

Matter of Beaudet

2023 NY Slip Op 34074(U)

November 16, 2023

Surrogate's Court, New York County

Docket Number: File No. 2010-1659/A

Judge: Hilary Gingold

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This opinion is uncorrected and not selected for official publication.

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

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Application of Susan Raiola, as former
Preliminary Executor of the Estate of

CHRISTOPHER BEAUDET,

File No. 2010-1659/A

Deceased,

For the Payment of Commissions Pursuant
to SCPA 2310.

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Application of John O. McManus for the
Payment of Legal Fees from the Estate of

CHRISTOPHER BEAUDET,

File No. 2010-1659/B

Deceased,

Pursuant to SCPA 2110.
-----X

GINGOLD, S.

Before the court are two miscellaneous proceedings for the payment of commissions and legal fees in connection with the estate of Christopher Beaudet. In the first proceeding (2010-1659/A), the former preliminary executor, Susan Raiola (Raiola), seeks the payment of commissions pursuant to SCPA 2310. In the second proceeding (2010-1659/B), the estate's former attorneys, McManus & Associates (McManus), seek the payment of its legal fees pursuant to SCPA 2110.

Background

Decedent died on April 19, 2010, leaving three children from a prior marriage and a child from another relationship, who was born shortly after his death. On May 6, 2010, Raiola filed a petition to probate a will dated December 8, 2006 (2006 Will), which left decedent's estate to his children. Preliminary letters were issued to Raiola on May 13, 2010. Thereafter, Cynthia Roeser (Roeser or Respondent), decedent's fiancée and the mother of his youngest child, filed a cross-petition to probate a later will dated December 11, 2009 (2009 Will), which instrument distributed the residuary estate to a pour-over revocable trust, dated December 11, 2009, created by decedent, as grantor, and which solely benefitted Roeser.

On November 15, 2013, the parties reached a settlement agreement (Agreement) regarding the dueling probate proceedings. The parties agreed to probate the 2009 Will with Roeser serving as executor, resolved the distributions to be made to the beneficiaries, agreed to the payment of certain claims and fees, and approved an informal accounting of the estate by Raiola. The Agreement held open the issues of Raiola's commissions as preliminary executor and the remaining legal fees of McManus, which were to be resolved by application to the court within 20 days of service of the letters testamentary confirming Roeser's appointment as executor. On December 19, 2014, pursuant to the parties' Agreement, the court issued a decree admitting the 2009 Will to probate, issuing letters testamentary to Roeser, and revoking Raiola's preliminary letters.

Raiola and McManus (together Petitioners) commenced the instant proceedings for commissions and legal fees, respectively. Roeser, as executor, filed an answer in both proceedings objecting to, inter alia, the unreasonable delay of Petitioners' applications. Thereafter, on stipulation of the parties, Petitioners amended their respective applications to seek the

reimbursement of legal fees of John Sebastian Vaneria (Vaneria), the attorney representing them in these proceedings. Roeser, in turn, filed objections to the new relief. The parties have waived an evidentiary hearing and have consented to adjudication of the issues based on their submissions.

Discussion

The threshold issue in both proceedings is the timeliness of the applications. The Agreement provided that Petitioners file the applications with the court within 20 business days of service upon them of a certified copy of Roeser’s letters testamentary. Roeser’s letters issued on December 19, 2014, and she served Petitioners a copy of the letters on January 30, 2015. Thereafter, in an effort to resolve these issues, the parties mutually agreed to extend the deadline to file these applications until December 2015. Despite the ongoing settlement negotiations, Petitioners submitted their applications to the court on May 29, 2015, well within the agreed upon deadline.¹ While Petitioners were required to revise their applications more than once, the facts reflect that they met the deadline set forth in the Agreement and as extended by the parties. Thus, the court finds that the applications are timely.

Commissions to Raiola

In her application for commissions, Raiola initially sought to recover statutory commissions of \$27,054 based on estate assets valued at \$1,804,338, which she marshalled while serving as the preliminary executor of the estate. Raiola subsequently submitted an additional affidavit to support a *quantum meruit* calculation in which she alleges she is due compensation of \$46,350 based on 618 hours of work.

Under SCPA 1412(7), a preliminary executor is not entitled to statutory commissions unless the will is admitted to probate and letters testamentary issue to such fiduciary. Instead, the

¹ Attached as exhibit E to the Affirmation of John O. McManus dated June 10, 2019, is a letter from the court dated September 15, 2015 confirming this filing.

compensation of such fiduciary is a matter of the court's discretion based on the reasonable value of the fiduciary's services to the estate, which are not to exceed statutory commissions.

Courts generally consider the statutory commission schedule as indicative of reasonable compensation and apply statutory rates to the amounts received and paid out during the fiduciary's tenure (*Matter of Helmsley*, NYLJ, August 20, 2019, at 22, col 3 [Sur Ct, NY County]; *Matter of Shanes*, NYLJ, November 8, 2013, at 23, col 2 [Sur Ct, Bronx County]; *Matter of Hahn*, NYLJ, March 15, 2006, at 17, col 2 [Sur Ct, Suffolk County]; *Matter of Witherill*, 8 Misc.3d 1012[A] at 12-13 [Sur Ct, Madison County]).

