2013 IL App (1st) 122082-U

Nos. 1-12-2082, 1-12-3429 cons.

SIXTH DIVISION
December 20, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re ESTATE OF STEVEN KOLINSKI, Deceased,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 10 P 910
	)	
PAUL W. GRAUER and PAUL W. GRAUER & ASSOCIATES,	)	
	)	Honorable
	)	James G. Riley,
Petitioners-Appellants.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *HELD*: The trial court did not abuse its discretion in its rulings on Appellant Paul Grauer's fee petition for attorney fees and costs for his work on Appellee Estate of Steven Kolinski, Deceased (the Estate), when it determined the amount of the award, denied Grauer's motion to reconsider the award, or when it ordered Grauer to turn over the case file to the Estate.

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¶ 2 On appeal, Grauer raises three claims of error: he contends that the trial court denied him a fair hearing on his fee petition by its alleged improper conduct and bias; he also contends that the court abused its discretion by ordering him to turn over the case file; and he contends that the court further abused its discretion by denying him fees for certain work allegedly done on a survival action for personal injury to the decedent.

¶ 3 For the reasons that follow, we affirm the trial court's rulings.

¶ 4 I. BACKGROUND

¶ 5 At the outset we note that these consolidated cases (Appeal Numbers 1-12-2082 & 1-12-3429) contain a voluminous record that involves a complicated estate. Within approximately two years of litigation, there were several executors appointed and several attorneys representing the estate. There were allegations of fraud and litigation among the parties named in the will. Additionally, there were at least two actions filed for personal injury to the decedent. Grauer worked for the Estate for approximately six months. His appellant's brief fails to adequately set forth the entire factual background necessary to an understanding of the issues raised. After examining the record, we set forth only those facts pertinent to this appeal.

¶ 6 According to the record, Steven Kolinski died on October 22, 2009.

¶ 7 In March 2010, a petition for probate of decedent Kolinski's will of November 24, 2001 was filed by Steven Gillespie, who was the decedent's brother-in-law and who was named in the will as executor of the Estate. The November 2001 will named three siblings of the decedent (also referred to in the record as the heirs) and a close friend, Mark Zahareas (also referred to in the record as the sole legatee); in that will, decedent left his personal and household effects and

all residue of his estate to Zahareas.

¶ 8 Grauer's involvement with the Estate apparently began on August 8, 2011, when by order of the probate court, the Estate's original attorney, Wayne Kurzeja, was allowed to withdraw and Grauer was allowed to substitute for him. In the same order, the court granted leave for attorney Peter J. Curielli (who represents the Estate on appeal) to file an appearance on behalf of Zahareas and Zahareas' parents (creditors) for a claim against the Estate. The same order also terminated the independent administration of Gillespie and ordered letters of office to reissue with Gillespie as Supervised Administrator. Finally, the order required the Estate to prepare an inventory of the Estate within 45 days, i.e., by September 22, 2011.

¶ 9 On August 17, 2011, Zahareas filed a petition to remove Gillespie as the executor of the Estate. According to the petition: prior to his death, the decedent had filed a product liability action (entitled Kolinski v. GE Healthcare et al., No. 2008 L 006216), which is also referred to as "the law division case," in June 2008; in July 2008, the decedent signed a promissory note to the creditors, in which he stated his intention that proceeds from the legal action be used to pay the balance of the loan from the creditors. The petition contained further allegations of actions by Gillespie that were "adverse to the interests of the Estate," believed to have been done for the benefit of non-beneficiaries of the Estate, and which created a conflict of interest and breached his fiduciary duties to the Estate by, among other things, failing to protect the interests of the sole beneficiary of the Estate, Zahareas. Zahareas sought to be named executor with independent administration.

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¶ 10 On August 19, 2011, Grauer filed an appearance on behalf of Gillespie, executor of the Estate.[1]

¶ 11 On September 2, 2011, the court appointed Ray Koenig as special administrator of the Estate because of "potential conflicts of interest between the sole legatee" and the heirs of the Estate. One week later, Grauer sent a letter to Zahareas seeking documentation of the decedent's assets and expenses as information needed to prepare the inventory of the Estate. Subsequently, Grauer, on behalf of Gillespie, filed a motion to vacate the order of September 2, which allegedly had not been properly noticed to Gillespie.

