

Matter of Goliger

2012 NY Slip Op 30832(U)

March 22, 2012

Surrogate's Court, Nassau County

Docket Number: 324194/B

Judge: III., Edward W. McCarty

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

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In the Matter of the Petition of Donna M. Goliger,
to Render and Settle Account to the Estate of

File No. 324194/B

ELEANOR E. GOLIGER,

Dec. No. 27871

Deceased.
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In this accounting proceeding, David Goliger, the executor, moves by order to show cause for an order adjudging Anne F. Pizzo, Esq. in contempt for refusal to obey the orders of this court made on February 1, 2007 and August 7, 2007, and her refusal to produce any of the information and documents that were requested during her examination before trial on November 28, 2007. The motion is decided as set forth herein.

The decedent, Eleanor E. Goliger, died in 2002, survived by her adult children, Donna Goliger and David Goliger. While Donna was originally appointed executor of the decedent's estate, she was replaced by David, who petitioned to compel her accounting pursuant to SCPA 2205. Donna rendered her account in June 2003 and David filed objections thereto. A hearing in this contested accounting proceeding was held from February 27, 2006 through March 3, 2006. While most of the issues raised by the objections were resolved by a stipulation placed on the record, the issue of the reasonableness of the fees sought by Anne F. Pizzo, the attorney retained by Donna when she was the executor of the estate, was not resolved, and was submitted to the court for decision. In a decision dated June 2, 2006, the court found that the results achieved by Ms. Pizzo were "clearly de minimus when compared to the fee sought," and fixed her fee at \$25,000.00 payable from the estate. All sums received by Ms. Pizzo in excess of that amount from the estate were to be returned to the estate; any sums received from Donna were to be

repaid to Donna, with proof of refunding to be filed with the court upon payment. The decision was reduced to an order signed by the court on February 1, 2007 which directed, inter alia, that:

ANNE F. PIZZO, ESQ., attorney for DONNA GOLIGER, as executrix, who, based upon the accounting, her own billing records, and evidence adduced, charged \$169,277.59 in legal fees, is to return all sums in excess of \$25,000.00 paid for her legal services, which constitutes a sum of \$144,277.59 to be returned by Anne Pizzo, Esq. to the Estate. Said sum shall be paid to the Estate of Eleanor Goliger, to the extent that such fees were paid by the Estate. Donna Goliger may make claim to such funds as were expended by her on behalf of the Estate upon the furnishing of adequate proof. Proof of the payment by Anne Pizzo, Esq. to the Estate of Eleanor Goliger shall be filed with the Court to be made no later than thirty (30) days after notice of entry of this Order.

Judgment in the amount of \$144,277.59 was docketed against Ms. Pizzo on March 1, 2007. She was served with a certified copy of the court's February 1, 2007 order on February 5, 2008, by substituted service upon a person of suitable age and discretion at her actual dwelling place and by mail. Ms. Pizzo appealed this court's order, and by decision and order dated January 20, 2009, the Appellate Division, Second Department affirmed and found that the Surrogate providently exercised his discretion in fixing the reasonable value of the services rendered by Ms. Pizzo at the sum of \$25,000.00 and in directing the refund of the sum of \$144,277.59 (*Matter of Goliger*, 58 AD3d 732 [2d Dept 2009]). No appeal has been taken from the Appellate Division's decision and order, and there is no stay pending such appeal.

Anne F. Pizzo has failed to make any payment as directed by this court's February 1, 2007 order. The petitioner now moves by order to show cause to hold Ms. Pizzo in contempt for her refusal and willful neglect to obey such order.¹

¹ Movant also seeks to hold Ms. Pizzo in contempt for refusal and willful neglect to obey the order of this court dated August 7, 2007. However, a review of that order fails to reveal any directive aimed at Ms. Pizzo. The petitioner's papers submitted in support of his order to show cause also fail to explain how Ms. Pizzo may have violated any term of the August 7, 2007 order.

In response to the order to show cause, Ms. Pizzo does not deny that she has failed to repay the estate as directed by the court's February 1, 2007 order. She argues that she has no obligation to make payment because the order has not been reduced to judgment, however, this argument is of no avail given the fact that the movant has submitted a copy of the transcript of judgment entered against Ms. Pizzo. She further argues that she is under no obligation to make payment to the estate because she never received any monies from the estate, but was paid by Donna. This argument ignores the fact that Donna has never offered competent proof that the attorney's fees were paid from her own personal funds (*see Matter of Goliger*, 72 AD3d 966 [2d Dept 2010]). Ms. Pizzo's remaining argument is that she is financially unable to make payment in any regard.

Judiciary Law 753, which governs the power of courts to punish for civil contempt, provides, in relevant part, that a court of record has power to punish, by fine and imprisonment, or either, a neglect or violation of duty, or other misconduct, by which a right or remedy of a party to a civil action pending in the court may be defeated, impaired, impeded, or prejudiced in the case of an attorney for the non-payment of a sum of money, ordered or adjudged by the court to be paid, in a case where by law execution cannot be awarded for the collection of such sum except as otherwise specifically provided by the CPLR (Judiciary Law 753 [A] [3]).

CPLR 5104 provides that any interlocutory or final judgment or order, or any part thereof, not enforceable under Article 52 of the CPLR (which provides for the enforcement of money judgments) may be enforced by serving a certified copy of the judgment or order upon the person required by law to obey it and if he refuses or wilfully neglects to obey it, punishing him for a contempt of court.

A valid judgment in the amount of \$144,277.59 has been docketed against Ms. Pizzo and she has failed to make any payment as required by that judgment. However, this court may not find Ms. Pizzo in contempt for such failure because the judgment is solely a money judgment and is enforceable pursuant to Article 52 of the CPLR. “The contempt remedy is not available to enforce the ordinary money judgment, although it does serve as the enforcement device to effectuate several of the mechanisms that Article 52 offers for the money judgment (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C5104:1).

While this court is mindful of the fact that the various enforcement mechanisms provided for in Article 52 of the CPLR are of limited utility under circumstances where the judgment debtor appears to be unemployed and does not appear to own any property, movant may serve her with an information subpoena pursuant to CPLR 5224 (a) (3) in an effort to ascertain any assets, and in the event of the judgment debtor’s failure to properly respond, move for relief pursuant to CPLR 2308 (b)²

Accordingly, the motion to hold Anne Pizzo in contempt is denied at this time, with leave to renew upon a proper showing.

This constitutes the decision and order of this court.

Dated: March 22, 2012

EDWARD W. McCARTY III
Judge of the
Surrogate’s Court

² It appears that the movant conducted a post-judgment deposition of Ms. Pizzo and requested production of documents which have not been produced to date. If the movant seeks to hold Ms. Pizzo in contempt for such failure to produce, she should be served with a judicial subpoena seeking such documents, and, in the event of her failure to properly respond to such subpoena, a motion for contempt may be made pursuant to CPLR 2308 (a).

