Matter of Colt
2017 NY Slip Op 30934(U)
April 11, 2017
Surrogate's Court, New York County
Docket Number: 2008-4673/B
Judge: Rita M. Mella

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

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In the Matter of the Account of SR, as Successor Trustee of the Trust created March 13, 2006, by

ALVIN COLT,

Grantor.

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DECISION
File No. : 2008-4673/B

In the Matter of the Account of SR, as Executor of the Will of

ALVIN COLT,

Deceased.

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File No. : 2008-4673/C

M E L L A, S. :

These are contested proceedings for the settlement of the accounts of SR (SR, or the Fiduciary), as executor of the will of Alvin Colt and as successor trustee of a revocable inter vivos trust created by Colt in March 2006. After the dismissal of certain objections and withdrawal of others, the only outstanding objections are to the amount of legal fees paid from the estate and trust to SR's counsel, M&F, a professional corporation.[1] The court held a hearing on this issue over four days, at which testimony was taken from AF, a senior attorney and one of two shareholders of M&F; SR; and LB, counsel for the remaining objecting beneficiaries.[2]

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[1] M&F did not render separate invoices to the estate and trust. The firm billed SR in his two fiduciary capacities together based on time records that do not distinguish between services to the estate and services to the trust. The estate pours into the trust, and the court's analysis of the fees does not require an allocation of the charges. For purposes of this decision the court treats the estate and trust as a single entity.

[2] Prior to taking testimony on the fee issue, and on the record of the April 28, 2015 proceedings, the court denied two motions by SR. As to his motion to dismiss certain objections for failure to state a ground for relief, or for failure to plead with sufficient particularity, the court noted that the objections, as amended, stated a valid claim for excessive legal fees and were sufficiently particular to give adequate notice. The court in its discretion denied SR's motion for sanctions under Rule 130-1.1.

M&F seeks approval for total charges of $1,037,183.[3] The firm has waived its claim to another $853,880 in time charges, in part because of the limited funds remaining on hand. The amount requested is approximately 33.7% of the total of the estate and trust assets for which the Fiduciary has accounted, that is, principal received, income collected, and realized gains.

Background

Alvin Colt died in 2008 with assets that consisted largely of a brokerage account at Merrill Lynch (worth approximately $1.38 million on date of death) and a condominium apartment (valued at $1.137 million). Much of the contested legal fees in this otherwise routine administration were generated by a controversy as to which of two revocable inter vivos trusts that Colt created held title to the brokerage account and to the condominium. This was a significant issue because the respective beneficiaries of the two trusts are not the same.

Colt created the first trust with himself as trustee in April 2004. This trust purchased the condominium in June 2004, and the deed was recorded in the name of "Alvin Colt Trust, Alvin Colt, as Trustee." The 2004 trust also held the brokerage account, titled in the name of "Alvin Colt as Trustee" without further specification. The 2004 trust was designated the beneficiary of Colt's residuary probate estate under a pour-over will he executed on the same date as that of the 2004 trust. The 2004 trust instrument provided on Colt's death for various cash bequests and a charitable remainder annuity trust, of which his niece, Susan Noack (Noack), was the lifetime annuitant. The remainder was to pass on her death to two designated charities (the Charities).

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[3] Of the amount requested, $667,380 has been paid. SR, an attorney, had an "Of Counsel" agreement with M&F, beginning in 2007. It is unclear whether SR should have made an application under SCPA 2111 before compensating the firm. SR and M&F deny they shared fees for this matter.

In March 2006 Colt executed a second revocable trust, again with himself as trustee. On the same day he executed a new will which left his probate estate to the 2006 trust. The new trust instrument made cash gifts to the same persons who were pecuniary legatees under the 2004 trust, but the trust remainder instead now passed outright on Colt's death: 80% to Noack and 10% to each of two other individuals. There was no further trust after Colt's death and no provision for the Charities.

Both wills and both trust agreements were drafted by SR, an estate planning attorney, now the executor and trustee. He acknowledges that Colt's intent was for his assets to pass pursuant to the terms of the later, 2006 trust, and has conceded his mistake in failing to have his client revoke the 2004 trust and fund the 2006 trust with the brokerage account and the condominium (Tr. 311, 317;[4] *see also* Fiduciary's Post-Trial Mem. at 3, referring to the Fiduciary's "admitted error"). With the assistance of the court, the heart of the controversy was settled in late December 2011, when the Charities agreed to accept $37,500 each in satisfaction of their claims.