¶ 12 A short time later, Zahareas filed an emergency motion, seeking that Grauer cease and desist direct contact with him, and seeking issuance of a citation for removal of representative.

¶ 13 On November 22, 2011, the court ordered that Koenig as Special Administrator of the Estate was authorized to settle the law division case, with the following distribution of settlement proceeds: 57% survival and 43% wrongful death.

¶ 14 Disputes concerning the Estate continued, including allegations by the decedent's siblings, i.e., the heirs, of fraud on the part of Zahareas. In January 2012, the heirs filed a combined petition to vacate "void orders" and for other relief. In that petition, the siblings sought to have the waivers of notice withdrawn and the order admitting decedent's 2001 will to probate vacated; they alleged widespread extrinsic fraud by Kurzeja and Zahareas by, among other things, misrepresenting the validity of the November 2001 will. The petition was supported by,

[1] Grauer filed his appearance using the title of "Executor of the Estate" for Gillespie despite the fact that Gillespie had earlier been named "Supervised Administrator" by the court.

among other things, a document purporting to be a later, January 2004, will of the decedent, in which the decedent left his personal and household effects to Zahareas but left the residue of his estate to be divided equally between the heirs and Zahareas. It also contained an affidavit of Gillespie, the executor named in both the 2001 and 2004 wills, in which Gillespie stated that: he was never informed that Kurzeja personally represented Zahareas; Kurzeja told him that the November 2001 will was decedent's only valid will; Kurzeja never informed him that the November 2001 will was allegedly invalid because it lacked a proper attestation clause; and that he acted at Kurzeja's express direction when he directed the heirs to sign the waivers of notice.

¶ 15 On January 19, 2012, Grauer filed an inventory of the Estate listing only two items, which were two causes of action. Those causes were both identified as personal injury claims and both were described as " 'survival' cause[s] of action;" one was the law division case previously referred to (Case No. 2008 L 006216), with a value of $350,583.93 that had not yet been disbursed; the other was entitled "Steven Gillespie, as Administrator of the Estate of Steven Kolinski, Deceased vs. Chicago Institute for Specialty Care, S.C. et al.," Case No. 2011 L 10196, with an undetermined value.

¶ 16 The same day, the court issued a citation for removal of representative, directed to Gillespie, ordering him to appear at a later date to show cause why he should not be removed as representative of the Estate for failing to file an inventory or an accounting pursuant to order of the court.

¶ 17 On February 7, 2012, Zahareas' and the creditors' attorney filed an emergency motion to hold the executor (Gillespie) in contempt of court and to stay proceedings in the second personal

injury case listed in the inventory. That day, the court issued an order stating that "The Executor" has the right to non suit Case No. 2011 L 10196 which was not filed with the court's authority; the order also reminded and reprimanded "The Estate" for not seeking court approval in the supervised administration, and reminding it "in the future that ANY Action the Estate [sic] must first be approved by this Court."

¶ 18 Among the numerous other proceedings in connection with the heirs' petition to vacate, Grauer filed a Rule 237 Notice to Produce directed toward Zahareas, seeking production of numerous documents.

¶ 19 On February 16, 2012, the court entered several orders which: removed Gillespie as Supervised Executor[2] of the Estate and appointed Zahareas as Successor Independent Executor of the Estate; dismissed Grauer as attorney for the Estate and substituted Curielli; gave Grauer 21 days to file a fee petition and to turn over all of his files. That day, the court also granted the Special Administrator's petition to settle the law division case. However, the heirs' petition to vacate void orders and for other relief was not resolved.

¶ 20 On March 8, 2012, Grauer filed a petition for attorney fees and costs seeking a total amount of $37,634.03. Grauer's petition did not state a specific basis, statutory or otherwise, for the fees he sought; it consisted of 11 numbered paragraphs and it included an attached invoice for "professional services" rendered from July 6, 2011 (approximately one month before he was allowed by court order to substitute for the Estate's original attorney) to March 3, 2012. The

[2] The title "Supervised Executor" was used in this order although Gillespie had been titled "Supervised Administrator" in letters of office that were reissued in August 2011.

court later ordered a hearing on the fee petition for June 5, 2012, at which time Grauer was ordered to bring a "complete original" case file to court.

