

<b>Jackson &amp; Nash, LLP v E. Timothy McAuliffe, PLLC</b>
2008 NY Slip Op 33652(U)
December 10, 2008
Supreme Court, New York County
Docket Number: 102265/06
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn  
Justice

PART 49m

Jackson & Nash LLP

INDEX NO.

102265/06

MOTION DATE

- v -

MOTION SEQ. NO.

001

E. Timothy McAuliffe et al

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

Cross-Motion:  Yes  No

DEC 15 2008

Upon the foregoing papers, it is ordered that this motion

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE . . . .**

Dated: 12/12/08

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 49

-----X  
JACKSON & NASH, LLP,

Plaintiff,

-against-

Index No. 102265/06

E. TIMOTHY McAULIFFE, PLLC  
and E. TIMOTHY McAULIFFE,

Defendants.

-----X  
E. TIMOTHY McAULIFFE

Third-Party Plaintiff,

-against-

ALBERT L. LINGELBACH, ALBERT L.  
LINGELBACH, , P.C., and JOSEPH MICHAELS IV,

Third-Party Defendants.

**FILED**

DEC 15 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**HERMAN CAHN, J:**

Defendant and third-party plaintiff, E. Timothy McAuliffe, moves to dismiss and/or for partial summary judgment, dismissing that portion of the complaint which seeks to compel him to account and pay to plaintiff Jackson & Nash, LLP (Jackson & Nash or the Firm), certain executor's commissions he received from the Estate of Virginia Field, CPLR 3211 (a) (7) and 3212 (e). Jackson & Nash cross-moves for partial summary judgment on its first, second, third and fourth causes of action, CPLR 3212.

Jackson & Nash, a now-defunct law firm, brings this action to recover certain commissions and fees earned by McAuliffe, a former partner of the Firm. The Firm alleges that McAuliffe actually earned these fees from two clients in the final months of his tenure with the

Firm, but did not bill and/or collect them until after his departure. In its complaint, the Firm seeks an accounting (first cause of action), damages for breach of contract (second cause of action), unjust enrichment (third cause of action) and breach of fiduciary duty (fourth cause of action). The Firm also seeks to impose a constructive trust on those fees (fifth cause of action).

In the third-party action, McAuliffe sues his former partners in Jackson & Nash for an accounting of the assets of the firm and to recover his equity interest in the Firm.

### **The Virginia C. Field Estate**

McAuliffe became a partner of Jackson & Nash on January 26, 1999. Mrs. Virginia C. Field had been a client of his before he joined the Firm. She died on April 30, 2003. Her Last Will and Testament named McAuliffe as a Co-Executor of her Estate. Preliminary Letters Testamentary were granted to McAuliffe on May 28, 2003, by the Surrogate's Court, New York County. He withdrew as a partner from the Firm on August 14, 2003. On November 5, 2003, approximately three months after his resignation from the Firm, McAuliffe obtained Letters Testamentary in the Estate. The Estate was settled on December 14, 2005 and McAuliffe received his executor's commission in the amount of \$247,819.96 on that date.

The Firm claims that under its partnership agreement, it is entitled to the fees received by McAuliffe in December 2005. The parties agree that, for the purposes of this motion, the relevant portion of the Partnership Agreement is Section 8.5. That section provides, in relevant part, as follows:

#### 8.5 Allocation of Fees, Commissions and Allowances

(a) All fees and allowances received by a Partner or Counsel for legal services, and all fees and allowances received by a Partner for acting as a referee or arbitrator, shall belong to the Firm.

(b) All fees and commissions payable to a Partner for acting as an executor, administrator, trustee, committee, conservator, guardian ad litem, general guardian or other similar fiduciary capacity shall belong to the Firm . . .

The operative word in section 8.5 (b) is “payable.” The Firm argues that the critical factor is not when the fees were first payable, or actually paid, but what services the attorney performed while at Jackson & Nash in order to generate a commission (Lingelbach Aff, ¶ 11). It also argues that McAuliffe could have applied for an advance payment of commissions.

The right to commissions is wholly statutory and is governed by the Surrogate’s Court Procedure Act (SCPA). Commissions are determined by the law as it stands on the date the commissions are allowed, since the right to commissions accrues on the settlement of the account (SCPA 2307). “No right to commissions accrues and they are not payable until judicially allowed by the Surrogate in the decree settling the account of the fiduciary” (*Matter of Nelson*, 105 Misc 2d 747, 749 [Sur Ct Westchester County 1980], quoting *Matter of Gildersleeve*, 75 Misc 2d 207, 209 [Sur Ct Orange County 1973]).

It is commonplace that commissions are payable only when allowed by the court. No vested right to commissions arises because of the mere act of receiving nor because of the mere act of paying out nor indeed because of the combined acts of receiving, administering and distributing. What is intended to be compensated is the entire body of service by the fiduciary

(*Matter of Erickson*, 184 Misc 830, 834 [Sur Ct NY County 1945]). Accordingly, since an executor’s commissions are not “payable” until the settlement of the account, and the Field Estate account was not settled until December 2005, two years after McAuliffe left Jackson & Nash, the Firm is not entitled to his executor’s commission.

While SCPA § 2311 allows an executor to petition the court to receive a sum “on account” of the commissions to which he would be entitled if he were then filing his account and it were judicially settled, such an application must demonstrate that either the executor or the estate will be deprived of substantial advantages under the income tax laws, that the executor will suffer hardship or that all persons who would be affected by the payment have consented thereto. This section is clearly not a method by which the executor may collect sums already earned, since it also provides that the “order or decree authorizing the payment on account shall require the fiduciary to file a bond in the amount of the payment securing its return if and to the extent that the payment is disallowed . . . .” (SCPA § 2311 [5]).

Finally, *Gibbs v Breed, Abbott & Morgan*, cited by Jackson & Nash, is not on point, since in that case the executor/attorney consented to pay his commission to the firm in exchange for his claimed share of the firm’s earnings that year as well as his inventory interest in the firm (170 Misc 2d 493 [Sup Ct NY County 1996], *modified*, 227 Ad2d 196 [1st Dep’t 1996]). The court specifically noted that “In the event that [the law firm] is found to be in breach of its obligation, [plaintiff] might well be relieved of his obligation to pay fees to the firm” (*Gibbs*, 170 Misc 2d at 498).

### **The Cross Motion**

Jackson & Nash cross moves for partial summary judgment on its claim for un-billed time for the period July 1, 2003 through August 14, 2003. The Firm asserts that, although McAuliffe claims he was on jury duty and vacation during this time, he in fact made a number of telephone calls from his office. Jackson & Nash therefore believes that there must have been billable hours associated with these calls. McAuliffe asserts that none of these calls to clients

were for billable services. He contends that he was either informing clients that the Firm was closing and helping them protect their files, trying to collect receivables or even pitching new matters from these clients. He states that while he recorded a small amount of billable time during that period, he ultimately determined that no entry could be billed to any client.

Inasmuch as the Firm cannot prove that the telephone logs represent billable hours, the motion for partial summary judgment is denied.

Accordingly, it is

ORDERED that the motion by defendant E. Timothy McAuliffe for partial summary judgment is granted, and that portion of the complaint seeking an accounting and/or commissions from him relating to the Estate of Virginia Field, are dismissed; and it is further

ORDERED that the cross motion by plaintiff Jackson & Nash, LLP for partial summary judgment is denied.

Dated: December 10, 2008

**FILED**  
DEC 15 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
ENTER:

*[Handwritten Signature]*

J.S.C.