

Matter of Greer

2011 NY Slip Op 33375(U)

December 20, 2011

Sur Ct, Monroe County

Docket Number: 2009-426/B

Judge: Edmund A. Calvaruso

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

In the Matter of the Application For
An Order Authorizing the Sale
of
Real Property
and
For a Compulsory Accounting
of the Estate of

WILLIAM J. GREER,

Deceased.

DECISION AND ORDER

File No. 2009-426/B

APPEARANCES

Douglas W. Whitney, Esq., attorney for Dorothy J. Greer, Petitioner herein. *Evans & Fox, LLP, (Richard J. Evans, Esq., of Counsel and Kenneth R. Kraus, of Counsel)* attorneys for Cheryl A. Prystal, Co-Executrix of the Estate of William J. Greer and Respondent herein.

BACKGROUND

The decedent, William J. Greer, died on February 8, 2009. Cheryl A. Prystal (hereinafter the Respondent) and her sister, Edith M. Sweet, were granted letters testamentary for decedent's Estate on March 3, 2009. At the time of the decedent's death, he owned real property located at 851 Erie Station Road, West Henrietta, New York. Pursuant to the decedent's will, this real property was devised to his four daughters: Edith M. Sweet, Marcie Smith, Dorothy J. Greer and the Respondent. On June 20, 2011, The Petitioner, Dorothy J. Greer, filed a Citation for an order authorizing the sale of real property and compulsory accounting. The Citation was served on Edith M. Sweet, Cheryl A. Prystal and Marcie Smith. However, the Respondent was the only

party who retained counsel and appeared in this matter. Ms. Sweet did not sign the retainer agreement between Evans & Fox, LLP, and the estate. Only the Respondent signed as co-executor on behalf of the Estate.

The Petitioner sought an Order directing the following: that the Respondent, as Co-Executrix, accept Petitioner's purchase offer for the sale of the decedent's residence at 851 Erie Station Road, West Henrietta, New York; that the Respondent file an immediate accounting; that the Respondent pay and/or reimburse Petitioner for any and all legal fees and disbursement incurred by the Petitioner in this proceeding; and that no Estate funds be used to pay or reimburse the Respondent for any legal fees, disbursements or other expenses that she incurs in this proceeding.

The Respondent filed an Answer on July 12, 2011. The Court held a chambers conference with counsel on August 2, 2011, in order to facilitate a settlement in this case. The Court suggested a resolution to the parties and an offer of settlement was made by the Estate but was rejected by the Petitioner. Accordingly, the Court scheduled the matter for a hearing on October 2, 2011. Pursuant to SCPA §2609 the Court designated its law clerk to take testimony. A hearing was commenced and testimony was taken, however, prior to the conclusion of the hearing, the parties entered into a stipulation resolving the issues of the sale of decedent's residence and the compulsory accounting. The stipulation was set forth in an Order which the Court signed on October 31, 2011. Pursuant to their agreement, the parties waived a hearing relative to their respective legal positions relative to the responsibility for and payment of each party's respective legal fees and submitted their requests to the Court for its consideration and determination. The Court received Mr. Whitney's affirmation of services and legal memorandum to the Court on October 27, 2011. The Court received Mr. Evans' and Mr. Kraus' affirmations on submissions of fees on November 9, 2011. Petitioner's Reply to those affirmations was received on November 16, 2011.

DECISION

The first issue that the Court must determine is whether the Respondent should be responsible for the payment of the Petitioner's legal fees. It is the Petitioner's burden to provide

a legal basis upon which the Court may hold the Respondent responsible for the payment of her legal fees. This burden has not been met by the Petitioner in this case.

The Petitioner argues that the Respondent's refusal of the Petitioner's purchase offer for the decedent's residence for \$90,000, was unreasonable and harmful to the estate. The Respondent argues that the offer was below market value and that subjected the Estate to liability in that the estate was unable to give a warranty as to certain conditions and fixtures on the property. She also argues that the Petitioner's ability to finance the purchase of the residence was in doubt. A fiduciary's powers are listed in the Estates Powers and Trusts Law §11-1.1. Regarding a fiduciary's power to sell property the statute provides:

*“With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of:
(B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein.”* (Emphasis added)
EPTL §11-1.1(b)(5)(B).

The Court cannot substitute its judgment for the business judgment of the Respondent in refusing the Petitioner's purchase offer. See *Matter of Birnbaum*, 168 AD2d 933 (4th Dept., 1990). “The Surrogate's statutory power to order the sale of estate over the fiduciary's objection must be strictly construed, and should not be exercised absent extraordinary circumstances (*Matter of Osterndorf*, 75 Misc 2d 730, citing *Matter of Tannenbaum*, 20 AD2d 808, affd 15 NY2d 829). Such relief should be granted by the court only upon a showing that such disposition will carry out the provisions of the will or inure to the benefit of the estate or the beneficiaries (*Matter of Perkins*, 55 Misc 2d 834, 837; see also, *Matter of Bolton*, 79 Misc 2d 895, 901-902). In the absence of such showing, and particularly where the decision involves the fiduciary's business judgment, the Surrogate generally should not usurp the fiduciary's powers (EPTL 11-1.1.; see, *Matter of Osterndorf*, supra)” *Matter of Birnbaum*, 168 AD2d 933, 934 (4th Dept., 1990). In this matter, the Respondent offers a prudent and reasonable rationale for refusing to accept the offer to purchase from the Petitioner. She had the discretion, as a fiduciary to decline the Petitioner's purchase offer. The Court cannot say, based on the information provided, that it was unreasonable for the Respondent to refuse to accept the Petitioner's purchase offer. Accordingly,

there is no legal basis upon which the Court should order the Respondent to pay the Petitioner's legal fees.

