the funeral invoice, specifically, the copy of the invoice that was exchanged in connection with this proceeding. That investigation, which included a technical inspection of the invoice, concluded in February 2019, with a finding by Lebanese accounting expert, Charles Salame, that the invoice was “false and illegal,” in that it was not a “true copy of original.” This determination was made under applicable Lebanese law relating to businesses and their maintenance of records, and was based on the dates of the fiscal stamp and information on the invoice.

In response to Joseph’s arguments, George first maintains that Joseph has not presented Salame’s report to this court in admissible form and that Salame’s expertise is in accounting, not document examination,<sup>10</sup> and, in any event, that Joseph has not substantiated his allegations that George sought reimbursement based on a “false” funeral invoice. George points to the fact that Salame’s report does not call into question the accuracy of the contents of the invoice. George states that the invoice, affixed with a 2012 fiscal stamp is a recreation of the original, which shows the services provided and the costs, and that it was never represented to be an exact copy

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<sup>10</sup> George also argues that Salame’s report includes an improper conclusion in contravention of Article 320 of the Lebanese Civil Procedures Law, which prohibits experts from giving legal opinions, clearly evidencing Salame’s lack of neutrality in conducting his investigation. The court, however, need not pass on this issue in determining the matters at hand.

of the original invoice. If any conclusion can be drawn under these circumstances, it is that the document presented to this court was neither the original printed invoice generated at the time nor a photocopy of that original. Rather, it is a contemporary printout of the invoice's contents, on which a current fiscal stamp was affixed. To the extent that the presentation of this copy of the invoice is actionable or unlawful in Lebanon, as Joseph contends, the court does not and need not pass on such determination here; the filing of an original funeral bill is not required by the Surrogate's Court in wrongful death compromise proceedings (*see* 22 NYCRR 207.38[b][5]).

Relevant to the claims here, Joseph has offered no evidence that Forster or George created the invoice with the 2012 fiscal stamp placed on it. Nor has he shown that Forster or George had actual knowledge that the invoice was defective insofar as described by Salame when it was presented to the court. Finally, as stated above, the court has permitted the withdrawal of the request for reimbursement of this expense allegedly incurred by George and thus any harm caused to Objectants by the presentation of this invoice is de minimis.

#### Decedent's Domicile

Forster explains that he initially alleged decedent was a domiciliary of Lebanon based on the information available to him. He further explains that his subsequent efforts to investigate the issue of decedent's domicile, including communication with Joseph, resulted in his good faith amendment of the compromise petition to identify New York as decedent's domicile. This amendment took place prior to the filing of objections in this proceeding.

Joseph argues in response that Forster always had the information that purportedly led to his amendment of the compromise petition because Joseph had provided it in support of his own petition to serve as administrator. According to Joseph, this establishes that Forster knowingly

made false statements regarding decedent's domicile. Joseph further argues that the fact that Forster ultimately amended the petition to accurately reflect decedent's domicile does not eliminate the harm to Objectants, who lost all trust in Forster. He asserts that Forster's dishonesty regarding decedent's domicile and the funeral invoice caused him and Nada to lose trust in the co-Administrators and eventually led them to file their objections.

Nothing in this record allows the court to conclude that Forster knowingly or willfully misrepresented decedent's domicile to the court.

#### Settlement Negotiations

Joseph also argues that the co-Administrators engaged in settlement negotiations in bad faith and, as a result, the attorneys fees they incurred during this period should be reduced. Joseph maintains that the terms of settlement that the parties negotiated turned out to be incomplete in that they did not include a provision for releasing George from liability, which did appear as a term in the draft settlement agreement. He maintains that the inclusion of this term that was not negotiated or bargained for is an indication of bad faith. The co-Administrators argue that if anyone engaged in bad faith negotiations, it was Joseph and Nada, who, they contend, had already begun litigation in Lebanon against George relating to the funeral invoice at the time the parties here were discussing resolution of these proceedings.

The record before the court contains no evidence that the co-Administrators engaged in settlement negotiations in bad faith.

Having determined that none of the grounds advanced by Joseph for a wholesale denial of commissions and attorneys fees are availing, the court proceeds to determine the objections.