¶ 21 The Estate filed a response to Grauer's fee petition in which it addressed each paragraph of the petition. In some instances, the Estate admitted Grauer's statements, and in others, it stated it could not admit nor deny them. In its response, the Estate relied on, among other things, the court's orders of: August 8, 2011 (making Gillespie a "supervised administrator"); September 2, 2011 (appointing a special administrator due to potential conflicts of interest between the sole legatee and the heirs); and September 21, 2011 (ordering the special administrator to represent the Estate in the law division case).[3] The response contained allegations that Grauer helped Gillespie in furthering the interests of the heirs but had not worked in the best interests of the Estate.

¶ 22 On May 8, 2012, Grauer filed a petition for executor's fees and costs on behalf of Gillespie. In the signature line of the petition, Grauer identified himself as "Attorney on behalf of Petitioner, Steven Gillespie (from 7/22/11 to 2/16/12)."

¶ 23 At the June 5, 2012, hearing on Grauer's fee petition, Grauer stood on his petition as filed. He was the sole witness to testify and was cross-examined by Curielli as an adverse witness. Following the hearing, the court awarded Grauer a total of $17,429.35. Later that month, the court ordered the special administrator of the Estate to bring a check for the fee award to a subsequent hearing. Grauer subsequently filed a motion to reconsider the award of attorney fees,

[3] The order of September 21, 2011, does not appear in the record chronologically but as an exhibit in support of the Estate's response to Grauer's fee petition.

vacate the order of June 5, and increase the award.

¶ 24 On July 10, 2012, the court ordered Grauer to turn over his "complete file" within 24 hours. In that order, the court also stated that the Estate "stood willing to tender Paul Grauer's fee petition award, subject to withdrawal of Paul Grauer's motion to reconsider the award" and that Grauer "refused to withdraw" the petition. The next day, Grauer filed a notice of appeal (No. 1-12-2082) of the order.

¶ 25 On November 9, 2012, Grauer's motion to reconsider the award of attorney fees, vacate the order of June 5, and increase the award, was denied. Grauer then filed a separate appeal (No. 1-12-3429), seeking reversal of the June 5 order awarding attorney fees and the November 9 denial of his motion to reconsider. This Court granted Grauer's motion to consolidate the two appeals.

¶ 26 II. ANALYSIS

¶ 27 Appellant Grauer first contends that the court denied him a fair hearing on his fee petition by alleged improper conduct and bias. He next contends that the court abused its discretion by ordering him to turn over the case file, claiming that he is entitled to maintain a retaining lien until he is fully compensated for his legal services. Finally, he contends that the court further abused its discretion by denying him attorney fees for certain work allegedly done on the survival action for personal injury to the decedent.

¶ 28 These contentions are taken in the order set out in the "Issues Presented For Review" section of Grauer's appellant's brief although Grauer does not follow that order in his argument section. We note that these three contentions may be considered as various points of a single

issue, which is Grauer's assertion that the award of attorney fees was improper. Therefore, contrary to Grauer's unsupported contention that the final point should be reviewed de novo, all three points are subject to an abuse of discretion standard.

¶ 29 It is a general rule that the decision to award attorney fees is a matter within the sound discretion of the trial court and such decision will not be disturbed on appeal absent an abuse of discretion. In re Marriage of Nesbitt, 377 Ill. App. 3d 649, 656 (2007); see also In re Estate of Knott, 245 Ill. App. 3d 736, 739 (1993). The Probate Act of 1975 provides that an attorney for a representative is entitled to reasonable compensation for his services. 755 ILCS 5/27-2 (2006); see In re Estate of Dyniewicz, 271 Ill. App.3d 616, 624 (1995). However, in probate cases, the court has broad discretion to determine the amount to be awarded to the attorney. In re Estate of Bitoy, 395 Ill. App. 3d 262, 272 (2009); In re Estate of Shull, 295 Ill. App. 3d 687, 691 (2006). When legal services rendered do not benefit the estate, the fees will be rejected. Estate of Dyniewicz, 271 Ill. App.3d at 624. Further, in probate matters, the fee award is made on a case by case basis and there is no hard and fast rule which can be applied to determine the reasonableness of the award. Estate of Bitoy, 395 Ill. App. 3d at 272 (quoting In re Estate of Marks, 74 Ill. App. 3d 599, 604 (1979)).