Courts have also used a multi-factor approach consistent with *Matter of Freeman*, 34 NY2d 1 (1974) and *Matter of Potts*, 213 AD 59 (4th Dept 1925) to determine the reasonable compensation of a fiduciary (*Matter of Helmsley*, NYLJ, August 20, 2019, at 22, col 3 [Sur Ct, NY County]). Under this approach, courts consider the following factors, in no particular order: (1) the expertise, knowledge and reputation of the fiduciary; (2) the difficulty of the issues involved and the skills required to handle them; (3) the size of the estate being administered; (4) the time and labor involved; (5) the responsibilities and the risks assumed; (6) the benefits and results achieved for the estate; (7) the customary fee charged for similar services (*Id*).

Raiola has demonstrated her entitlement to compensation. Her supplemental affidavit reflects, in detail, the services she performed on behalf of the estate for nearly five years (Raiola 2020 Aff., ¶ 4). It shows that Raiola spent approximately 618 hours for the benefit of the estate, marshalling and managing estate assets valued at \$1,804,338. While Respondent claims that some of this work was performed by the decedent's ex-wife, and not Raiola, Respondent does not dispute that the work outlined in Raiola's affidavit was completed. Since Raiola bore the responsibility and the attendant liability of administering the estate, she is entitled to be compensated.

In her supplemental affidavit, Raiola seeks to recover compensation of \$46,350 based on a rate of \$75 per hour for 618 hours of work. However, pursuant to SCPA § 1412(7), Raiola's compensation is capped at \$27,054, the calculated statutory commissions for the estate pursuant to SCPA 2307. Accordingly, Raiola is entitled to recover \$27,054 as reasonable compensation for her services as preliminary executor.

In addition, Raiola seeks the payment of attorney fees to Vaneria, her counsel in this proceeding, in the amount of \$36,261. However, under SCPA 2310(4), the total expenses of an application for commissions must be paid by the person seeking commission. Thus, Raiola, not the estate, is responsible for the legal fees and costs incurred in connection with this application.

Legal Fees to McManus

With regard to the petition for legal fees, McManus seeks an award for legal services, fees and costs incurred in connection with the administration of the estate in the amount of \$19,527.50. Raiola, as preliminary executor of the estate, retained McManus on April 20, 2010, to assist her with the administration of the decedent's estate. The firm's legal fees, incurred through June 2013, were paid by the estate in the total amount of \$71,785, and those fees were approved by the parties in the Agreement. McManus now seeks payment of the outstanding amount for services and costs rendered through October 26, 2016, which are reflected on invoices nos. 12 and 13.²

Pursuant to SCPA 2110 (1), the Surrogate's Court has the power to fix the compensation of an attorney for his or her services rendered to a fiduciary (*Matter of Berlin*, 135 AD3d 746, 750 [2d Dept 2016] ["An award of counsel fees and expenses is dependent upon a finding that counsel's services were necessary and beneficial to the estate."]). In determining such fees, the court takes

² Affidavit of John O. McManus, Esq., sworn to on November 21, 2016, Exh. B.

into consideration the time spent, the difficulty of the matter, the amount involved in the estate, the professional standing of counsel and the results obtained (*Matter of Potts*, 213 AD 59 [4th Dept 1925], accord *Matter of Freeman*, 34 NY2d 1, 9 [1974]). Attorneys' fees cannot be awarded for non-legal work, such as executorial services (*Matter of Ellis v Koerner, Silberberg & Weiner LLP*, 277 AD2d 102, 103 [1st Dept 2000]), and the time spent on a fee application, in other words, "fees on fees," is also not compensable (*Ferst v Abraham*, 140 AD3d 581, 582 [1st Dept 2016]; *Matter of Kaplan*, NYLJ, May 15, 2000, at 32, col 4 [Sur Ct, Kings County]; *Matter of Marshak*, NYLJ, April 30, 1996, at 1, col 6 [Sur Ct, NY County]).

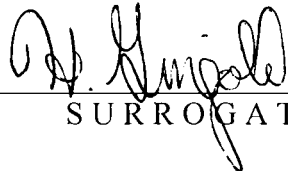
Here, most of the unpaid fees listed on invoice no. 12 pertain to the parties' preparation and negotiation of the Agreement and the transfer of the estate's assets to the new executor, which is clearly within the scope of counsel's work and is compensable. However, the August 10, 2013 charge of \$2,426.25 for visiting a storage unit is not compensable as this is not legal work but rather work that should have been performed by the preliminary executor. The unpaid fees and costs listed on invoice no. 13 in the amount of \$6,935, for services performed in 2015 after the appointment of Roeser as executor, pertain to the firm's efforts to collect commissions and legal fees, which is not compensable (SCPA § 2310[4]; *Ferst*, 140 AD3d at 582). Likewise, the legal fees of Vaneria, the firm's counsel in this proceeding, are not compensable. Thus, the court fixes the fair and reasonable value of the legal services of McManus in the amount of \$9,916.25.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the petition to recover commissions is granted to the extent that Susan Raiola shall recover compensation from the estate in the sum of \$27,054 with statutory interest from the date of this decision to the date of payment; and it is further

ORDERED, ADJUDGED and DECREED that the petition to recover attorneys' fees is granted to the extent that McManus & Associates shall recover from the estate costs and legal fees in the sum of \$9,916.25 with statutory interest from the date of this decision to the date of payment.

Dated: November 16th, 2023



SURROGATE

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