

Matter of Esquivel

2018 NY Slip Op 32752(U)

September 27, 2018

Surrogate's Court, Nassau County

Docket Number: 2013-374358/A,B,C

Judge: Margaret C. Reilly

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**SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**In the Matter of the Application of Laura Esquivel,
as Administrator of the Goods, Chattels and Credits
which were of**

DECISION

**File No. 2013-374358/A,B,C
Dec. No. 34770**

RAUL ENCARNACION,

Deceased,

**for leave to compromise and settle the claim and
cause of action arising out of the personal injuries
sustained by decedent and to judicially settle her
account relating to the proceeds thereof.**

PRESENT: HON. MARGARET C. REILLY

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

Petition with Exhibits.	1
Waivers and Consents.. . . .	2
Attorney’s Affirmation of Mark J. Rayo, Esq..	3
Attorney’s Affirmation of Michael R. Rossi, Esq..	4
Attorney’s Affirmation of Brian Brandman, Esq..	5
Attorney’s Affirmation of I. Peter Rayo, Esq..	6
Account.. . . .	7
Proposed Decree.	8

In this uncontested proceeding for leave to compromise a certain cause of action for personal injury of the decedent, the petitioner, Laura Esquivel, seeks a decree: (1) modifying the limited letters of administration heretofore issued to the petitioner on April 16, 2013 to permit said compromise; (2) authorizing the petitioner to compromise and settle the cause of action for personal injuries of the decedent for a total settlement sum of \$600,000.00 against the defendant/third-party plaintiff, 2707 Creston Realty, LLC; (3) permitting the petitioner to execute and deliver any and all papers necessary to effectuate the settlement;

(4) permitting the petitioner to discontinue the action for personal injuries; (5) authorizing and directing the defendant/third-party plaintiff, 2707 Creston Realty, LLC, or its insurer, Westchester Fire Insurance, to pay and distribute the settlement sum of \$600,000.00 as follows: \$94,952.14 to Mark J. Rayo, P.C.; \$62,619.64 to Pontisakos & Brandman, P.C.; \$62,619.64 to Michael R. Rossi, P.C.; \$37,158.00 to I. Peter Rayo, Esq.; \$30,000.00 to Casecash GP, LLC; \$65,000.00 to Stephen Alexander Capital, Ltd., \$116,139.29 to Laura Esquivel; \$65,565.15 to Jackeline Encarnacion Esquivel; and \$65,565.14 to Raul Encarnacion, Jr; (6) accepting waivers and consents from Jackeline Encarnacion Esquivel and Raul Encarnacion, Jr.; (7) dispensing with the filing of a bond; and (8) judicially settling the account.

The decedent, Raul Encarnacion, died intestate, a resident of Nassau County, on February 26, 2013. He is survived by his spouse, Laura Esquivel, and by his two adult children: Jackeline Encarnacion Esquivel and Raul Encarnacion, Jr. Letters of administration issued to the petitioner on April 16, 2013. Jackeline Encarnacion Esquivel and Raul Encarnacion, Jr., as well as the New York State Department of Taxation and Finance, filed waivers and consents in this proceeding.

A personal injury action was commenced in Supreme Court, Nassau County on December 16, 2010 by the decedent and the petitioner against defendant 2707 Creston Realty, LLC, which offered \$600,000.00 in settlement of the action. Since the cause of the decedent's death was unrelated to the injuries alleged in the action, allocation of the entire settlement proceeds to the cause of action for the decedent's personal injury is approved.

Decedent had retained Mark J. Rayo, P.C. to represent him in the personal injury action for a fee of 33 $\frac{1}{3}$ % of the net sum recovered, plus disbursements. Mark J. Rayo, P.C., retained Pontisakos & Rossi, P.C., of counsel, to assist in the prosecution of the action and agreed to share the attorneys' fees equally. The firm of Pontisakos & Rossi, P.C. dissolved and agreed to split their one-half of the attorneys' fees 25% to Michael J. Rossi, P.C., and 25% to John Pontisakos, Esq., who then assigned his 25% share to Pontisakos & Brandman, P.C. Petitioner retained I. Peter Rayo, Esq., to represent her in the administration proceeding for "a flat fee equal to 6% of gross funds you receive from the Estate for services rendered."