¶ 30 First, we reject Grauer's contention that one remark by the court at the hearing on his fee petition rendered the hearing unfair and showed improper conduct and bias. The one remark that Grauer cites was an admonition by the court directed at opposing counsel Curielli, the successor attorney for the Estate. In response to the court's question of "What else?" to Curielli during his cross-examination, the following exchange took place:

"Mr. Curielli: Okay. I mean, it – maybe it would be easier, a different approach would just be, I mean, I've got notes on –

THE COURT: How about using a direct approach? Instead of beating around the bush, how about stabbing him in the eyeballs right now so I can watch you? Do that. Use the direct approach.

Mr. Curielli: Okay."

Grauer does not so much present an argument on this point as he merely makes the assertion that the one remark constituted prejudicial trial conduct. His "argument" consists of six sentences including quotation from the record. Grauer simply claims that such statement "proved" that the court was not impartial and that the court "not only condoned prejudicial conduct but instructed opposing counsel to engage in inappropriate conduct." However, other than this bald assertion, Grauer offers nothing to support his claim. For example, the sole authority that Grauer cites concerns the denial of motion for change of venue, and as such, it does not support his position. *Hartnett v. Stack*, 241 Ill. App. 3d 157, 169 (1993) (stating the principle that a trial judge is presumed to be impartial and the burden of overcoming the presumption rests on the petitioner who must show actual prejudice in the form of personal bias stemming from an extrajudicial source and prejudicial trial conduct). There, the court found that the petitioner failed to show prejudice and the denial of the motion was affirmed. *Hartnett*, 241 Ill. App. 3d at 171-72.

¶ 31 Our review of the entire transcript of the hearing reveals that, at various times in Curielli's cross-examination of Grauer, the court expressed a desire to move the proceedings along. For example, some time before the allegedly prejudicial remark, the court prompted Curielli to

"move this down or we'll be here forever." At another point, also before the remark in question, the court, addressing Curielli, sought to "just get down to the nuts and bolts." At most, the remark in question displays the court's impatience with opposing counsel's failure to move the cross-examination along as quickly as he desired. In context, it is clear that the remark is nothing more than an expression of the court's frustration, and it in no way "condone[s] prejudicial conduct" or "instruct[s] opposing counsel to engage in inappropriate conduct" as Grauer asserts. We find that the remark did not constitute bias, nor did it deny Grauer a fair hearing. See *Hartnett*, 241 Ill. App. 3d at 171-72.

¶ 32 Next, Grauer contends that the court abused its discretion by ordering him to turn over the case file, claiming that he is entitled to maintain a retaining lien until he is fully compensated for his legal services. A retaining lien is one of two types of liens that may be asserted to obtain payment of outstanding attorney fees; it attaches to property belonging to the client and it has been recognized under Illinois common law as a possessory lien in favor of an attorney for his fees. Twin Sewer & Water, Inc. v. Midwest Bank & Trust Co., 308 Ill. App.3d 662, 667 (1999). Grauer's argument on this point is as scant and devoid of citation as that presented for the previous point. Here, the sole case that Grauer relies upon, Upgrade Corp. v. Michigan Carton Co., 87 Ill. App. 3d 662 (1980) is of no avail. In Upgrade Corp., the discussion concerned the distinctions between a statutory lien and a common law possessory lien in favor of an attorney. Upgrade Corp., 87 Ill. App. 3d at 664-65. There, although the court found that the statutory lien of the appellant attorney who had withdrawn from the case provided inadequate security, the portion of the order requiring him to turn over his litigation files was in fact affirmed. Upgrade

Corp., 87 Ill. App. 3d at 666.

¶ 33 Here, Grauer acknowledges that the court awarded him fees and costs in the amount of $17,429.35. He implicitly claims, without citation to the record, that he had, by having the file copied onto a CD and sending it to opposing counsel, satisfied the order to turn over the case file. In conjunction with that, he claims that the court "never ruled that it was not proper to comply by producing a CD of the files." Whether or not the court explicitly ruled that the CD copy of the file allegedly produced by Grauer was improper, its orders make clear that Grauer was to turn over the entire file, not just a copy of it. The order of April 6, 2012, directs Grauer to bring the "complete original file" to court on June 5, 2012; similarly, the order of July 10, 2012, explicitly directed Grauer to turn over his complete file, including "all electronic files including email, documents, as well as the complete paper file WITHIN 24 hrs." In his response brief, Curielli argues that the CD copy does not satisfy the best evidence rule.