The Estate and Trust Administration and Current Procedural Posture

The legal work necessary to administer Colt's estate and trust entailed probate of the 2006 will; negotiation of a contract with the cemetery for perpetual care as directed in the will; sale of the condominium; and the routine tasks of any administration, including paying expenses, filing tax returns, accounting, and distributing the net probate and trust estates to the beneficiaries. In addition to these routine matters, the attorneys devoted very substantial time to litigation that ensued as a direct result of the failure to fund the 2006 trust. The extensive

[4] References to pages in the hearing transcript are denoted "Tr. __".

proceedings included an action by the Fiduciary in the Supreme Court, commenced in 2009, seeking a declaration that all the assets were property of the 2006 trust; and counterclaims by the beneficiaries for negligence and breach of fiduciary duty, demands for accountings and removal of SR as executor and trustee, and cross-motions for partial summary judgment in that action. In July 2011, the Supreme Court transferred the action to Surrogate's Court, where SR eventually brought these proceedings to settle his accounts. The currently outstanding objections were filed by Noack and the other two remainder beneficiaries of the 2006 trust (Objectants).[5]

Standards for Fixing Legal Fees

A fiduciary is allowed to pay from an estate or trust "any reasonable counsel fees he may necessarily incur" (EPTL 11-1.1 [b][22]). It is well established that the Surrogate has the ultimate authority and broad discretion in fixing the fee (*e.g. Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Verplanck*, 151 AD2d 767 [2d Dept 1989]). In determining the reasonableness and necessity of attorneys' fees, the courts are often guided by the factors enumerated in *Matter of Freeman* (34 NY2d 1, 9 [1974]): the "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*see also Matter of Potts*, 213 App Div 59, 62 [4th Dept 1925], *affd* 241 NY 593 [1925] [in fixing fees for settlement of an estate the court should generally consider "the time spent, the difficulties involved in the matters

[5] The Objectants also brought a proceeding to compel distribution of legacies. The decision here will enable the Fiduciary to compute the balance available for distribution, which renders that proceeding moot.

in which the services were rendered, the nature of the services, the amount involved, the professional standing of the counsel, and the results obtained"]). The burden of establishing the allowable amount of the fees is on the fiduciary, as the party seeking approval (*id.*).

Analysis of Legal Fees Charged

Time required. From the time records submitted, the court finds inefficiencies that were both extreme and pervasive. For example, and despite M&F's acknowledgment that there were no major issues in the probate proceeding (*see* Fiduciary's Post-Trial Mem. at 7), diary entries reflect review upon review of the probate papers, revisions upon revisions, and research of basic procedures that should not have been necessary in a firm that purports to have familiarity with this type of work. More than 20 time entries refer to the probate petition alone, a fairly simple document with no complications. As another example, for May and June of 2009, at least 37 separate entries refer to drafting, revising, reviewing, discussing, and "coordinating" a letter to the Charities. AF testified that his firm had to respond to the Charities' numerous inquiries, but has not met the Fiduciary's burden of justifying the extraordinary amount of attention given to this effort, which primarily consisted of furnishing readily available information. In a third example, M&F recorded more than 50 entries for drafting, reviewing, "coordinating," revising, or editing the stipulation of settlement.

Work devoted to the negotiation of the contract for the sale of decedent's condominium, preparation for and attendance at the closing, and preparation of a closing statement was all appropriate, but again the fee charged in connection with the sale is excessive. AF testified that his firm expended 42.7 hours for this work, which translated to approximately $15,000 in time charges (Tr. 104, 196, 338). According to his trial testimony, complications stemming from the

question of title were resolved by the title company after "a bunch of phone calls back and forth" (Tr. 41), and the transaction was otherwise routine, with no lending institutions involved on either side.

The court also finds scores of entries for time recorded by the two principals of M&F for conversations with each other, both of whom are attorneys with decades of experience. At their blended rate, these exchanges were billed at approximately $1,000 per hour. While intra-office communications are not per se improper, testimony at the hearing did not provide adequate justification for the extent of these discussions between the senior attorneys.

The court also observes that time has been improperly charged for travel for court appearances, certain executorial duties, and, despite the waiver of some charges for work to support the fees requested, other fees for such work have been included in the invoices (*see e.g. Matter of Trotman*, NYLJ, May 13, 1998, at 29, col 3 [Sur Ct, Nassau County] [charges for travel time spent on executorial services not compensable]; *Matter of Gallagher*, NYLJ, Feb. 2, 1993, at 26, col 3 [Sur Ct, Bronx County] [time spent on fee application not compensable]). Based on the above, a substantial reduction in the number of hours that are compensable is appropriate.

