

**Matter of Duell**

2017 NY Slip Op 32002(U)

September 21, 2017

Surrogate's Court, New York County

Docket Number: 1977-4835/O

Judge: Rita M. Mella

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

New York County Surrogate's Court

September 21, 2017

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Application of Andrew J. Duell, as Executor of the Will of

MANNY E. DUELL,

Deceased,

DECISION and ORDER

File No. : 1977-4835/O

to Fix and Determine the Compensation of his Attorneys  
Pursuant to SCPA 2110.

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M E L L A, S. :

The following papers were considered in deciding this motion and cross-motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion to Strike Affirmative Defenses, dated March 18, 2017	1
Affirmation of Thomas E. Butler, Esq., in Support of Motion (undated), with Exhibits A to J	2
Memorandum of Law in Support of Motion, dated March 15, 2017	3
Notice of Cross-Motion to Dismiss Petition, dated April 25, 2017	4
Memorandum of Law in Opposition to Motion to Strike Affirmative Defenses and in Support of Cross-Motion to Dismiss Petition, dated April 25, 2017	5
Affirmation of John R. Morken, Esq., in Further Support of Motion to Strike Affirmative Defenses, and in Opposition to Cross-Motion to Dismiss Petition, dated May 9, 2017	6
Reply Memorandum of Law in Further Support of Cross-Motion to Dismiss Petition, dated May 15, 2017	7

This is a proceeding under SCPA 2110 by Andrew J. Duell, as executor of the will of

Manny E. Duell, to fix and determine the compensation of his attorneys. Benjamin Duell and

Thea Duell, individually and as executors of the will of Irene Duell, who are beneficiaries under the will of Manny E. Duell (respondents), have interposed five defenses. Petitioner has moved to strike the defenses, and respondents have cross-moved to dismiss the underlying petition. The legal services at issue consist primarily of defending petitioner against respondents' largely unsuccessful appeals of this court's decree entered August 1, 2013, which fixed Andrew's commissions and legal fees for a prior period.

Respondents' first defense is their allegation that "the fees demanded are duplicative and exceed the fair and reasonable value of services rendered to the Estate." Dismissal in these circumstances is available only if the defense has no merit (CPLR 3211 [b]). Whether the fees are duplicative or exceed the fair and reasonable value of services rendered are issues relevant to the court's consideration of the underlying petition and it cannot be said at this stage of the proceeding that the defense has no validity. The court denied the motion to dismiss this defense at the call of the calendar on May 16, 2017.

The second and third defenses allege in substance that the petition does not state a claim against the respondent beneficiaries and that petitioner is not entitled to have his attorneys fees fixed because the estate assets have been fully distributed. Respondents base their argument on the provision in SCPA 2110 (2) that authorizes the court to direct payment of attorneys fees "from the estate generally or from the funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested." This restriction on the source of payment for fees, however, does not preclude the court from determining the amount of reasonable and necessary fees to which the attorneys for fiduciaries are entitled (EPTL 11-1.1 [b] [22]). Subsection (1) of SCPA 2110 unconditionally authorizes the court to "fix and determine" the fees, without any reference to the source of payment. Each of the cases that respondents cite

for their position holds only that the court can not make an “award” or “allowance” of counsel fees or direct payment from a particular fund if the fiduciary is not holding the fund.

In addition, ample authority exists to require a beneficiary to return to an estate the amount of any overpayment that leaves insufficient funds to satisfy estate obligations (*e.g. Matter of Dewar*, 62 AD2d 352 [3d Dept 1978]; *cf.* SCPA 2215 [3]). If the parties are unable to reach agreement as to their respective responsibility for the fees as fixed, the court, if necessary, could entertain a petition for a separate proceeding for reimbursement to the estate. Accordingly, the motion to dismiss these defenses is granted and the cross-motion to dismiss the petition on these grounds is denied.

The fourth defense is that the statute of limitations bars the claim for any attorneys fees for services rendered more than three years before this petition was filed. Petitioner maintains that a six-year period of limitations governs this application. It is immaterial, however, whether a three- or six-year statute applies, because the limitations period for recovery of petitioner’s attorneys fees does not begin until the date that petitioner’s attorneys last provided the legal services in issue (*see Matter of Margolin*, 259 AD2d 396, 397 [1st Dept 1999]). That date was January 27, 2016, only six months before petitioner commenced this proceeding. Furthermore, SCPA 2110 (1) expressly permits proceedings to fix fees to be instituted “[a]t any time during the administration of an estate.” No final accounting decree has been rendered in this estate and its administration is not complete.

Respondents’ reliance on *Matter of Merker* (18 AD3d 332 [1st Dept 2005]) and CPLR 214 (2) — placing a three-year limit on actions “to recover upon a liability, penalty or forfeiture created or imposed by statute” — ” is misplaced. The right of an executor to have legal fees fixed by the court was not created by statute. Referring to Surrogate’s Court Act 231-a, the

predecessor to SCPA 2110, Surrogate Foley explained in *Matter of Parsons* (121 Misc 747, 749 [Sur Ct, NY County 1923]):

“Prior to the enactment of this amendment the power of this court to fix and determine the compensation of an attorney for services rendered to a representative of an estate and to direct payment thereof out of the funds of the estate had been established by judicial decisions . . . [citing cases].

“This amendment . . . incorporated into statute what had already been settled by the judicial decisions . . . .”

Accordingly, the motion to dismiss the statute of limitations defense is granted and the cross-motion to dismiss the petition on this ground is denied.<sup>1</sup>

Lastly, the respondent beneficiaries argue that the amount of attorneys fees should be determined in a final accounting proceeding, in the interests of judicial economy. The court observes that a final judicial accounting has not been directed, and petitioner states that the only outstanding issue will likely be the amount of his legal fees. Determination of legal fees here could narrow or even eliminate any issues requiring resolution in a formal accounting proceeding. The court in its discretion denies the motion to dismiss the petition on this ground, and grants the cross-motion to dismiss this defense.

This decision constitutes the order of the court.

Dated: September 21, 2017

  
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SURROGATE

<sup>1</sup>See also *Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 415-416 (1st Dept 2014) (“SCPA 2110 merely served as the attempted vehicle for plaintiffs to pursue their claims, *and did not create those claims*” [emphasis added]).