## DISCUSSION

### *George's Disbursements*

A prima facie case for entitlement to reimbursement for out-of-pocket expenses related to George's travel to New York for his deposition and to participate in the underlying litigation related to decedent's death has been made out on this record (*see Matter of Schnare*, 191 AD2d 859 [3d Dept 1993] [party submitting account has burden of proving fully accounted for the assets of the estate]; *Matter of Doman*, 110 AD3d 1073, 1074 [2d Dept 2013]; *Matter of Rosenblatt*, 77 Misc 3d 1204[A] [Sur Ct, Queens County 2022]). These administration expenses were reported in the account presented to the court in the context of this compromise and account proceeding, as amended and reduced by affidavit of Forster dated March 4, 2021. George seeks reimbursement in the amount of \$3,718.53, supported by receipts from the travel agency listing the cost of George's airline ticket and the invoices from two hotels with dates of occupancy from April 6 to April 9, 2013, and April 9 to April 14, 2013, respectively.

In opposition, Joseph has proffered no evidence disputing the invoices substantiating George's expenses (*see Matter of Rosenblatt, supra*). Thus, Joseph has raised no material issue of fact challenging George's entitlement to reimbursement for these out-of-pocket expenses in the requested amount.<sup>11</sup> Accordingly, any objection related to the request for reimbursement to George for his disbursements in the amount of \$3,718.53 is dismissed.

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<sup>11</sup> In a motion to compel made by Joseph in June 2021, he sought additional disclosure and responses from George regarding information contained in the hotel invoices. The court had previously declared, when it set the final briefing schedule for dispositive motions, that discovery in this proceeding had concluded. Nevertheless, the court granted Joseph an opportunity to submit additional questions concerning these invoices for George to answer by affidavit. Joseph failed to submit any questions to the court and this request for additional discovery was considered abandoned.

The court also concludes that nothing in the record demonstrates that the co-Administrators engaged in improper conduct relating to disbursements they claim they expended on the estate's behalf. George submitted his receipts to Forster and requested reimbursement. In the context of wrongful death compromises, the court often reviews itemized lists of disbursements for which reimbursement is sought. The mere fact that the court may determine that a particular out-of-pocket expense is not reasonable and should not be reimbursed or approved (EPTL 5-4.4[b] [reasonable expenses incident to the wrongful death cause of action may be fixed by the court]) does not in and of itself establish that the individual requesting reimbursement has behaved improperly.

### ***Commissions***

Pursuant to SCPA 2307, on the settlement of the account of a fiduciary, “the court *must* allow” reasonable and necessary expenses actually paid by him and commissions for his services as fiduciary, in accordance with the calculation table provided in subdivision (1) of that statute. On this record, movants Forster and George have established, *prima facie*, their entitlement to commissions on the proceeds of the settlement (\$1,500,000.00) allocated to the cause of action for decedent's conscious pain and suffering, in the amount of \$46,500.00 each (*see* SCPA 2307[5]; *Matter of Drier*, 245 AD2d 787, 788 [3d Dept 1997] [“Statutory commissions must be awarded in the absence of mathematical error in their computation or allegations of misconduct amounting to dereliction, complete indifference or other comparable acts of misfeasance”]; *Matter of Gottlieb*, 221 AD2d 530 [2d Dept 1995]).

Fiduciaries are entitled to commissions where “there is no fraud . . . no gross neglect of duty, no intentional harm to the [estate] or sheer indifference to the rights of others or disloyalty”

(*Matter of Armstead v Morgan Guar Trust Co. of NY*, 13 AD3d 294, 295 [1st Dept 2004]; *Matter of Lasdon*, 105 AD3d 499, 500 [1st Dept 2013]). The party asserting fraud committed by a fiduciary must first make a showing before any burden is imposed on the fiduciary to establish the absence of fraud or fairness in dealing with persons interested in the estate (*Matter of Armstead*, 13 AD3d at 296).

