Matter of Gomez
2018 NY Slip Op 32127(U)
August 6, 2018
Surrogate's Court, Nassau County
Docket Number: 2011-365510/B
Judge: Margaret C. Reilly

SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
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Accounting by Anthony Gomez, as Executor of the Estate of

ROMAN GOMEZ,

Deceased.

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DECISION & ORDER

File No.: 2011-365510/B
Dec. Nos.: 34490 & 34491

PRESENT: HON. MARGARET C. REILLY

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

In Connection with the Motion:

Motion for Reargument filed by Seltzer Sussman Heitner LLP on behalf of Blodnick Fazio & Associates, P.C., as Counsel for Anthony Gomez, as the Executor of the Estate of Roman Gomez 1
Affirmation of Thomas R. Fazio, Esq., for Reargument, with Exhibits 2
Affirmation in Opposition to Motion for Reargument and for Sanctions Pursuant to 22 NYCRR § 130-1.1 filed by Cohen & Schwartz LLP, Attorneys on behalf of the Objectants, Susan Nelson and Kathleen Gomez-Trimarchi 3
Affirmation of John V. O'Connor, Esq., in Response to Motions for Reargument and Cross-Motion for Partial Reargument, filed on behalf of Roman Gomez, Jr. 4
Reply Affirmation for Reargument filed by Seltzer Sussman Heitner, LLP, on behalf of Blodnick Fazio & Associates, P.C. 5

In Connection with the Cross-Motion:

Cross-Motion for Partial Reargument filed by Cohen & Schwartz LLP, on behalf of the Objectants, Susan Nelson and Kathleen Gomez-Trimarchi 1
Affirmation of Joel M. Schwartz, Esq., in Support of Cross-Motion for Partial Reargument, with Exhibits 2
Affirmation of John V. O'Connor, Esq., in Response to Motions for Reargument and Cross-Motion for Partial Reargument, filed on behalf of Roman Gomez, Jr. 3
Affirmation of Joel M. Schwartz, Esq., in Reply to the Response of John V. O'Connor, Esq., in Opposition to the Objectant's Cross-Motion for Partial Reargument 4

Before the court is a motion for reargument and a cross-motion for partial reargument.

The motion for reargument, which was filed by Seltzer Sussman Heitner LLP on behalf of Blodnick Fazio & Associates, P.C., as counsel for Anthony Gomez, as the executor

of the estate of Roman Gomez, seeks an order (1) granting to Blodnick Fazio & Associates, P.C., reargument of the court's amended decision and order dated January 31, 2018[1], as to the determination and approval of its legal fees and disbursements with respect to its services as attorneys for the executor of the estate of Roman Gomez; and (2) granting to Blodnick Fazio & Associates, P.C., reargument of the court's amended decision and order dated January 31, 2018, with respect to the calculation of interest due on account of any legal fees and disbursements to be disgorged by said law firm in connection with the estate of Roman Gomez.

The cross-motion for partial reargument, which was filed by Cohen & Schwartz LLP, on behalf of the objectants, Susan Nelson and Kathleen Gomez-Trimarchi, seeks an order, pursuant to CPLR 2221[d], granting to objectants, Susan Nelson and Kathleen Gomez Trimarchi, partial reargument of the court's amended decision and order dated January 31, 2018, so as to cause the beneficiary, Roman Gomez, Jr., to pay for his share of the benefits received by him as a result of the legal services provided by Cohen & Schwartz LLP, resulting in additional assets coming back into the estate.

BACKGROUND

The court's amended decision and order dated January 31, 2018 (the January 31, 2018 decision) included a detailed and thorough summary of the administration of the estate of Roman Gomez (the decedent) and the numerous issues raised in connection with the fees paid, and the fees billed but unpaid, for services rendered to Anthony Gomez (the executor) by: Harvey A. Schweiger, Esq. (Schweiger); the law firm of Blodnick Fazio & Associates PC (BF&A); and the accounting firm Naftol & Weberman, CPAs, PC (N&W). Pursuant to a stipulation dated July 19, 2017 (the stipulation), these fees were to be fixed by the court,

[1]Dec. No. 32943.

along with a determination as to the ultimate distribution of professional fees disgorged, if any. The court was also asked to review reimbursement of travel expenses for the executor. All other objections filed by Susan Nelson and Kathleen Gomez-Trimarchi (the objectants) to the executor's accounting had been previously granted or were withdrawn pursuant to the stipulation.

