In re Probate of the Holographic Will of Murray

2009 | Cited 0 times | New Jersey Superior Court | May 14, 2009

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Submitted March 9, 2009

Before Judges Carchman, R. B. Coleman and Simonelli.

Appellants Kathleen and Laraine Murray (the Murrays), and their father Joseph Murray, Sr. (Joseph)[1], contested the holographic will of the Murrays' brother, decedent Robert Murray (Robert). The Murrays appeal from the January 22, 2007 order and the February 25, 2008 judgment of the Chancery Division judge approving an accounting of the court-appointed temporary administratrix, a licensed New Jersey attorney. On appeal, the Murrays contend that the judge erroneously allowed the administratrix $31,362.78 in attorney's fees and costs for legal services she rendered to the estate and failed to make findings of fact and conclusions of law on their motion to cancel a contract for sale of Robert's condominium located at 32 Lindsey Court, Franklin Park (the condo). We affirm.

We briefly summarize the facts from the record. The condo was Robert's sole asset. He committed suicide there and his remains were not discovered for a considerable period of time. He was survived by Joseph and four siblings, the Murrays, Michele Mora (Mora) and Joseph Murray, Jr.[2]

Prior to his death, Robert executed the holographic will leaving his estate to Mora with "nothing to be given to any other member of [his] family." On April 27, 2006, Mora filed a verified complaint for probate of the will. The Murrays contested the probate and sought Joseph's appointment as the estate's administrator. They were represented by Frank J. Nostrame, Esq. (Nostrame).

Judge Reed ordered discovery, including any handwriting and medical expert reports. He also appointed Marcia Polgar Zalewski, Esq. (Zalewski) as the estate's temporary administratrix and ordered her to immediately list the condo for sale with a multiple listing service broker and to pay the estate's debts from the sale proceeds. Robert had considerable debt at the time of his death because he

a. failed to report certain capital gains as well as failed to file income tax returns for several years;

b. had taken early withdrawals from his individual retirement accounts without having filed the appropriate returns and/or paid appropriate penalties;

c. failed to pay his condominium association dues, resulting in liens in excess of $11,000 being placed on his property by the condominium association;

d. was faced with a tax sale certificate, due to his unpaid real estate taxes, which had been sold and was accruing interest at 18 percent on a debt of approximately $19,000;

e. failed to pay municipal tax, sewer and water charges, resulting in liens on his property; and

f. failed to pay credit card debts which were accruing interest at very high rates.

Zalewski inspected the condo and found it in deplorable condition, both inside and outside. The dining room and living room ceilings were almost completely collapsed; all of the carpeting had been ripped out of the unit, leaving plywood sub-flooring upstairs and concrete padding downstairs; the kitchen linoleum flooring was pulling away from the wall and had been ripped up; some lights were disconnected, while other lights did not function; none of the toilets functioned; the kitchen stove was dirty and corroded and did not appear to function; there was black mold on the wall in the furnace/utility room, along the wood between the concrete slabs, and in the master bath; there was a black substance on the air intake panels throughout the unit; cabinets were falling off the walls in the laundry room; the closet sliding doors upstairs and downstairs were not tracking and were in very poor condition; the furnace was rusted and did not appear to be functioning; and the hot water heater showed signs of water leakage. The property was uninhabitable and cleanup companies were needed to remove debris, mold and twenty-seven gallons of bio-hazard sealed containers from the property.

Zalewski advised the parties of the condo's uninhabitable condition and sent them color photographs confirming this condition. She also provided a Comparative Market Analysis (CMA), indicating that the condo was worth between $150,000 and $155,000 due to its poor condition and need of substantial repairs. She informed the parties that since she had "not heard back from anyone concerning the photographs, nor any issue with the realtor's CMA," she would list the condo for sale in accordance with the CMA. The next day, Nostrame sent the first of his numerous letters objecting to the sale.

On November 17, 2006, Zalewski entered into a six-month multiple listing agreement for the sale of the condo at $175,000, with a 6% realtor commission. Other comparable properties were selling for substantially more; however, the listing price reflected the condo's deplorable condition.

On either the day before or the day Zalewski signed the listing agreement, she entered into a contract of sale with real estate agent Frank Martino and his business partner (the first contract). The purchase price was $162,500, the sale was "as is" and the closing was scheduled for December 1, 2006. The Murrays immediately objected to the sale, with Nostrame claiming that the contract was "not an arms length transaction and [was] merely an opportunist picking up a bargain. It appears that this property was sold before it was offered for sale at the highest price."