Necessity of litigation services provided. Litigation is by far the largest category of work for which M&F seeks compensation. The firm maintains that its time charges were largely attributable to the Objectants' own conduct throughout the litigation. It claims that the firm was obligated to correct or otherwise respond to unnecessary and wasteful actions on the part of the Objectants, related, among other things, to false statements in the Objectants' pleadings; the Objectants' failure to recognize the irrelevancy of the 2004 will after the 2006 will had been probated; inappropriate "gang-buster" mentality regarding settlement; frivolous affirmative

defenses and counterclaims, including a claim for SR's malpractice; delay in concluding the partial settlement with the Charities; badgering the Fiduciary for further distributions without obtaining a court order, contrary to an alleged agreement between counsel; a failed removal proceeding; and unreasonable requests for backup documents.

In analyzing the necessity of the litigation and attendant expense, the court will not substitute its judgment for every strategy employed by M&F, but makes the following observations to address some of the criticism each side has directed at the other. First, it was not inappropriate for the Fiduciary to bring the action for declaratory judgment, in light of the controversy surrounding title to the assets and the Fiduciary's duty to distribute those assets to the proper beneficiaries. Supreme Court was not necessarily the "wrong" court for the lawsuit, as the Objectants contend, and the fees attributable to the discretionary, unopposed transfer of the action to Surrogate's Court are relatively small. Nor was it inappropriate for the Fiduciary to defend himself against the failed application for his removal, or to resist a demand for an accounting that he reasonably believed was premature. Further, the reasonable cost of preparing trust and estate accounts and prosecuting the proceedings for their settlement (whether or not compelled) is a necessary legal expense that is normally reimbursable from the trust or probate estate.

The Objectants argue strenuously that the Charities' claims could have been settled much earlier, based upon the Objectants' allegations that the Charities offered a settlement in early 2009 for a figure substantially less than the legal fees incurred afterwards to settle with them. The evidence suggests, however, that this offer covered only the Charities' claim to an interest in the condominium, and did not include a claim to an interest in the brokerage account. In any

event, whether, when, and at what amount the case could have settled earlier is wholly speculative.

Weighing against the necessity of the litigation fees incurred are charges for the extensive efforts M&F describes to force the Objectants to "correct" their "nonsensical" objections, even going so far as to draft amended pleadings for the Objectants, their own client's adversaries. Much of this work was not appropriate or required and is non-compensable from the estate. After reasonable attempts at negotiation failed, M&F could simply have moved to dismiss improper pleadings for failure to state a cause of action, could have denied the allegations in the cross-claims and counterclaims, or could have moved for summary judgment on any demonstrably unsupportable claims. The court also deems unwarranted the time spent drafting a complaint against the Objectants' attorney under Judiciary Law 487, intended to threaten him with an action for treble damages when he did not respond to M&F's demand to correct alleged misstatements in the Objectants' pleadings (*see Thomas v Chamberlain, D'Amanda, Oppenheimer & Greenfield*, 115 AD2d 999, 999-1000 [4th Dept 1985] ["Assertion of unfounded allegations in a pleading, even if made for improper purposes, does not provide a basis for liability under [Judiciary Law 487]"]).

M&F appropriately engaged in settlement discussions with the Charities and with Colt's niece, Noack, who had the greatest stake in the outcome, although testimony confirmed that much of the negotiation was conducted by Noack's attorney with little participation by M&F (*e.g.* Tr. 50). After the figure of $75,000 was agreed upon in December 2011, however, the settlement was not immediately completed because M&F continued to negotiate with the Objectants over, among other things, whether the Fiduciary should personally fund the

settlement, and whether he should be required to waive his commissions (*see* Tr. 233). In December 2011, if not before, the continued negotiations were for the primary benefit of the Fiduciary, personally, and not in furtherance of the interest of the estate or trust. He did not need the Objectants' consent to conclude the $75,000 agreement with the Charities.[6] His maximum exposure to the Objectants was $75,000, far less than the subsequent legal fees he incurred and approved to protect his own interests.[7] Negotiating with the Objectants after December 2011 was largely unwarranted, and the majority of the legal fees for such discussions is therefore non-compensable by payment from the estate.

Size of the Estate. The legal fees charged must not exceed a reasonable proportion of the size of the estate (*e.g. Matter of Efstathiou*, 41 Misc 3d 1219 [A] [Sur Ct, Nassau County 2013], and cases cited therein). Even after M&F's waiver of substantial charges allegedly attributable to time spent, and taking into account the litigation, the 33.7% fee M&F requests is far in excess of a typical fee for the services they performed (*see* Turano & Radigan, New York Estate Administration § 13.03 [2017 ed] ["The courts often approve attorney's fees ranging up to five percent of the estate for the first $50,000 or so and smaller percentages on higher amounts"]).