In the January 31, 2018 decision, the court reached the following conclusions:

Although the total of the requested professional fees equal nearly thirty-five percent (35%) of the probate estate, total professional fees to be fixed by the court would be capped at twenty percent (20%) of the probate estate, or no more than $221,000.00.

Schweiger's fee: Schweiger was retained by the executor on May 7, 2011 and dismissed on or about July 26, 2013, a period of twenty-six (26) months. Schweiger billed and was paid $22,259.18 and seeks approval of an additional $10,997.57, billed but unpaid, for services rendered between January 1, 2012 and August 16, 2013.[2]

After reviewing Schweiger's invoices, the objections and the court files, the court concluded that the services provided by Schweiger were, in large part, not competently performed. Applying quantum meruit, the court fixed Schweiger's total fee at $10,000.00, inclusive of disbursements, and directed Schweiger to return the balance paid in the amount of $12,259.18, together with interest at six percent from August 1, 2013, within thirty (30) days of the filing of a Notice of Entry.

BF&A's fee: Concerning its fees, BF&A advised the court that "[b]etween July 2013 and January 2017, the Estate has incurred fees from [BF&A] totaling $354,628.00, plus disbursements of $4,150.11 The Estate has paid $281,632.50 and the firm has written off

[2]The unpaid amount was actually $19,460.00 for 70.1 hours of services, but the requested amount of $10,997.57 reflects a reduction of $8,462.43 as an adjustment related to charges against the estate for the late filing of returns.

$43,204.50 in courtesy discounts. Currently, therefore, there is an outstanding balance of $33,94.11, including disbursements." BF&A asserts that the firm expended over 950 hours and anticipates the need for an additional thirty (30) hours of legal services.

Considering the criteria for fixing legal fees, and taking into account all the routine services performed by the firm and the lack of any recovery for the benefit of the estate, the court fixed BF&A's fee in the amount of $50,000.00, inclusive of disbursements. BF&A was directed to return the balance of the payments they received, in the amount of $231,632.50, together with six percent interest from June 1, 2014, within thirty (30) days of the filing of a Notice of Entry.

N&W's fee: According to the affidavit filed by N&W, the accounting firm billed the estate $50,650.00, of which $49,600.00 was paid and $1,050.00 for the preparation of a fiduciary tax return for the year ending February 29, 2016 remained unpaid. The court reduced the fees charged in connection with Anchor Sales, approved the fees charged for tax work and the most recent fiduciary tax return, and found that the charges of $31,050.00, of which $29,000.00 was billed for the preparation of accountings, were overly broad, and that there was sufficient indication that the accountings were not prepared competently. The court fixed the combined fees of N&W at $29,175.00, and directed the firm to return the balance of $20,425.00, together with six percent interest from January 1, 2015, within thirty (30) days of the filing of a Notice of Entry.

The executor's travel expenses: The executor asked that the court approve reimbursement to him in the amount of $1,445.32 for travel expenses related to his deposition in the malpractice case against Schweiger. The amount requested was approved.

The *pro tanto* rule: In the January 31, 2018 decision, the court also considered the request made by the objectants for application of the *pro tanto* rule, and the denial of

payment to Roman Gomez, Jr., of any portion of the fees recovered by the estate pursuant to the court's decision. The court noted that the *pro tanto* rule is designed to protect fiduciaries from having to pay a surcharge to a beneficiary who did not object to the accounting. Here, the issue before the court was the propriety of fees charged by attorneys and accountants and whether any of the fees should be returned to the estate. The court found that "the *pro tanto* rule does not apply to this proceeding and the residuary beneficiaries will share equally in the sums to be returned to the estate."

BF&A'S MOTION FOR REARGUMENT AND AFFIRMATION

AND THE AFFIRMATIONS IN RESPONSE

BF&A seeks reargument of (1) the determination of its fees and disbursements, which the court fixed at $50,000.00, inclusive of disbursements; and (2) the court's calculation of interest due on the legal fees and disbursements to be refunded to the estate, which was set at six percent, beginning on June 1, 2014. In connection with the court's determination of the fees payable to BF&A, counsel for BF&A argues that the court "relied almost exclusively on the size of the estate to reduce the legal fees payable to BF&A" and that "[w]ith proper consideration of the other necessary factors, it is respectfully suggested that a much greater legal fee" than that which was awarded by the court is warranted.