As a result of the objection, Zalewski sought the court's guidance. She wrote that due to the condo's uninhabitable condition, which she described in detail, "[i]t would not pass any inspections . . . nor would a mortgage company approve a mortgage for a traditional home buyer." She explained that the contract was in the estate's best interests because the sale was "as is" with no inspections, mortgages or other contingencies. She also explained that:

Based upon the current condition of the property, the townhome would be difficult to maintain and is ripe for damage to occur during this winter season with its plumbing issues and lack of heat. The plumbing is exposed, the property is without any means of protection - no carpeting, no sheetrock, and no operational heating system.

Finally, the Estate has no liquid assets or any funds to speak of. Therefore, the options are limited since there are no means to repair, renovate, or maintain the property. The Estate cannot undertake any repairs. The Estate has no funds to pay the current or future bills and cannot pay to maintain the property.

The real estate taxes, sewer and water charges, and homeowners association dues continue to accrue, resulting in additional liens against the property. As of October 4, 2006, the balance due to the homeowners association is $10,315.35. Again, the Estate has no means with which to pay the bills.

At this time I also have concerns that in its current state there is potential liability for the Estate should a pipe burst or other catastrophe cause damage to any neighboring townhouse units.

The property is also in violation of covenants, conditions and restrictions of the homeowners association as a result of its current physical condition. Should the association become aware of the property's condition, the Estate could be facing additional fines from the [a]ssociation.

The Murrays continued objecting to the first contract and filed a motion to cancel it. Zalewski opposed the motion. Prior to resolving the motion, Judge Derman permitted the Murrays' to inspect the condo and obtain a better offer. Thereafter, after numerous conferences and correspondence between the parties, they agreed that Nostrame would purchase the condo for $176,000, with a 4.5% commission on the original contract price of $162,500. Thereafter, the Murrays lodged several objections to the form of order resolving the motion, and objected to paying the realtor's commission, among other things. As a result, Judge Derman scheduled argument for January 19, 2007 to settle the order.

Prior to the hearing, Martino's attorney filed a certification of services, requesting $1812.73 for the attorney's fees and costs his client incurred for the first contract. Zalewski filed a certification of services, requesting $19,885.26 for her firm's attorneys fees and costs for services rendered to the estate from September 6, 2006, to January 17, 2007.

By order entered on January 22, 2007, Judge Derman voided the first contract, returned Martino's deposit, reimbursed him $1812.73 for his attorneys fees and costs, and required the estate to convey title to Nostrame. The judge also authorized Zalewski to pay the estate's debts, to place the net proceeds of the sale in escrow, to retain an accounting firm for the filing of Robert's outstanding income tax returns, to pay Robert's outstanding credit card debt, to pay Joseph $12,679 for reimbursement of Robert's funeral expenses and to pay Zalewski $12,227.43 for attorney's fees and costs.

On September 6, 2007, the parties filed a stipulation of settlement providing Mora two-thirds of the net estate and Joseph one-third. Joseph died testate on October 1, 2007, prior to the final distribution of his share of the estate.

Zalewski then filed a complaint for settlement of accounting. She submitted a detailed accounting and included invoices from her law firm indicating outstanding attorney's fees and costs of $31,362.78, and an accountant's fee of $3385. The Murrays filed exceptions, challenging payment of Zalewski's attorney's fees and costs, payment of the realtor's commission, payment of the accountant's fee and payment of Martino's counsel fees. The Murrays argued, among other things, that Zalewski and the accountant's were negligent and that Zalewski made misleading representations to the court about the condo's condition.

After a hearing, Judge Derman found that Zalewski acted appropriately. The judge concluded that:

With respect to the attorney's fees of $32,000, the court reviewed the certifications of services provided by Marcia Zalewski and her firm. These records submitted to the court were very detailed and in accordance with the Rules of Professional Conduct, R.P.C. 1.5. Every expenditure of time was justified by Ms. Zalewski, an experienced practitioner in the area of estate administration. Her hourly rate of [$200] was reasonable under the circumstances and the rate charged by her partner, Julie Goldstein, of [$225] was reasonable under the circumstances. This Estate was hotly contested which increased the work required to be performed by [Zalewski] and her law firm. Dealing with Mr. Nostrame's application to abort the prior sale, buy the property himself and attend the closing . . . hardly represented the usual real estate transaction. There were judgments, liens, taxes and debts to be paid. It is reasonable that Ms. Zalewski used her law firm to provide legal services. Ms. Zalewski did not take an additional commission from the Estate. Nothing was easy in this contested Estate with high debt and few assets. The one substantial asset of the Estate, an uninhabitable condominium, ironically required [Zalewski's] constant attention which she provided.