The *Heino* case (NYLJ, Jan. 28, 2014, at 31 [Sur Ct, Kings County]) cited by M&F is distinguishable. There, the court approved fees amounting to 31% of the estate, but the fees were found attributable to the conduct of the beneficiaries themselves, during the administration, and

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[6] *See* EPTL 11-1.1 (b) (13), authorizing a fiduciary to settle claims.

[7] The only additional substantive term of this partial settlement was that the assets be treated as if belonging to the 2006 trust, rather than the 2004 trust. It could not have been difficult to strike this part of the bargain. Once the Charities had agreed to accept $75,000, all of the other beneficiaries fared better under the 2006 trust.

the beneficiaries were also the estate fiduciaries. Further, to the extent the beneficiaries here may have driven some of the work performed by M&F, such work was largely unnecessary, as discussed above.

Results Achieved. Achieving a settlement with the Charities for $75,000 was a good result. The assets were never registered in the name of the 2006 Trust, as required by EPTL 7-1.18, which put the Objectants in a difficult legal position. M&F has acknowledged, however, that the settlement negotiations were primarily conducted by Noack's attorneys (Tr. 50, 163). It took more than three years to reach the settlement, and, even then, M&F concedes it was the court attorney assigned to this matter who was "the crucial part of the settlement" (Tr. 61). M&F is not entitled to any premium for its role in the favorable settlement of the litigation.

Time Spent. The time spent on the various aspects of the trust and estate administration, as opposed to the time required, treated above, is virtually impossible to assess. M&F has submitted hundreds of pages of contemporaneous time records, but in many instances the descriptions of the work performed— especially by the two principals, who command the highest billing rates in the firm—merely indicate "discussions with . . ." or "telephone call with . . . ," omitting any further specification of the particular services provided, as M&F concedes (*e.g.* Tr. 196). Many other entries bundle the time for various services without allocation. Testimony at the hearing did not provide clarity. M&F disputed the Objectants' analysis of its time records, but offered very little breakdown of its own. When asked for specifics or confirmation of the Objectants' tallies, AF responded many times "I don't know . . ." or "I don't recall . . . " or "I'd have to do my own calculation . . ." (*e.g.* Tr. 196-197). In these circumstances, the court's analysis is necessarily informed primarily by the time periods for which the services were

charged, and M&F's narrative of the work performed. Total time charges will be afforded relatively little weight (*Matter of Kelly*, 187 AD2d 718, 719 [2d Dept 1992] [Surrogate not obligated to accept "at face value" diary entries that "fail[ed] to comprehensibly document . . . entitlement to the requested fee"]). Thus, for example, although the court finds (contrary to the Objectants' position) that it was appropriate for M&F to negotiate with the cemetery to carry out a directive in the decedent's will, it is not possible to determine from the evidence how much time M&F expended for this work. The same is true for the performance of routine administrative matters, including tax and accounting services.

Nor is the court obligated to make a precise calculation of the charges attributable to each service. As stated in *Matter of Nicastro* (186 AD2d 805, 805 [2d Dept 1992]), "The evaluation of what constitutes reasonable counsel fees is a matter within the sound discretion of the court [internal citations omitted] which is in a 'far superior position to judge those factors integral to the fixing of counsel fees such as the time, effort and skill required . . . and the review of contemporaneous time records.' "

In consideration of the foregoing factors, as well as the standing of counsel, the court fixes the fees of M&F for its representation of the Fiduciary in the total amount of $520,000. This conclusion balances a number of elements. The court has given particular weight to the failure of the Fiduciary to carry his burden to justify the necessity of M&F's charges for the various categories of work, the firm's failure to detail all of the time records to support the charges, the largely routine nature of the administration, and, significantly, the ratio of the amount of the fee request to the value of the estate and trust.

M&F is directed to refund to the 2006 Trust the difference between the amount paid in legal fees (including any sums paid for "Miscellaneous Reimbursable Expenses"[8]) and the sum of $520,000 as allowed in this decision.

Commissions

A fiduciary is presumptively entitled to statutory commissions, but commissions are by no means guaranteed. As the court stated in *Matter of Smith* (91 AD2d 789, 791 [3d Dept 1982]):

> "[I]t is well settled that when the fiduciary is derelict in the performance of his or her duties, the denial of commissions is within the discretion of the Surrogate."