After reviewing the history of the administration of the estate, counsel for BF&A cites *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 *Matter of Freeman* (34 NY2d 1 [1974]) for the factors to be considered by a court in setting a legal fee. These include (1) time and labor; (2) difficulty of questions; (3) skill required; (4) counsel's reputation, experience, and ability; (5) the size of the estate and the benefit to the client that results from the legal services; (6) the usual fee for such services; (7) the certainty or contingency of being compensated; (8) the

results achieved; and (9) the attorney's responsibilities. Citing the same two cases, counsel for BF&A argues that no one factor can be given more weight than another; instead, the court must apply a balanced approach by considering all of the factors.

Counsel argues that the court failed to consider all of the above factors in its determination of BF&A's fee, in particular, the hours of services rendered, the difficulties faced by counsel, the nature of the legal services rendered, the standing of BF&A, and the outcome of the firm's work on behalf of the executor. In addition, the court did not give adequate consideration to the acrimony between the objectants and the executor as well as the acrimony of the objectant's attorney toward BF&A.

While acknowledging that BF&A did not represent the executor during the probate proceeding, counsel for BF&A reviews in great detail nine other matters that counsel says are representative of the services provided, including (1) consummation of a contract of sale for real property, including the addressing of title issues, the drafting of a closing statement, and attendance at the closing, while acknowledging that prior counsel had previously drafted, negotiated and supervised the execution of the contract; (2) discharge of an ancient mortgage, which required an action to quiet title; (3) pursuit of an action against Anchor Security and Investigations, Inc., and Melvin Boone, including a motion for summary judgment, the filing of a complaint, discovery proceedings, and ultimately successful motions for a default judgment, all of which resulted in judgments for the estate in the amounts of $83,833.90 and $53,877.77, plus interest; (4) collection on a promissory note for $22,000.00 from Karl Pedersen, the son of the decedent's girlfriend; (5) commencement of a malpractice action against Schweiger, including initiation of the action, discovery proceedings, defense of motions, depositions and additional services, while acknowledging that after more than three years, the proceeding was terminated when counsel discovered that Schweiger lacked

malpractice insurance, had moved to Florida and was judgment proof; (6) recovery of pro rata contributions from individual beneficiaries for estate taxes in the total amount of $82,782.91; (7) marshaling the decedent's account at Franklin Templeton, valued at $135,368.58; (8) addressing extensive accounting litigation initiated by the objectants and the eventual execution of a settlement, while acknowledging that the accountants had prepared the executor's final account; and (9) legal research, court appearances, and general legal services provided in connection with the estate administration.

In support of the firm's request for reimbursement of their expenses, which the court had included in the fee of $50,000.00, counsel attached Exhibit K, which lists all disbursements, and asks that the court consider total disbursements of $3,581.19. Counsel also provided a description of the academic and professional credentials of the two attorneys who provided the services to the executor.

Counsel argues that the fixing of the fee of $50,000.00 for BF&A belies the court's determination that the estate could absorb professional fees up to $221,000.00, or twenty percent (20%) of the probate estate, when the total fees awarded by the court amounted to only $89,175.00. Counsel asks the court to reconsider the fee.

With respect to the calculation of interest, counsel for BF&A notes that although the court directed that interest run from June 1, 2014, not all of the fees had been paid by that date, as the fees were paid over a period of time, and not all at once. As of June 1, 2014, BF&A had been paid $125,648.57. Twenty-five payments were made thereafter on a monthly basis, in varying amounts, as shown on Exhibit L, annexed to the affirmation for reargument. It is further argued that although the court has the discretion to award interest on refunded legal fees, courts apply interest to compensate beneficiaries for losses suffered as a result of overpayment, and even then only in the most egregious cases. On that basis, counsel takes

the position that the court's application of a six percent interest rate is patently unreasonable, and asks the court to reconsider the interest rate.