¶ 34 However, even if the propriety of the CD copy and the application of the best evidence rule had been argued before the court below, we need not consider them here. It appears Grauer's argument on appeal does not really concern the specific form of the file. Rather, the amount of the award is the crux of the issue: after asserting that the alleged CD copy constituted compliance, Grauer contends that such "compliance" is sufficient until he is "fully compensated." If we were to accept Grauer's argument that turning over the CD constituted compliance, his assertion of a retaining, or possessory, lien would fail: the retaining lien existence is dependent on the attorney's continued possession of the client's property and it is lost if the attorney surrenders possession. Twin Sewer & Water, Inc., 308 Ill. App.3d at 667. Therefore, Grauer

cannot claim compliance with the turn over order and still assert a retaining lien. Rather, his real claim on this point is that the amount awarded him was insufficient. In his reply brief, Grauer affirms this understanding of the issue when he states that the appeal "is not to 'recover' his fees but rather to have the amount of fees and costs determined" (emphasis in the original). Again, the amount was determined by the court, but it is not an amount that satisfies Grauer. Our review of the record reveals that the court stated its bases for excluding certain charges. For example, the court rejected fees related to the medical malpractice case and Grauer agreed with the ruling, replying at the hearing, "You're probably correct, Judge." Given the court's broad discretion to determine the amount to be awarded, and because Grauer's mere assertion of error does not establish that the court abused its discretion in making that determination, we affirm the award of attorney fees. See Estate of Bitoy, 395 Ill. App. 3d at 272 (stating the court's broad discretion to determine the amount of compensation to be awarded to the attorney and that such award will be overturned only where the determination is manifestly erroneous).

¶ 35 Finally, Grauer contends that the court further abused its discretion by denying him attorney fees for certain work allegedly done on the law division case (Case No. 2008 L 006216, incorrectly referred to in Grauer's brief as "Case #08 L 6210"). When stating the issue, Grauer properly expressed it as a question of abuse of discretion. See, e.g., Estate of Bitoy, 395 Ill. App. 3d at 272. However, in making this point of his argument, Grauer contends that the court's failure to award him fees and costs related to work on the decedent's personal injury case was a misapplication of the law. Grauer's reliance on Estate of Knott is unavailing. Estate of Knott, 245 Ill. App. 3d at 740 (finding no abuse of discretion where attorney fees were allowed as an

administrative expense).

¶ 36 Here, too, Grauer is challenging the amount of fees and costs awarded. As previously stated, the court is given broad discretion in determining amounts for attorney fees. The court at various points in the hearing on the fee petition stated its reasoning for including or excluding certain costs. Grauer cites only one such instance, where the court excluded certain fees that were designated as "due to the personal injury case." As previously noted, Grauer apparently agreed with the court's oral ruling that rejected fees related to the law division case, questioning why Grauer should be paid:

> "to review medical records for a potential cause of action that had nothing to do with the estate? Wouldn't that be part of your fee petition or your retainer that you may or may not have taken in the medical malpractice case?
>
> THE WITNESS: You're probably correct, Judge."

If the legal services rendered were not in the interest of, or did not benefit the Estate, they were properly rejected by the court. See Estate of Dyniewicz, 271 Ill. App.3d at 624. Despite Grauer's claims that the original executor Gillespie was entitled to his, Grauer's, representation in that law division action, and that his, Grauer's, services benefitted the Estate, Grauer does not establish that the court abused its discretion in its determinations on proper fees and costs to be awarded. See Estate of Bitoy, 395 Ill. App. 3d at 272. As previously stated, there is no hard and fast rule governing awards of attorney fees, and an award in the one instance, in the case cited by Grauer, does not compel the court here, in a highly distinguishable factual situation, to also include fees

Grauer presented for work on the personal injury case. See Estate of Bitoy, 395 Ill. App. 3d at 272. Accordingly, we will not overturn the court's determination as to the amount awarded to Grauer on his fee petition.

¶ 37 Finally, we decline Curielli's invitation, made in his response brief, to impose sanctions on Grauer.

¶ 38 Therefore, the orders appealed from, to turn over the complete, original case file, to award Grauer $17,429.35 in attorney fees and costs, and to deny reconsideration of that award, are affirmed.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, the above-stated orders of the trial court are affirmed.

¶ 41 Affirmed.