Thus, although it is the rare case where commissions are denied, denial is warranted in certain circumstances, some of which are enumerated in *Matter of Cushman* (NYLJ, July 23, 2010, at 34, col 4 [Sur Ct, Bronx County]):

> "[T]he allowance of commissions is within the discretion of the court, and the harsh determination that a personal representative should not receive any compensation for administering the estate is limited to those cases involving bad faith, neglect of duty or wanton disregard of the rights of the beneficiaries of the estate [citations omitted]."

This case presents an unusual situation in that much of the substantial legal fees incurred

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[8] M&F's invoices included a flat 2.5% fee added to all its time charges, for what it labels "Miscellaneous Reimbursable Expenses," totaling $14,397.34 through the October 12, 2012 statement. The parties' retainer agreement indicates that these charges were not to reimburse for out-of-pocket expenses but rather for in-house "copying, telephone charges, and faxes" and other expenses that are considered office overhead and are not reimbursable, in absence of an affidavit explaining that the expenses were extraordinary (*Matter of Herlinger*, NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, NY County]).

and approved by the Fiduciary would not have been necessary but for his own wrongdoing. The court will exercise its authority to review sua sponte his commissions as executor and trustee (*Stortecky v Mazzone*, 85 NY2d 518 [1995]; *Matter of Taft*, 145 Misc 435 [Sur Ct, Kings County 1932]).

The parties have devoted considerable argument to the question of SR's potential insulation from a malpractice claim on the grounds, first, that the three-year statute of limitations had expired before the Objectants filed their counterclaim against SR in the Supreme Court action for declaratory judgment; and, second, that the Objectants lacked the requisite privity with SR to give them standing to sue him under New York law.[9]

Contrary to the Fiduciary's position that the statute of limitations began to run in 2006 when the second trust was executed, the court concludes that Colt's date of death is the appropriate date of reckoning. The estate planning error here did not lie in the creation of the 2006 Trust or the failure per se to revoke the 2004 Trust, but in the failure to fund the 2006 Trust with the assets of the 2004 Trust (which by its terms allowed Colt to withdraw those assets at any time). The funding could have been accomplished at any point until Colt's death in May 2008, when both trusts became irrevocable and the provisions for the beneficiaries of both trusts became operative. No harm occurred before then.

In June 2010, the Court of Appeals held that an executor has standing to sue the decedent's estate planning attorney for malpractice (*Schneider v Finmann*, 15 NY3d 306). With

[9] Also pending before the court is SR's motion for summary judgment dismissing the Objectants' counterclaim for malpractice in the declaratory judgment action. That motion is being determined in a separate decision rendered contemporaneously with this decision.

any technical barriers removed at that point, any other person serving as executor clearly would be derelict in his or her fiduciary responsibilities for failing to pursue a malpractice claim against SR. Colt's estate had a claim against SR, in his individual capacity, for damages in the amount of the legal fees necessarily incurred to resolve the trust issues that SR acknowledges he created. SR had an even greater duty to the beneficiaries than a hypothetical disinterested fiduciary, because the wrong he failed to redress was a wrong he himself committed. He breached not only his fiduciary duty to satisfy the estate's claim against himself, but also his duty of loyalty to the estate, in effect putting his own interests first.

Even if the statute of limitations had expired or SR had been shielded from claims under the privity doctrine, his duty as an executor required that he make the estate whole for the legal fees attributable to his negligence. In *Matter of Schultz* (104 AD3d 1146 [4th Dept 2013]), the court considered an executor's standing to object to his co-fiduciary's account for the co-fiduciary's failure to collect a loan. Although the objecting fiduciary had no personal interest in the loan, and had releases from the beneficiaries that protected him from liability for his co-fiduciary's breach, the court concluded that he had standing to object. Relying on the special duty a fiduciary owes to the estate, the court stated:

> "An executor's duty is not fulfilled merely because he or she has obtained releases from liability. The standard of care for a fiduciary cannot be set so low; rather, a fiduciary has a 'duty of active vigilance in the collection of assets belonging to the estate' "

(*id.* at 1148-1149 [citations omitted]).

Here, the Fiduciary's failure to make the estate whole for the harm that he caused was a serious violation of his "duty of active vigilance in the collection of assets belonging to the

estate." The violation was exacerbated by his affirmative approval of the skyrocketing legal fees, for which he offered no evidence of attempts to control. He has demonstrated a gross neglect of duty and a substantial disregard of the rights of the beneficiaries that warrants denial of his commissions.

Accordingly, the Fiduciary's commissions both as executor and trustee are denied in their entirety, and he is directed to refund commissions previously taken.

Settle decree on accounting in accordance with the foregoing.

Clerk to notify the parties of this decision by mail.

Dated: April 11, 2017

SURROGATE