

Matter of Fergang

2017 NY Slip Op 31641(U)

July 25, 2017

Surrogate's Court, Nassau County

Docket Number: 2010-361695/C

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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**Petition by ALLEN S. FERGANG for the Settlement of his
Accounts as Executor of the Estate of**

**MELVILLE L. FERGANG
a/k/a MEL FERGANG,**

Deceased.

**DECISION AND
ORDER**

**File No. 2010-361695/C
Dec. No. 32722**

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PRESENT: HON. MARGARET C. REILLY

The following papers were considered in the preparation of this decision:

Notice of Motion to Compel, Affidavit (Scott) and Exhibits	1
Affirmation in Support (Kokacz).	2
Affirmation in Opposition and Exhibits (Kelly).	3
Reply Affidavit (Scott).	4

Before the court is a petition to settle the accounts of Allen Fergang (brother of the decedent) as executor of the estate of Melville Fergang for the period July 25, 2010 through August 31, 2013. Nicholas Casaccio, grandson of the decedent, filed objections to the account and now moves the court for an order compelling the executor to produce all documents responsive to the objectant’s notice of discovery and inspection, dated June 27, 2016. The movant also seeks costs. Jane Fergang, daughter of decedent and beneficiary under the will, also an objectant, filed an affidavit in support of the objectant’s Nicholas Casaccio’s motion.

In June 2016, Nicholas Casaccio served a demand upon the executor for discovery and inspection which included demands for tax returns and for documentation of legal

services and accountant's services to the estate. These are demands numbered #3, #4, #7 and #8. In response to the demand, the executor objected to disclosure of documents relating to the payment of legal fees.

By instrument dated December 20, 1990, the decedent created a revocable lifetime trust. The agreement was amended by instruments dated December 16, 1993; October 18, 1994 and May 15, 2003. The executor and the decedent were the co-trustees of the lifetime trust until the decedent's death on July 25, 2010. On August 5, 2010, Joseph Morrissey was appointed successor co-trustee. The executor resigned as a trustee on October 5, 2010.

Article "2" section 2.1 (A) of the Melville Fergang Trust provides:

"A. Upon and after my death, the Trustees may directly pay and discharge, or disburse funds to my probate estate to pay and discharge: (i) all or any part of any debts owing by me; (ii) all or any part of the expenses incident to my last illness, funeral and burial; and (iii) all or any part of the administration expenses of my probate estate, including executors' commissions, attorneys' fees and all other proper administration expenses that are not paid or discharged by my probate estate, all as the Trustees may determine."

In a prior decision dated October 20, 2015, this court determined that the executor was not entitled to the payment of commissions (SCPA § 2307 [1]). The decision directed that commissions "shall not be calculated on those sums which were not actually received and paid out by the executor."

The executor opposes disclosure of information related to legal fees. His argument is based on the court's direction to amend fees not actually paid by the executor, which

included legal fees.

The Surrogate's Court has general jurisdiction in matters relating to executors and the authority to satisfy itself on questions arising during a proceeding to settle an executor's account including attorneys' fees (*Stortecky v Mazzone*, 85 NY2d 518 [1995]). Moreover, the court did not direct that the executor omit the reporting of administration expenses which appear in Schedule "C."

EPTL § 11-1.1 places responsibility on the executor for administration of the estate including the employment of attorneys and payment of fees (*see e.g. Matter of Mergentime*, 155 Misc 2d 502 [Sur Ct, Westchester County 1992]; *Matter of Smolley*, 144 AD2d 366 [2d Dept 1988]) subject to review by the court (*Matter of Phelan*, 173 AD2d 621 [2d Dept 1991]).

The duties of an executor and trustee are distinct. An executor is not a trustee (Restatement [Third] Law of Trusts § 5 subd [c] [2003]). A trustee's status is characterized by the fact that he holds title to the trust property and is responsible for its administration (*Matter of Fontanella*, 33AD2d 29 [2d Dept 1969]).

The executor had no authority in his capacity as a trustee to exercise discretion as to the administration of the estate. As to the estate's administration expenses, the only function assigned to petitioner in his capacity as trustee was to pay the expenses or provide funds for their payment.

The obligation of the executor to take responsibility for the reasonableness of paid administration expenses was not affected by the disallowance of commissions. The executor assumed office subject to the limitations imposed by the testator as to commissions (*Lehman v Irving Trust Co.*, 55 NY2d 97 [1982]) as set forth in the combined terms of the last will and testament and the lifetime trust (*Matter of Chrestensen*, 175 AD2d 641 [2d Dept 1991]).

The motion to compel the production of documents is **GRANTED**, to the following extent: Demand #3 seeks all documents and communications including time records and invoices for legal fees and disbursements billed to the estate or trust for services pertaining to the estate, whether paid or unpaid, including but not limited to the fees of Morrissey & Morrissey, Ruskin Moscou Faltischek and James Joseph Morrissey, III. The executor is directed produce the documents within thirty (30) days of receipt of this decision.

In response to the motion to compel, the executor consented to produce documents demanded in requests #4, #7 and #8 pertaining to accountant's work sheets and federal and state tax returns. Objectant's counsel states that relevant documents have been produced but have not been reviewed to determine whether they are complete. The executor is further directed to produce all documents responsive to requests #4, #7 and #8, if he has not already done so, within thirty (30) days of receipt of this decision.

The motion for costs and attorneys' fees is, in the court's discretion, **DENIED**, as the

executor's opposition to the motion, standing alone, was not frivolous conduct (22 NYCRR 130-1.1; *Accent Collections, Inc. v Cappelli Enterprises, Inc.*, 84 AD3d 128 [2d Dept 2011]).

This constitutes the decision and order of the court.

Dated: July 25, 2017
Mineola, New York

E N T E R:

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Judge of the Surrogate's Court

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