This court finds, as admonished by [In re Bloomer, 37 N.J. Super 85 (App. Div. 1955)], that the counsel fee does not exceed reasonable compensation for the services rendered the Estate under the circumstances of this difficult and contentious matter. The services performed by Ms. Zalewski were real services provided to a difficult Estate.

The judge also found that the accounting fee was reasonable because of the work required to resolve Robert's failure to file tax returns for several years. The judge further concluded that the 4.5% real estate commission and payment of Martino's legal fees were reasonable. She entered judgment approving payment of Zalewski's attorney's fees and costs in the amount of $31,362.78, among other things. This appeal followed.

We first address Laraine's and Kathleen's alleged lack of standing in this matter. They were not beneficiaries under Robert's will, nor were they entitled to an intestate share if the will had been set aside. N.J.S.A. 3B:5-4. Thus, only Joseph had standing to contest the will. He settled his claim before he died. Joseph allegedly died testate leaving his entire estate to the Murrays. Even if he had died intestate, the Murrays were beneficiaries of his estate. N.J.S.A. 3B:5-4. Accordingly, we are satisfied that the Murrays had standing to continue the will contest as either testate or intestate beneficiaries of Joseph's estate.

The Murrays contend that Zalewski should not have performed any legal services for the estate because she was appointed only to perform ministerial duties relating to the sale of the condo. We disagree.

N.J.S.A. 3B:18-6 governs legal fees for an attorney who also serves as a fiduciary:

If the fiduciary is a duly licensed attorney of this State and shall have performed professional services in addition to his fiduciary duties, the court shall, in addition to the commissions provided by this chapter, allow him a just counsel fee. If more than one fiduciary shall have performed the professional services, the court shall apportion the fee among them according to the services rendered by them respectively.

An allowance of counsel fees "is a matter which rests in the sound discretion of the trial court. [We] will not interfere unless the record discloses manifest misuse of the discretion." In re Probate of Alleged Will of Landsman, 319 N.J. Super. 252, 271-272 (App. Div.) (quoting In re Estate of Bloomer, 43 N.J. Super. 414, 417 (App. Div.), certif. denied, 23 N.J. 667, 130 (1957)), certif. denied, 161 N.J. 335 (1999). See also In re Estate of Simon, 93 N.J. Super. 579, 583 (App. Div. 1967).

Generally, the factors to be considered in a judicial analysis of reasonable compensation for legal services to an estate are "the size of the estate and the amount of legal work necessary to bring it to the point of distribution[.]" Bloomer, supra, 43 N.J. Super. at 417 (citations omitted). Also to be considered is the nature and extent of litigation required on behalf of the estate and the amount at stake, and "any amounts in dispute or in jeopardy which are resolved without litigation, as well as the nature and complexity of the problem[.]" Ibid. The court must consider the time spent by the attorney "over the entire period of administration, the skill exhibited; the danger of financial loss avoided; the amount saved through litigation, conciliation or conference[,]" and "the learning, ability, integrity and standing of the particular member of the bar." Ibid.

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Based upon our review of the record, we discern no abuse of discretion in the award of attorney's fees and costs to Zalewski. The estate required Zalewski's legal expertise due to the nature and complexity of the problems the estate faced, including the Murrays' constant objections. Accordingly, we agree that Zalewski is entitled to compensation for her legal work.

We are also satisfied that Zalewski is entitled to $31,362.78. The nature and extent of work necessary to bring the estate to distribution resulted from the status of the estate at the time of Robert's death and from the Murrays' relentless challenges. We agree that the time spent and the hourly rate Zalewski charged were reasonable.

The Murrays next contend that Judge Derman did not comply with Rule 1:7-4(a) because she did not consider and make findings on their exceptions to the first contract, to the allowance of attorney fees and to the accounting fees. This contention lacks merit.

Rule 1:7-4(a) requires that "'the court shall, by opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon'" in all actions tried without a jury. Yueh v. Yueh, 329 N.J. Super. 447, 469 (App. Div. 2000) (quoting R. 1:7-4). We are satisfied that Judge Derman complied with this rule. She thoroughly addressed each of the Murrays' exceptions twice on the record and also in a supplemental written opinion. She made adequate findings, which are amply supported by the record. Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div.), certif. denied, 40 N.J. 221 (1963).

Finally, the Murrays' contention that Zalewski could have sought a commission under N.J.S.A. 3B:18-13, subject to their exceptions, lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Zalewski did not request a commission.

Affirm.

1. We sometimes collectively refer to the Murrays and Joseph as the Murrays.

2. Joseph Jr. was not a party in the probate matter.