Objectants' Affirmation in Opposition

Counsel for the objectants filed an affirmation in response to the motion for reargument, asserting that BF&A failed to meet its burden of showing that the court misapprehended, misapplied or overlooked matters of fact or law. In counsel's understanding of the January 31, 2018 decision, the size of the estate was used to cap the total professional fees that might be paid to all of the attorneys and accountants who provided services to the executor, and not as the nearly exclusive factor to determine fees payable to BF&A. This is supported by the text of the January 31, 2018 decision, in which the court, among other factors: considered whether the estate benefitted from BF&A's defense of questionable actions taken by the executor or from services provided to rectify the executor's errors; noted that BF&A's primary objective was to help the executor avoid a surcharge; concluded that the overwhelming majority of the services provided by BF&A were not competently performed; and recognized that the summary judgment motion for the dismissal of objections, which was filed by BF&A in response to the objectants' rejection of the executor's settlement offer, was "patently frivolous" and that BF&A had shown no basis in law or fact for their motion. The court also considered BF&A's duplication of services that were provided by the accountant, and the factors to be considered when multiple law firms provide legal services to the estate's fiduciary.

With respect to the portion of the motion that seeks reargument on the calculation of interest, counsel for the objectants notes that BF&A has acknowledged that the imposition of interest is at the discretion of the court. Finally, counsel asserts that the motion to reargue is frivolous and should result in the court awarding costs to the objectants and the imposition

of sanctions on BF&A pursuant to 22 NYCRR § 130-1.1.

Affirmation in Response filed on Behalf of Roman Gomez Jr.

An affirmation in response to the motion for reargument and the cross-motion for partial reargument was filed by counsel for Roman Gomez, Jr. With respect to the motion for reargument, counsel does not object to the right of BF&A to seek reargument and/or appeal the January 31, 2018 decision.

OBJECTANTS' CROSS-MOTION FOR PARTIAL REARGUMENT AND AFFIRMATION, AND THE AFFIRMATIONS IN RESPONSE

In the motion for partial reargument, the objectants seek a modification of the January 31, 2018 decision that would require Roman Gomez, Jr. to pay for his share of the benefits he received as a result of the legal services provided by the objectants' counsel, Cohen & Schwartz, LLP (C&S), which services resulted in the return of professional fees to the estate. Although the objectants had originally sought relief based upon application of the *pro tanto* rule, the objectants now concede that the *pro tanto* rule is inapplicable. At the same time, C&S now argues that the court failed to address the unfair windfall to Roman Gomez, Jr., if the objectants alone must pay for the legal services of their counsel, when the efforts of C&S resulted in additional assets being refunded to the estate, to the benefit of all of the beneficiaries. Counsel argues that fees for C&S's legal services should be paid by the estate before the additional assets are distributed to the beneficiaries. In support, counsel for the objectants argues that the services provided by C&S were the sole reason that excess professional fees totaling $264,300.00 plus interest will be refunded to the estate. He cites various court decisions in which the court directed that the fees of counsel to a beneficiary should be paid out of the estate, and SCPA § 2110 (2), which addresses a proceeding that may be instituted for the payment of fees from the estate or from funds belonging to a

devisee, distributee, legatee or other person interested in the estate.

Counsel for the objectants argues that once the court finds that the services provided by C&S were of benefit to the estate, it follows that the fees of C&S should be paid by the estate, and the court must then fix counsel's fee. In so doing, the court should consider the retainer agreement executed by C&S and the objectants, which was based upon a 25% contingency fee, or 25% of $264,300, which is $66,075.00, plus 25% of the interest to be paid to the estate. Counsel notes that the fee would be even higher if it were to be calculated on a quantum meruit basis for more than 300 hours of services rendered over a period in excess of five years, at hourly rates ranging from $300.00 to $350.00. That approach would have resulted in a fee of more than $90,000.00, rather than the contingency fee of $66,075.00.

Affirmation in Response filed on Behalf of Roman Gomez, Jr.

In his affirmation in response to both the motion for reargument and the cross-motion for partial reargument, counsel for Roman Gomez, Jr. argues, with respect to the cross-motion for partial reargument, that the court in the January 31, 2018 decision already addressed the issue of whether Roman Gomez, Jr. can share in the fees refunded to the estate. Counsel opposes that part of the cross-motion that seeks to increase the fees of C&S[3] and