Joseph's speculative and conclusory assertions that Forster and George breached their fiduciary duties in presenting the Lebanese funeral invoice to the court are meritless and unsubstantiated and thus fail to raise a fact issue.<sup>12</sup> On this record, none of the objected to conduct of Forster or George calls into question their faithfulness in the discharge of their fiduciary duties.<sup>13</sup> Indeed, even "erroneous payments of estate assets in good faith have been considered insufficient grounds for denial" of commissions (*see Matter of Taft*, 145 Misc 435 [Sur Ct, Kings County 1932] [collecting cases]), and here, there is nothing proffered to raise a material issue of fact. In any event, George ultimately withdrew his request for reimbursement

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<sup>12</sup> In submission after submission, Joseph states that, when he advised Forster that the funeral invoice was fraudulent, Forster's response showed disrespect for countries of the Middle East and failure to take the issue seriously and that Forster's flippant response constitutes a breach of fiduciary duty that merits surcharge. Even if Forster's alleged comments to Joseph were irrefutably established on the record, such conduct does not warrant a denial of fiduciary commissions.

As discussed above, Joseph also asserts that Forster's allegations in his pleadings regarding decedent's domicile are of such false nature that should cause his commissions to be reduced. That Forster made domicile allegations out of malice or neglectful indifference to the rights of the distributees is a speculative and conclusory assertion and Joseph has failed to provide evidence of conduct by Forster that would support a reduction or elimination of his commissions.

<sup>13</sup> Joseph argues that the court has prevented him from conducting the disclosure necessary to challenge the substance of the funeral invoice. In its decision dated April 7, 2021, the court considered no fewer than 4 discovery motions and determined each one, permitting relevant and available disclosure within the confines of the applicable law and the court's jurisdiction.

for this expense and he did so, he states, to protect the financial interests of the estate from further waste in the form of continued litigation.

On this record, movants have established their entitlement to summary judgment and dismissal of the objections to the co-Administrators' receipt of their full commissions and Joseph has failed to raise an issue of fact requiring a trial.

***Attorneys Fees***

It is well-settled that this court has authority to determine the reasonable compensation for an attorney that has rendered legal services to an estate (SCPA 2110; *Matter of Stortecky v Mazzone*, 85 NY2d 518 [1995]). The reasonableness of attorneys fees are analyzed using the factors articulated in *Matter of Freeman* (34 NY2d 1 [1974]) and *Matter of Potts* (213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), which include: the amounts involved, the difficulty of the issues presented, the professional standing of counsel, the skill required, the results obtained, and the time spent.

In addition to seeking compensation for their respective attorneys,<sup>14</sup> the co-Administrators also ask that these fees be apportioned against the shares of Objectants and not the general estate, in accordance with *Matter of Hyde*, 15 NY3d 179 (2010).

Joseph argues that the attorneys fees were not incurred as a result of the Objectants' conduct but because of the misconduct and fraudulent behavior of Forster and George which required Joseph and Nada to file objections and litigate these proceedings. In addition, Joseph

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<sup>14</sup> Joseph was given the opportunity to request the determination of the reasonableness of the fees of his former counsel, Kenneth T. Wasserman, who filed a Second Amended Notice of Charging Lien on June 17, 2021, in the amount of \$22,007.39 (*see* Judiciary Law § 475, 475-a). Joseph declined to do so.

identifies particular services as to which fees (and any disbursements) should be denied or reduced, including those incurred in the context of the settlement negotiations which Joseph argues were a farse. Joseph also argues that the attorneys abused the system and Joseph's *pro se* status and for that reason their fees should be reduced.

Joseph's arguments in support of his request for a blanket denial of fees for certain services are without merit. Moreover, nothing in this record supports his speculation that attorneys for the fiduciaries have taken advantage of his *pro se* status. As previously mentioned, the court has extended significant latitude to Joseph, while attempting to ensure that the rights of the other parties are prejudiced. As a *pro se* litigant, Joseph "acquire[d] no greater rights than those of any other litigant and cannot use such status to deprive [an opponent] of the same rights as other [party]" (*Brooks v Inn at Saratoga Association*, 188 AD2d 921 [3d Dept 1992]; *Goldmark v Keystone & Grading Corp.*, 226 AD2d 143, 144 [1st Dept 1996]). The court's familiarity with the litigation in this estate, and its fastidious review of the time records submitted by counsel lead to the conclusion that no attorney in this case performed services in a manner designed to exploit Joseph's *pro se* status.

