

<b>Matter of Efstathiou</b>
2016 NY Slip Op 32024(U)
September 20, 2016
Surrogate's Court, Nassau County
Docket Number: 352949/G
Judge: Margaret C. Reilly
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decedent's estate on September 16, 2008, she did not receive full letters until June 2, 2012. In response to Eleni Efstathiou's initial petition, Steven Alexander filed objections and a separate petition for probate. Pursuant to a stipulation dated and so ordered on November 19, 2008, limited letters of administration issued to Eleni Efstathiou, restricting her from administering, selling, transferring or collecting any rights to the decedent's interest in The Nautilus Restaurant. The letters were otherwise unrestricted. The stipulation also provided that temporary letters of administration in connection with the decedent's interest in The Nautilus Restaurant would be granted to Steven Alexander, but these letters never issued.

Another stipulation was entered into on March 6, 2012 between the administrator and Steven Alexander. Pursuant to this agreement, the petitions and objections filed by Steven Alexander in all of the related proceedings were withdrawn, and the parties consented to the issuance of full letters to Eleni Efstathiou. On June 2, 2012, a decree was signed under which Eleni Efstathiou was granted full letters of administration without bond.

The administrator's account was initially filed on July 7, 2014, and it was amended repeatedly at the request of the court. A citation, a first supplemental citation, and a second supplemental citation were issued and served. The second supplemental citation, issued on September 22, 2015, was served together with a summary of the accounting filed on September 21, 2015, on Alexia Efstathiou, Christopher Efstathiou, Steven Alexander, Georgette Wolf-Ludwig, and the unpaid creditors, Bank of America and TD Bank.

The amended account currently under review was filed on April 15, 2016, and it covers the period from August 26, 2008 to the date submitted. No citation was filed or

issued in connection with the current amended account.

## **II. RELIEF SOUGHT**

The petitioner seeks approval of the following: the accounting; payment to creditor TD Bank in the reduced amount of \$4,200.00 on a claim of \$9,263.59; payment to Given Assoc. in the amount of \$1,600.00 for appraisal fees; the administrator's rejection of the claim of Bank of America in the amount of \$6,614.48; payment of \$5,625.00 to Alan Gruber for accounting services; payment of \$45,000.00 to Victor Mevorah for legal services; payment of \$37,762.02 to George Magriples for legal services; and payment of \$17,334.64 to Sacco and Fillas LLP for unpaid legal services and \$20,000.00 in legal fees previously paid, for a total fee of \$37,334.64.

## **III. CORRECTIONS TO ACCOUNT AND RELIEF SOUGHT**

The administrator must make the following corrections to her account:

### **A. Status of Georgette Wolf-Ludwig**

Citations in this proceeding have been served on a fourth biological child of the decedent, Georgette Wolf-Ludwig, who is listed on Part 4, Line 5 of the federal estate tax return filed by the administrator, as one of the individuals, other than the surviving spouse, who received benefits from the estate. The tax return reflects that Georgette Wolf-Ludwig received \$126,629.00 from the estate, which is also shown as the amount received by each of the decedent's three other children. Current counsel for the administrator states that this listing on the tax return was an error made by prior counsel. Counsel has not submitted a copy of an amended tax return.

The account before the court does not reflect these distributions, and Georgette Wolf-Ludwig is not listed on the amended petition or the account as an interested party. Although she was served with citations in this matter, the citations previously served are silent as to whether Georgette Wolf-Ludwig would receive a share of the decedent's estate. In an affirmation in support of the amended petition for the administrator's account, filed with the court on April 15, 2016, counsel for the administrator advised the court that Georgette Wolf-Ludwig was adopted out of the decedent's family and is therefore ineligible to inherit an intestate share of the decedent's property. Counsel further advised the court that although Georgette Wolf-Ludwig's attorney was unable to obtain copies of his client's adoption papers, Georgette Wolf-Ludwig was served with citation and "did not appear on the citation date to object to her status."

Annexed to counsel's affirmation is a letter dated October 22, 2008 from counsel for Georgette Wolf-Ludwig stating that his client has no paperwork that could verify her adoption and that she is estranged from her adoptive parents. He goes on to say: "It certainly maybe (sic) that there was a valid adoption but unless there is sufficient documentation available to verify the same it would be difficult to draw a conclusion in this regard. Georgette stands ready to cooperate with the Estate in resolving this matter."

However, as noted above, the citations served on Georgette Wolf-Ludwig and the other interested parties do not reflect in any way that the status of Georgette Wolf-Ludwig differs from that of the decedent's other children. In the relief sought by the administrator, as reflected in the petition and on the citations, there is no request asking the court to

authorize the administrator to divide the estate among herself, Alexia Efstathiou, Christopher Efstathiou, and Steven Alexander only, or to otherwise address the status of Georgette Wolf-Ludwig as a distributee or non-distributee of the decedent. Accordingly, while it is possible that Georgette Wolf-Ludwig was legally adopted out of her biological family, and has no expectation that she would inherit anything from the decedent, there is nothing on record to show that Georgette Wolf-Ludwig or any of the other children received actual notice of the administrator's intention to omit Georgette Wolf-Ludwig from the division of the decedent's property on the grounds that she was adopted out of the family.