[3] Although counsel for Roman Gomez, Jr, apparently believes that counsel for the objectants is asking the court to increase his fee from $66,075.00 to $90,000.00, the court's understanding of the papers is that counsel for the objectants is only seeking the fee reflected in the firm's retainer agreement with the objectants, which amounts to $66,075.00. In his affirmation, counsel for the objectants points out that if his fee were to be calculated on a quantum meruit basis, multiplying the firm's hourly rates by the number of hours of services rendered by counsel, the fee would result in an approximate fee of $90,000.00. However, this information is provided in support of the court granting the total contingency fee requested. The relief sought in the motion for partial reargument is limited to the court's "modifying the January 31, 2018 Decision so as to cause the beneficiary Roman Gomez, Jr., to pay for his share of the benefits received by him as a result of the legal services provided by Cohen & Schwartz LLP resulting in additional assets coming back into the estate;" no request was made for an increase of the legal fee. Thus, the relief now sought by the objectants pertains to the source of the payment, and not to a change in the amount of the payment.

have those fees paid by the estate, rather than by the two objectants. Counsel argues that the relief sought in the motion for partial reargument constitutes new and different relief than the relief sought in the original proceeding, and therefore it should be barred by CPLR 2221 (d). In addition, counsel argues that: (1) the will distributes the residuary estate in equal thirds; (2) the court previously found that the *pro tanto* rule does not apply; (3) the relief currently sought by the objectants would violate the *pro tanto* rule and is merely an effort to get around the court's previous ruling; (4) the objectants are barred from seeking new relief not prayed for in their original motions or proceedings, or which are subsumed in the stipulation in which all parties agreed that the court would determine professional fees; (5) Roman Gomez, Jr. is not a party to the objectants' retainer agreement with their attorney, which provided for payment of counsel's contingency fee from the proceeds received from the objectants, and not from the estate; (6) if the fee payable to the objectants' counsel is increased from $66,075.00, to $90,000.00, a difference of $23,925.00, the extra one-third that would be received by Roman Gomez, Jr. as a result of his not sharing in payment of the additional fee would hardly constitute a windfall.[4]

Objectants' Affirmation in Reply to the Response

Counsel for the objectants filed an affirmation replying to the response filed by counsel for Roman Gomez, Jr., noting that counsel for Roman Gomez, Jr. had no objection to BF&A's motion for reargument, and never challenged the fees paid by the executor to BF&A. Further, counsel for the objectants argues that his clients are entitled to reargue on the grounds the court overlooked requiring Roman Gomez, Jr., the non-objecting beneficiary, to pay his share of the legal fees that resulted in the estate's recovery of the excess fees. Counsel asserts that this request for relief can be found within the original request for relief.

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[4] See footnote (3), above.

On page (2) of the objectants' brief, dated March 24, 2017, the objectants asked for the court to direct payment of the returned professional fees only to the objectants, and not to the non-objecting beneficiary, Roman Gomez, Jr., but the objectants also asked, in the alternative, that the court "use the [one-third that would have been paid to Roman Gomez, Jr.] to compensate [the objectants] for their payment of their attorney's legal fees in obtaining such disgorgement." Based on this language, counsel for the objectants argues that the request for relief was timely submitted as part of the objectants' original prayer for relief and may therefore be considered in the motion for partial reargument.

In support of the relief sought, counsel cites *Matter of Grupe* (291 NYS2d 945 [2d Dept 1968); SCPA § 2110; *Matter of Albert* (137 AD2d 1266 [2d Dept 2016]); and *Matter of Kinzler*, 195 AD2d 464 [2d Dept 1993]). The objectants believe that it would be inequitable for Roman Gomez, Jr. to receive any of the returned fees, and even more inequitable for him to receive a larger net share than the objectants, when the record reflects that Roman Gomez, Jr. actively and continuously opposed the objectants' actions that resulted in the returned fees. Counsel for the objectants argues that it is within the court's equitable powers to direct that the contingency fee payable to C&S, whose services resulted in the recovery of assets by the estate, and the resulting enlargement of each beneficiary's respective share, be paid from the estate prior to distribution of the net funds to the three beneficiaries.

ANALYSIS AND CONCLUSION

"Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Grimm v Bailey*, 105 AD3d 703, 704 [2d Dept 2013] [citations omitted]). A

motion for leave to reargue is governed by CPLR 2221 and is not based upon any new facts.