Forster's counsel, Farrell Fritz, P.C., seeks compensation for legal services rendered to the co-Administrator for the period of October 2018 to November 30, 2020, in the total amount of \$41,409.50. The time records submitted by counsel, however, extend through December 22, 2020, and the invoice contained in them seeks payment in the amount of \$41,968.83, which is comprised of \$41,410.50 for legal services and \$558.33 for disbursements.

Upon careful review of the detailed contemporaneous time records, the court calculates that counsel spent a total of 97.5 hours in this time period performing a variety of necessary

services for Forster in his capacity as co-Administrator. These services included: 1) preparing reply papers for Forster's motion for partial summary determination; 2) engaging with the court and parties in settlement negotiations, including participating in the drafting of a stipulation of settlement; 3) reviewing and preparing responses to Joseph's discovery demands; 4) communicating with personal injury counsel in order to prepare a confidentiality agreement to be entered into by the parties in order to exchange disclosure from those proceedings; 5) reviewing various court decisions and preparing a proposed decree on relief granted by the court on Forster's continued motion for partial summary judgment; 6) communicating with the court and the other parties regarding disclosure and scheduling of briefings and court appearances; and 7) engaging in motion practice.

The time spent to perform these services, in the span of two years, is reasonable and not excessive in view of the manner in which these matters have been litigated by Objectants. Nothing in this record suggests fees were incurred for any unnecessary, self-serving or improper purpose. Services were performed by either a partner or an associate, with experience and expertise guiding the division of the work. Accordingly, fees for Farrell Fritz are fixed in the amount of \$41,410.50 for the period of time from October 2018 through December 22, 2020. With respect to disbursements, they are allowed in the reduced amount of \$154.87, eliminating reimbursement for items such as computer/legal research, in-house photocopying and local travel, in accordance with *Matter of Herlinger* (NYLJ, Apr 28, 1994, at 28, col 6 [Sur Ct, NY County]; see *Matter of Rosa-Myers*, 63 Misc 3d 251 [Sur Ct, Queens County 2019]).

George's counsel, Greenfield Stein & Senior, LLP, seeks compensation for legal services rendered to George for the period of September 2018 to November 17, 2021, in the total sum of

\$97,855.37. This is comprised of legal fees of \$97,054.00 for 219.6 hours of services performed and \$801.37 in disbursements. Accompanying the itemized time records is an affirmation of counsel in which she confirms that the items of disbursements for which reimbursement is sought are not general office overhead pursuant to their firm's billing practices.

Upon review of the detailed contemporaneous time records of Greenfield Stein & Senior, for services rendered to George, the court again notes the reasonableness of the services performed, and their necessity—in light of Joseph's extensive discovery and motion practice, which required responses. Here, the services are split among a partner and two associates, and the time records demonstrate that expertise and experience guided the division of work. The services performed by counsel included: 1) attending court conferences and participating in correspondence with the court and parties; 2) engaging in motion practice, reviewing the filings of the other parties, analyzing and drafting motion papers and affidavits; 3) reviewing multiple rounds of discovery demands and interrogatories and preparing production and responses; 4) engaging in extensive settlement negotiations, including drafting a comprehensive settlement agreement; and 5) preparing for and participating in numerous court appearances.

The services performed, over the span of three years are reasonable and appropriate under the circumstances and in furtherance of the resolution of this compromise and account proceeding. The court does note, however, that the work performed can be grouped into two categories: services representing George in his capacity as co-Administrator and those representing George in his individual capacity as a funeral creditor. As to all services performed, they were largely, if not wholly, required for purposes of addressing the discovery sought by Objectants and the related motion practice in this court. Again, nothing in this record suggests

fees were incurred for any unnecessary, self-serving or improper purpose. After examining the time records of counsel, and in view of George’s dual roles in these proceedings, the court fixes the fees of Greenfield Stein & Senior for services rendered to George in his capacity as co-Administrator in the amount of \$78,457.50 for the period of time from September 2018 through November 17, 2021, as well as disbursements in the amount of \$801.37, for total compensation in the amount of \$79,258.87. The balance of the fees charged by Greenfield Stein & Senior, which primarily relate to disclosure and motion practice regarding the funeral invoice, should be borne by George individually.