The administrator is directed to submit a revised Schedule H and a third supplemental citation for issuance by the court that will expressly include the position taken by the administrator concerning the status of Georgette Wolf-Ludwig as a non-distributee of this estate.

B. Value of 93 Ocean Avenue Shown on Schedule A

Schedule A of the account reflects net proceeds of \$560,436.62 on the sale of decedent's real property at 93 Ocean Avenue, Massapequa, New York (93 Ocean Avenue), but includes the date of death value, \$1,040,000.00, in reaching total Schedule A assets shown as \$1,665,913.50. The closing statement reflects that neither of these numbers is the correct amount to be shown on Schedule A. As reflected on the real estate closing statement, after the payment of attorneys' fees and escrow amounts for additional fees and debts, the proceeds were reduced to \$508,139.82. This is the amount that must be reflected on Schedule A, and the total of Schedule A should be reduced accordingly.

C. Loss of \$482,999.38 Shown on Schedule B

Schedule B of the account incorrectly reflects the deduction of a loss of \$482,999.38 on the sale of 93 Ocean Avenue. The correct Schedule A value of this asset, at \$508,139.82, incorporates the loss since the date of death value. When the value of an asset shown on Schedule A of the account correctly reflects the net sales proceeds, then there is no loss to be shown on Schedule B.

Accordingly, once Schedule A has been corrected as noted above, Schedule B decreases should be reduced to reflect this corresponding correction. The administrator must then balance her account to ensure that Schedule G of the newly amended account reflects the total amount of assets on hand, shown on the April 15, 2016 account as \$228,802.27, plus interest earned to date.

D. Decrease in Value of the Nautilus Restaurant Shown on Schedule B

Schedule B reflects a loss of \$625,913.50, based upon the judgment of foreclosure and sale (Nassau County Index #022759/2010) of the Nautilus Restaurant, in which the decedent had a 50% interest. In support, the administrator submitted a copy of the Judgment of Foreclosure and Sale and Referee Deed. However, page 2 of the Judgment is missing, and the Referee's Deed reflects a sale for \$1,725,000.00 (which means that the decedent's 50% interest yielded \$862,500.00). The administrator is directed to provide the court with a complete copy of the Judgment of Foreclosure and Sale and further information concerning the proceeds of sale and whether any proceeds were received by the administrator.

E. Approval of Appraisal Fees

The petitioner seeks the court's approval of payment to Given Assoc. in the amount of \$1,600.00 for appraisal fees. Schedule C reflects that the amount paid was \$1,500.00, on December 22, 2010. No explanation is given as to why this payment of \$1,500.00 or \$1,600.00 was made or why the payment requires court approval. The administrator is directed to clarify the amount paid and whether this payment requires court approval. Depending upon the amount of the fee paid, Schedule C may need to be amended.

F. Approval of Payment to TD Bank

Among the prayers for relief, the petitioner asks the court to approve payment to TD Bank as a creditor of the estate in the reduced amount of \$4,200.00 on a claim of \$9,263.59. The petitioner has submitted a copy of correspondence from TD Bank offering to accept the reduced amount of \$4,200.00 on the debt of \$9,263.59 on condition that payment is made by April 17, 2014. Here, too, the petitioner offers no explanation as to why court authorization is required for the settlement of this debt since the administrator has the authority to contest, compromise or otherwise settle any claim in favor of the estate or in favor of a third party against the estate (*see* EPTL § 11-1.1[b][13]). The administrator is directed to explain why court approval of the proposed payment is necessary and whether the offer of TD bank to settle the claim, which on its face expired more than two years ago, is still available to the estate.

G. Approval of Legal Fees Paid to Sacco and Fillas, LLP

The administrator has asked the court to approve legal fees paid to three different law firms, including approval of payment of \$37,334.65 to current counsel, Sacco and Fillas,

LLP, of which \$20,000.00 has been paid and \$17,334.65 remains unpaid. Schedule C shows \$13,900.00 of paid fees and Schedule C-1 shows \$17,334.65 of unpaid fees for Sacco and Fillas, LLP, for a total of \$31,234.65.

The initial affirmation of legal fees dated December 19, 2014 that was submitted by Sacco and Fillas, LLP indicates that the firm provided 61.2 hours of services at billable rates of \$350.00 to \$400.00 per hour. Annexed to the initial affirmation as Exhibit C are two billing statements based on time records. The first shows billable time of \$13,900.00, and the second shows billable time of \$7,605.00, for a combined total of \$21,505.00.