It is a basic principle that a movant on reargument must show that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision (*Bolos v Staten Island Hosp.,* 217 AD2d 643 [2d Dept 1995]; *Schneider v Solowey,* 141 AD2d 813 [2d Dept 1988]). A motion to reargue is not to be used as a means by which an unsuccessful party is permitted to argue again the same issues previously decided (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992]; *Pro Brokerage v Home Ins. Co*., 99 AD2d 971 [1st Dept 1984]), nor is it to be used as a means by which an unsuccessful party may present new or different arguments from those originally asserted (*Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006]; *Gellert & Rodner v Gem Community Mgt., Inc.*, 20 AD3d 388 [2d Dept 2005]). Nevertheless, "[i]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court" (*Peak v Northway Travel Trailers,* 260 AD2d 840, 842 [3rd Dept 1999]) and that "even in situations where the criteria for granting a reconsideration motion are not technically met, courts retain flexibility to grant such a motion when it is deemed appropriate" (*Louis v S&W Realty Corp.*, 16 AD3d 729, 730 [3d Dept 2005]).

BF&A's Motion for Reargument

BF&A's motion for reargument asks the court to permit reargument of two issues: (1) the court's fixing of BF&A's fee at $50,000.00, inclusive of disbursements, with any amount paid in excess of $50,000.00 to be returned to the estate; and (2) the court's imposition of six percent interest, to be computed from June 1, 2014, on all fees and disbursements to be returned to the estate by BF&A. The motion to reargue both issues is **GRANTED**.

BF&A's Fee

With respect to the first issue, the determination of BF&A's fee, the court finds that the January 31, 2018 decision reflects the court's careful consideration of all of the relevant factors. The court acknowledged that in setting a fee, it must consider multiple factors, including, but not limited to: the customary fee for such services; the results obtained; the time and labor provided by the attorney; the difficulty of the issues presented; the skill of the attorney; and the size of the probate estate. The court specifically noted that the beneficiaries of an estate cannot be penalized by being required to pay for legal services that were required as a result of an executor's errors, and further noted that when multiple attorneys provide services to the fiduciary of an estate, the combined fee of all of the attorneys should approximate the fee of one attorney. In fixing the fee of BF&A at $50,000.00, inclusive of disbursements, the court noted that significant amounts of time were spent by BF&A "to undo the improper actions and improper inaction by" the executor's prior counsel, as well as to commence a legal malpractice claim against prior counsel, which proceeding was ultimately discontinued when it was finally discovered that prior counsel had no reachable assets and no insurance. According to the court, most of the litigation for which BF&A billed the estate "was neither designed nor intended to benefit the estate, but only to protect the executor." The court noted that additional time was spent by BF&A opposing the objectants' efforts to: obtain a proper accounting from the executor; remove the executor; disqualify BF&A as counsel to the executor; obtain sanctions against the executor and BF&A; and get a partial distribution of estate assets. The court cites BF&A's justification of the bulk of legal fees billed over a three year period as resulting from the refusal of the objectants to accept the executor's settlement offer. In the court's analysis of the factors underlying its decision to fix the fee at $50,000.00, the court stated the following in the

January 31, 2018 decision:

> "It is apparent that the primary objective of BF&A in their representation of [the executor] was to avoid his being surcharged. . . . Blodnick admitted that his firm was retained to protect the executor from being punished for his failures in performing his fiduciary duties as executor and there is a clear attempt to attribute the executor's nonfeasance, misfeasance and/or malfeasance to the advice of former counsel Schweiger, even though such a defense is unavailing. The legal services . . . undoubtedly benefitted the executor. The court, however, is charged with determining whether and to what extent specific services benefitted the estate."

The court also notes that in its December 19, 2013 decision denying the objectants' petition to remove the executor, the court relied upon counsel's assurance that the administration of the estate was close to completion, and that only three items remained to be addressed. Despite this assurance, BF&A billed more than $300,000.00 in fees after that date. Finally, the court points out numerous items in the affirmation of services filed by BF&A that are inaccurate or incorrect.

For all of these reason, upon granting leave to reargue the fixing of the BF&A fee, the relief sought in connection with the fee is **DENIED**.

Computation of Interest

With respect to the second issue, the imposition of six percent interest on the amount to be refunded, calculated from June 1, 2014, counsel for BF&A asserts that all monies to be disgorged had not been received on that date. In the affirmation for reargument submitted by Thomas R. Fazio, he states that as of June 1, 2014, BF&A had only been paid the gross sum of $125,648.57. The balance of the payments, totaling $155,983.93, were made as shown on Schedule L annexed to the affirmation, which reflects 25 additional payments to BF&A between June 16, 2014 and September 12, 2016, in amounts ranging from $627.50 to $18,807.50. The combined total of the payments shown on Schedule L is $281,632.50,

of which $50,000.00 will be retained by BF&A.