#### Apportioning Fees

In addition to the authority to fix and determine compensation of an attorney for services rendered to a fiduciary, among others, SCPA 2110 gives the court “discretion to allocate responsibility for payment of a fiduciary’s attorney’s fees for which the estate is obligated to pay—either from the estate as a whole or from shares of individual estate beneficiaries” (*Matter of Hyde*, 15 NY3d at 182).

The Court of Appeals in *Matter of Hyde*, presented factors, none of which should be determinative, for the court to assess in considering the source from which the fiduciary’s attorneys fees should be paid:

“(1) whether the objecting beneficiary acted solely in his or her own interest or in the common interest of the estate; (2) the possible benefits to individual beneficiaries from the outcome of the underlying proceeding; (3) the extent of an individual beneficiary’s participation in the proceeding; (4) the good or bad faith of the objecting beneficiary; (5) whether there was justifiable doubt regarding the fiduciary’s conduct; (6) the portions of interest in the estate held by the non-objecting beneficiaries relative to the objecting beneficiaries; and (7) the future interests that could be affected by reallocation of fees to individual beneficiaries instead of to the corpus of the estate generally”

(*id.* at 186-187).

George maintains that all the legal fees incurred over the last three years in connection with the compromise petition have been a direct result of unnecessary and irresponsible motion practice initiated by Objectants and that, for that reason, legal fees and disbursements should be allocated to their shares. He maintains that it was personal self-interest and not an intent to protect or benefit the estate generally that motivated Objectants to pursue this prolonged litigation. For his part, Forster asserts that all legal fees incurred by him in connection with this proceeding were the result of Objectants' conduct.

The court must conclude that Objectants disproportionately burdened this estate in their pursuit of litigation with George regarding the Lebanese funeral invoice. This litigation was protracted (it lasted nearly five years), involved numerous motions and continued for more than a year even after the request for reimbursement for the invoice was withdrawn. All this, ostensibly over an invoice for an amount that represents less than two percent of the value of the estate and, were it to be shared equally among the three distributees, it would cost each not much more than \$7,000. The dispute about this invoice has caused the estate to incur well in excess of \$150,000 in legal fees alone.

Even were it possible to conclude that the estate benefited from the withdrawal of the request for reimbursement of the funeral expenses, and the court does not so conclude, any theoretical benefit is vastly outweighed by the burdens imposed, in delaying resolution of this proceeding, and in the attorneys fees incurred which are vastly out of proportion with the amount of the funeral invoice (*see Matter of Cook*, 177 AD3d 1214, 1217 [3d Dept 2019]). These

significant fees were incurred as a consequence of this largely unwarranted litigation,<sup>15</sup> supporting an apportionment of their payment to the party who caused them to be incurred (*see Matter of Denend*, NYLJ, Apr 22, 1996, at 26, col 6 [Sur Ct, Westchester County]). Accordingly, the court assesses 2/3 of the fees incurred by co-Administrator Forster (or \$27,607) and 1/2 of the fees allowed by the court as incurred by co-Administrator George (or \$39,228.75) against the share of net proceeds payable to Joseph.<sup>16</sup> The balance of the co-Administrators' legal fees will be paid from the net settlement proceeds, prior to splitting them in three equal shares, one for each distributee.

Settle decree on accounting for proceeds of the settlement of the causes of action.

Clerk to notify.

Dated: July 10, 2023

  
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S U R O G A T E

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<sup>15</sup> Joseph and Nada initially objected to essentially each and every aspect of relief sought in this compromise and account proceeding but Joseph has admitted that the funeral invoice was the primary source of their opposition.

<sup>16</sup> The court declines to assess any of this amount against Nada's share. Joseph and Nada are aligned in their objections and opposition insofar as relates to George and the funeral invoice, but the record is devoid of evidence that Nada was in agreement with or supported the litigation strategy and methods employed by Joseph, in particular with respect to motion practice. In view of this, Joseph alone should bear the responsibility of paying this portion of fees of the fiduciaries' attorneys.