The second issue that the Court must determine is whether the Respondent's legal fees should be paid personally or should be paid by the Estate. The Petitioner has provided no legal basis or case law which would compel the Court to hold the Respondent personally liable for paying her own attorney fees. Petitioner argues that the Respondent, as a co-fiduciary, could not bind the Estate to the retainer agreement signed with Evans & Fox, LLP, absent the agreement of Ms. Sweet, the other fiduciary. The Court disagrees with that argument.

A co-fiduciary may act unilaterally to safeguard the interests of the Estate. In this matter, the Respondent was the only fiduciary who entered an appearance. She took actions, which in her judgment, was necessary to safeguard the interests of the Estate. In fact, Ms. Sweet did not appear in this matter and did not retain counsel. Therefore, the Court cannot say that Ms. Sweet's consent, as co-fiduciary, was required before the Estate could retain the services of *Evans & Fox, LLP*. Accordingly, the Court finds that the Respondent acted reasonably and in a manner which arguably was in the best interests of the Estate. Therefore the estate should be responsible for the legal fees of the Respondent.

Finally, the Court must determine whether the fees sought by *Evans & Fox, LLP*, were reasonable under the circumstances and what responsibility, if any, the Petitioner has regarding payment of these fees. As noted above, the Court had a chambers conference with counsel on August 2, 2011. It worked with the parties in trying to forge a possible resolution to the parties at that time. The Respondent made a reasonable offer which ultimately was rejected by the Petitioner. The offer of settlement that the parties agreed to on the hearing date of October 12, 2011, was essentially the same that was offered to the Petitioner earlier. Therefore, the Court will surcharge the Petitioner for that portion of the fees incurred by the Respondent from the time period beginning with her rejection of the Respondent's offer made at the chambers conference until the date of the hearing. The Court finds that it would not be appropriate to charge the Estate with paying the entire amount of legal fees under the circumstances of this case.

The Court has reviewed the affirmations provided by Richard J. Evans, Esq., and Kenneth R. Kraus, Esq., as well its retainer agreement signed by the Respondent. The Court has also

reviewed the time sheets provided in the affirmations. The time sheets cover the period between May 25, 2011 and September 30, 2011. The total fees sought by *Evans & Fox, LLP*, are \$36,363.00 plus disbursements of \$1,297.94 through October 31, 2011. According to Mr. Evans' affirmation, the Estate has already paid fees to *Evans & Fox, LLP*, in the amount of \$16,170.50 and disbursements in the amount of \$154.11. Accordingly, the balance due would be \$20,192.50 in legal fees and disbursements in the amount of \$1,143.83. A calculation of 148.90 total hours spent on the file results in an average hourly fee of \$244 per hour. There were 73.70 hours spent on the file between August 12, 2011, (the date Petitioner's counsel learned that their client's offer of settlement was rejected) and October 2, 2011, the date of the hearing. The Court will approve payment on 57.80 hours during that time period. Thus, an amount of \$14,103.20 should be paid to *Evans & Fox, LLP*, by the Petitioner during that time period and the balance by the Estate. The total fees awarded to *Evans and Fox, LLP* are \$32,483.40, less amounts already paid.

In determining the fees to be fixed for legal services, one of several factors considered by the Court was the size of the Estate. *Matter of Potts*, 213 A.D. 59, 209 N.Y.S. 655 (4th Dept. 1925). According to the List of Assets filed with the Court on November 13, 2009, the Estate is valued at \$214,535.07. Additional factors considered by the Court in determining the Counsel's fees were the complexity of the issues presented and the time expended in the performance of his obligations to the Estate in this matter. Although the matter ultimately was resolved at the day of the hearing, this matter required Respondent's counselors to prepare for litigation between family members. The compensation sought by the attorneys for the estate is within the bounds of reasonableness, *Matter of Freeman*, 34 NY2d 1 (1973), given the amount of hours expended, the skill of the attorneys and the nature of the services provided.

CONCLUSION

The Petitioner will be responsible for payment of her attorney's fees. The Petitioner will also be responsible for the payment of \$14,103.20 of the Respondent's attorney fees. The Estate will be responsible for payment of the balance of the Respondent's attorneys' fees, \$32,483.40, plus disbursements of \$1,297.94, less amounts already paid. The Court finds that her conduct as co-fiduciary was reasonable under the circumstances and she had the right to retain counsel to

represent her as co-fiduciary for the Estate.

Enter.

Dated: December 20, 2011

Edmund A. Calvaruso

Hon. Edmund A. Calvaruso, Surrogate