Fee-sharing agreements are enforceable, provided that the attorney who seeks to share in the fee contributed some work, labor, or service to the fee earned (*Reich v Wolf & Fuhrman, P.C.*, 36 AD3d 885 [2d Dept 2007]; *Witt v Cohen*, 192 AD2d 528 [2d Dept 1993]). Furthermore, "the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially" (*Benjamin v Koepfel*, 85 NY2d 549, 556 [1995]). All counsel have submitted affirmations of legal services.

Contingent fees in personal injury actions are limited by court rule (22 NYCRR § 691.20 [e]) and generally are not to exceed one-third of the recovery. Where counsel has provided necessary legal services for the administration of the estate, a fee may be awarded for those services in addition to the contingent fee, but where those services relate to the personal injury action, they are deemed to be part of the one-third retainer (*Matter of Bender*, 50 Misc 3d 1207 [A] [Sur Ct, Broome County 2015]). Here, the only asset of the estate is the settlement and the appointment of an administrator was a necessary condition to the

resolution of the personal injury action (EPTL §§ 5-4.1, 11-3.2 [b]). “To allow counsel fees in an amount that exceeds 33 and 1/3 percent for work done only to obtain limited letters of administration to seek compromise of the action would circumvent [the] rule” (*Matter of Griffin*, NYLJ, Apr. 14, 2014 at 30 [Sur Ct, New York County]). Accordingly, any fees sought for the appointment of the administrator or in this compromise proceeding are disallowed.

In addition to attorneys’ fees, Michael R. Rossi, P.C. and Pontisakos & Brandman, P.C. seek reimbursement for \$30,287.14 in disbursements, which includes \$475.00 for “postage, printing, copying, transportation, etc.” With respect to disbursements, the tradition in Surrogate's Court practice is that the attorney may not be reimbursed for expenses that the court normally considers to be part of overhead, such as photocopying, postage, telephone calls, and other items of the same matter (*Matter of Graham*, 238 AD2d 682 [3d Dept 1997]; *Matter of Diamond*, 219 AD2d 717 [2d Dept 1995]). In *Matter of Corwith* (NYLJ, May 3, 1995, at 35, col 2 [Sur Ct, Nassau County]), this court discussed the allowance of charges for photocopies, telephone calls, postage, messengers and couriers, express deliveries and computer-assisted legal research. The court concluded that it would permit reimbursement for such disbursements only if they involved payment to an outside supplier of goods and services, adopting the standards set forth in *Matter of Herlinger* (NYLJ, Apr. 28, 1994, at 28, col 6 [Sur Ct, New York County]). The court prohibited reimbursement for ordinary postage and telephone charges other than long distance. Accordingly, Michael R. Rossi, P.C., and Pontisakos & Brandman, P.C., are entitled to reimbursement for only \$29,812.14 in disbursements. I. Peter Rayo seeks reimbursement for \$1,548.00 in disbursements, which is

approved. Total attorneys' fees are allowed in the sum of \$189,546.62 which shall be divided among the several law firms as they may agree. The decree to be entered is to be served on notice to all attorneys providing legal services.

There is a claim against the estate for \$30,000.00 from Casecash GP, LLC, which shall be paid from the net proceeds of the settlement. There is also a claim for \$65,000.00 by Stephen Alexander Capital, Ltd. against the petitioner, which shall be paid from her share of the settlement recovery.

There are no other known liens or claims against the decedent's estate. The decedent's funeral expenses have been paid in full and no reimbursement is sought. Petitioner waives her right to statutory commissions.

After payment of the allowable attorneys' fees and disbursements and the claim of Casecash GP, LLC, the net recovery shall be distributed pursuant to EPTL 4-1.1 (a) (1) to petitioner, less the \$65,000.00 due Stephen Alexander Capital, Ltd., and to the decedent's children: Jackeline Encarnacion Esquivel and Raul Encarnacion, Jr.

The petitioner is not required to file a bond herein. The account of the petitioner is judicially settled. Any restrictions on the letters of administration previously issued to petitioner shall be removed to allow her to effectuate the settlement.

Settle decree.

Dated: September 27, 2018
Mineola, New York

E N T E R:

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

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