Paragraph (9) of the affirmation in support of the petition submitted by Sacco & Fillas, LLP, dated April 15, 2016, seeks payment of unpaid legal fees owed to Sacco & Fillas, LLP in the amount of \$17,334.65, the amount shown on the petition and Schedule C-1, for work that was necessary to complete the accounting. This figure is based upon an annexed billing statement, dated April 14, 2016. The statement begins with a previous balance of \$7,757.43, but offers no indication of the services provided for this balance, or whether this amount was included in the previous billing statement filed with the court, dated December 19, 2014. The court did not receive time records for this amount.

The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*see Matter of Potts*, 241 NY 593 [1925]; *see Matter of Spatt*, 32 NY2d 778 [1973]). Contemporaneous records of legal time spent on estate matters are important to the court in the determining whether the amount of time spent was reasonable for the various tasks performed (*see Matter of Phelan*, 173 AD2d

621 [2d Dept 1991]; *Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]).

The court cannot review the \$7,757.43 portion of the requested fee without the filing of contemporaneous time records. If no contemporaneous time records exist, counsel is directed to so advise the court. There are also some inconsistencies in the fees requested under Schedules C and C-1, the affirmations, and the fee now being sought. Counsel for the administrator is directed to promptly submit documentation to support and clarify the total legal fee of \$37,334.65 sought by counsel. If additional records are not submitted, then no portion of the \$7,757.43 legal fee, for which records were not submitted, can be reviewed or granted.

#### **IV. THIRD SUPPLEMENTAL CITATION**

Although the parties interested in this estate have been previously served with citations, the summary statements served with the most recent citation, issued on September 22, 2015, do not reflect the status of Georgette Wolf-Ludwig, the subsequent amendments to the accounting filed on April 15, 2016 or the additional legal fees of \$9,902.72 sought by Sacco and Fillas, LLP.<sup>1</sup> None of the interested parties appeared in response to that citation. Moreover, the court has now directed the administrator to make additional amendments and corrections to the account and the relief requested, as delineated above. The account on file now, and the amended account to be filed in accordance with this decision, each constitutes an amended pleading that has been sufficiently modified to require that all interested parties

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<sup>1</sup>The citation issued on September 22, 2015 seeks a total of \$27,431.93 for Sacco and Fillas, LLP, while the amended accounting filed on April 15, 2016 seeks approval of total fees of \$37,334.65, an increase of 36%.

be provided with notice as well as an opportunity to be heard. “[S]ervice of process on a party who has defaulted is required if the changes to the pleading, as they relate to the defaulting party, are substantive in nature” (*Matter of Genger*, 2014 NY Slip Op 31841[U] [Sur Ct, New York County]). Accordingly, when filing her amended account, to be corrected in accordance with this decision, the administrator is directed to simultaneously file a third supplemental citation for issuance by the court that will expressly reflect all of these changes and all relief sought. Once issued by the court, the third supplemental citation shall be served with a new summary statement reflecting the schedules as shown on the newly amended account.

## V. CONCLUSION

The petition for judicial settlement of the administrator’s account is **DENIED** without prejudice. The administrator is directed to amend her account in accordance with this decision and to submit the account, together with the following documents, within 60 days of the date of this decision:

(1) Revised Schedule H reflecting the administrator’s position on the status of Georgette Wolf-Ludwig (paragraph [III] [A] above).

(2) Revised Schedule A to reflect net sales proceeds of 93 Ocean Avenue (paragraph [III] [B] above).

(3) Revised Schedule B to delete loss on sale of 93 Ocean Avenue (paragraph [III] [C] above).

(4) Revised Schedule G to bring the amount of cash on hand down to date (paragraph

[III] [C] above).

(5) Additional documentation in connection with the Judgment of Foreclosure and sale of the Nautilus Restaurant and the proceeds of sale (paragraph [III] [D] above).

(6) Written clarification as to whether Given Assoc. was paid \$1,500.00 or \$1,600.00 in appraisal fees, and whether court approval of this payment is required; an amendment of Schedule C may be necessary (paragraph [III] [E] above).

(7) Written clarification as to whether court approval is required for settlement of the claim of TD Bank, and whether the settlement offer is still available to the estate (paragraph [III] [F] above).

(8) Supporting documentation necessary for review and approval of the legal fee sought by Sacco and Fillas, LLP (paragraph [III] [G] above).

(9) An amended account, summary statement and third supplemental citation reflecting all of the changes required by the court pursuant to this decision.

This constitutes the decision and order of the court.

Dated: September 20, 2016  
Mineola, New York

**E N T E R:**

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**HON. MARGARET C. REILLY**  
**Judge of the Surrogate's Court**

cc: Matthew W. Beckwith, Esq.  
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