

Matter of Marx

2016 NY Slip Op 32064(U)

August 24, 2016

Surrogate's Court, Nassau County

Docket Number: 356539/F

Judge: Margaret C. Reilly

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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 Moritt Hock & Hamroff LLP,
to Fix and Determine its Compensation for Services Rendered
to the Estate of**

DECISION

SELMA SPECTOR MARX,

**File No. 356539/F
Dec. Nos. 31616
31617**

Deceased.

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PRESENT: HON. MARGARET C. REILLY

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

Notice of Motion for Summary Judgment	1
Affirmation in Support	2
Affirmation by Elizabeth P. Donlon in Opposition	3
Notice of Cross-Motion for Sanctions	4
Affirmation of David A. Smith in Opposition to Motion and in Support of Cross-Motion	5
Affirmation by Henry E. Klosowski in Reply on Motion and in Opposition to Cross-Motion	6
Reply Affirmation by David A. Smith on Cross-Motion	7

This is a miscellaneous proceeding pursuant to SCPA § 2110 to approve the payment from the estate of legal fees and disbursements to applicant Moritt Hock & Hamroff LLP [“MHH”] for services rendered to Ellen Beth Galkin, decedent’s daughter and residuary beneficiary, individually, and as co-executor of the estate. MHH now moves for an order pursuant to CPLR § 3212 granting summary judgment awarding it \$154,030.25 in legal fees and \$10,320.73 in disbursements. Howard Evan Spector, [“Howard”] decedent’s son, co-executor and residuary beneficiary with his sister, opposes the motion and cross-moves for

the imposition of sanctions against MHH in the form of reimbursement of his fees, costs and disbursements for opposing this motion.¹

Summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 311 [1972]). The court's function on a motion for summary judgment is "issue finding" rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), because issues of fact require a hearing for determination (*Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]). Consequently, it is incumbent upon the moving party to make a prima facie showing that he is entitled to summary judgment as a matter of law (*see* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zarr v Riccio*, 180 AD2d 734 [2d Dept 1992]). If there is any doubt as to the existence of a triable issue, the motion must be denied (*see Hantz v Fishman*, 155 AD2d 415 [2d Dept 1989]). To prevail on a motion for summary judgment the movant must establish his or her right to a directed verdict as a matter of law (*Friends of Animals v Assoc. Fur Manufacturers, Inc.*, 46 NY2d 1065 [1979]).

In evaluating the cost of legal services, the court may consider a number of factors.

These include: the time spent (*Matter of Kelly*, 187 AD2d 718 [2d Dept 1992]); the

¹ There had been references in the petition to relief in the nature of a *Matter of Hyde* (15 NY3d 179) allocation of the fees and disbursements, thus necessarily alluded to by respondents in their papers, but any such request was "abandoned" in footnote 2 of the MHH reply.

complexity of the questions involved (*Matter of Coughlin*, 221 AD2d 676 [3d Dept 1995]); the nature of the services provided (*Matter of Von Hofe*, 145 AD2d 424 [2d Dept 1988]); the amount of litigation required (*Matter of Sabatino*, 66 AD2d 937 [3d Dept 1978]); the amounts involved and the benefit resulting from the execution of such services (*Matter of Shalman*, 68 AD2d 940 [3d Dept 1979]); the lawyer's experience and reputation (*Matter of Brehm*, 37 AD2d 95 [4th Dept 1971]); and the customary fee charged by the Bar for similar services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *Matter of Freeman*, 34 NY2d 1 [1974]). In discharging this duty to review fees, the court cannot apply a selected few factors which might be more favorable to one position or another but must strike a balance by considering all of the elements set forth in *Matter of Potts* (123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]), and as re-enunciated in *Matter of Freeman* (34 NY2d 1 [1974]) (*see Matter of Berkman*, 93 Misc 2d 423 [Sur Ct, Bronx County 1978]). Also, the legal fee must bear a reasonable relationship to the size of the estate (*Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]; *Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]). A sizeable estate permits adequate compensation, but nothing beyond that (*Martin v Phipps*, 21 AD2d 646 [1st Dept 1964], *affd* 16 NY2d 594 [1965]; *Matter of Reede*, NYLJ, Oct. 28, 1991, at 37, col 2 [Sur Ct, Nassau County]; *Matter of Yancey*, NYLJ, Feb. 18, 1993, at 28, col 1 [Sur Ct, Westchester County]). Moreover, the size of the estate can operate as a limitation on the fees

payable (*Matter of McCranor*, 176 AD2d 1026 [3d Dept 1991]; *Matter of Kaufmann*, 26 AD2d 818 [1st Dept 1966], *affd* 23 NY2d 700 [1968]), without constituting an adverse reflection on the services provided. The burden with respect to establishing the reasonable value of legal services performed rests on the attorney performing those services (*Matter of Potts*, 123 Misc 346 [Sur Ct, Columbia County 1924], *affd* 213 App Div 59 [4th Dept 1925], *affd* 241 NY 593 [1925]; *see e.g. Matter of Spatt*, 32 NY2d 778 [1973]).

The court finds that the movant has failed to meet its burden of establishing entitlement to judgment as a matter of law. Although, as indicated above, the submission of contemporaneously maintained time records is helpful to the court in fixing a fee for legal services, those time records and counsel's recitation of his view on the services provided does not establish as a matter of law that all the services provided and the sums charged therefor, in excess of \$150,000.00, were reasonable and necessary. The court therefore finds that the movant has failed to make a prima facie showing of its right to summary judgment. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]).

The motion for summary judgment is therefore **DENIED**.

As to the cross-motion for sanctions, although the moving papers may have been inadequate to justify an order granting the motion, the court does not find that the motion was completely without merit in law or that it was made primarily to delay or prolong the

resolution of the litigation (22 NYCRR § 130-1.1 [c]); the cross-motion for sanctions is, therefore, also **DENIED**.

This constitutes the decision of the court.

A conference in this matter will be held on September 19, 2016, at 10:00 a.m.

Dated: August 24, 2016
Mineola, New York

E N T E R :

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Judge of the Surrogate's Court

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