Accordingly, upon granting leave to reargue the calculation of six percent interest on the amount of $231,632.50 to be refunded by BF&A, the relief sought is **GRANTED** and the court's January 31, 2018 decision is modified to the extent set forth below:

The final sentence of section (VI) (C) of the January 31, 2018 decision, found on pages 32-33, is deleted and replaced with the following new final sentence:

"Within thirty (30) days of the date of the filing of the Notice of Entry, BF&A is directed to return the balance of the monies received in the sum of $231,632.50, together with interest at six percent calculated as follows:

Six percent interest on the amounts paid between July 30, 2013 and June 1, 2014, for a total of $125,648.57, less $50,000.00, for a net total of $75,648.57, shall be calculated from June 1, 2014;

Six percent interest on the amounts paid between June 2, 2014 and June 2, 2015, for a total of $69,474.19, shall be calculated from June 2, 2015; and

Six percent interest on the amounts paid between June 2, 2015 and September 12, 2016, for a total of $86,509.74, shall be calculated from September 12, 2016."

Costs and Sanctions

In his affirmation in opposition to the motion and for sanctions pursuant to 22 NYCRR § 130-1.1, counsel for the objectants asks to be awarded costs and for the court to sanction BF&A for filing their motion for reargument. That request for relief is **DENIED**.

Objectants' Motion for Partial Reargument

The objectants' motion for partial reargument seeks a direction from the court that the legal fee of the objectants' counsel be paid by the estate, rather than by the objectants, prior to the distribution of the refunded amounts and the balance of estate assets among the three

beneficiaries. The objectants' original request had been for the court to deny Roman Gomez, Jr, the right to share in the refunded fees based upon the *pro tanto* rule, but in the January 31, 2018 decision the court determined, and the objectants have conceded, that the *pro tanto* rule is not applicable to a non-objecting beneficiary. Instead, the objectants now rely on decisions in which courts directed payment to counsel for a beneficiary out of estate funds, and SCPA § 2110 (2), which provides that a "proceeding shall be instituted by petition of a fiduciary of the estate or a person interested or an attorney who has rendered services" and states that the court may direct that payment of the attorney's fee fixed by the court be made "from the estate generally or from funds in the hands of the fiduciary belonging to any legatee, devisee, distributee or person interested."

As noted above, counsel for Roman Gomez, Jr. opposes the motion for partial reargument, insisting that the relief now sought is different from the previous prayer for application of the *pro tanto* rule, which was denied. On that basis, he argues that the new request for relief should be barred by CPLR 2221 (d), discussed above, which governs a motion for leave to reargue. In addition, counsel notes that Roman Gomez, Jr. is not a party to the objectants' retainer agreement with their attorney, which specifically provides that counsel's contingency fee will be paid from the estate proceeds received by the objectants, and not from the estate.

Counsel for the objectants originally asked that Roman Gomez, Jr. be denied a share of the fees refunded to the estate, based upon the *pro tanto* rule. In their motion for partial reargument, the objectants concede the inapplicability of that rule, and have requested instead that the court charge Roman Gomez, Jr. for his share of the objectants' legal fees, on the basis that the services rendered by the objectants' attorney benefitted all three beneficiaries, and not just the objectants.

Reargument is not available where the movant seeks only to argue "a new theory of law not previously advanced" (*DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005] [citations omitted]). In the context of a motion for reargument, a party may not "advance arguments different from those originally tendered" (*Arthur v TGI Friday's Inc.*, 2012 NY Slip Op 31750[U], *5 [Sup Ct, Nassau County 2012] [citations omitted]). Although counsel for the objectants claims that a previous request for this relief can be found in his earlier request for alternative relief, that the court "use the [one-third that would have been paid to Roman Gomez, Jr.] to compensate [the objectants] for their payment of their attorney's legal fees in obtaining such disgorgement"[5], the court does not find this language to be a request that the fees of C&S be paid out of estate assets, rather than by the objectants. Accordingly, the objectant's motion for partial reargument is **DENIED**.

This constitutes the decision and order of the court.

Dated: August 6, 2018
Mineola, New York

E N T E R:

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

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[5] See page (2) of the objectants' brief, dated March 24, 2017.

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