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IN THE MATTER OF THE WILL OF RICHARD RILEY

Docket No. A-1957-08T3.

Superior Court of New Jersey, Appellate Division.

Submitted October 7, 2009.

Decided October 30, 2009.

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On appeal from Superior Court of New Jersey, Chancery Division, Essex County, Docket No. CP-333-2006.

Goldring & Goldring, P.A., attorneys for appellant Patricia Riley (Eric J. Goldring, on the briefs).

Deutch & Associates, LLC, attorneys for respondents Betty Hummel, Joseph Lang and William Riley (Victor A. Deutch, on the brief).

Before Judges Cuff and Waugh.

PER CURIAM.

Patricia Riley, as executrix of the estate of her father Richard Riley, appeals from an award of counsel fees to plaintiffs Betty Hummel, Joseph Lang, and William Riley, who were the unsuccessful proponents of a purported codicil to the decedent's will. The executrix argues that the probate judge should have dismissed the fee application or, in the alternative, should have enforced a settlement allegedly reached by the parties. The executrix also appeals the denial of her

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application for sanctions against plaintiffs. We affirm in part and remand in part.

The probate judge originally awarded $15,000 in fees to the proponents of the codicil pursuant to Rule 4:42-9(a)(3), but did not explain the basis for the amount of the award. We affirmed the decision to award the counsel fees, but remanded for further findings of fact as to the quantum of the fees. In re Estate of Riley, No. A-3152-06 (App. Div. Apr. 9, 2008).

On remand, the probate judge initially awarded counsel fees and disbursements in the amount of $12,302 in an order dated August 1, 2008. In an order dated August 12, 2008, the judge amended the amount of the award to $13,587, apparently to correct an error in calculation. Her reasons for making the award and the adjustment were explained in an oral decision on July 9, 2 008, as supplemented by written opinions dated July 31, 2008, and August 12, 2008. The transcript of the July 2008 oral decision was not supplied by the executrix.

A controversy then arose with respect to a purported settlement between the executrix and plaintiffs. The record contains an extensive exchange of emails between counsel for the disputants about a settlement. Although it appears that there may have been a meeting of minds as to the amount of fees, there were continued, often rancorous exchanges about the content of

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releases and, more significantly, whether the releases would (1) be mutual, (2) include counsel, and (3) include the decedent's disinherited son, Walter Riley, who was not a party to the litigation. Those disagreements were never resolved. There also appears to be a dispute as to whether all of the clients, Walter Riley, and Jeffrey L. Knapp, the attorney on whose work the fee award was based, had agreed to the terms of the settlement.

On October 28, 2008, plaintiffs filed a motion to correct a clerical error in the order dated August 12, 2008. The executrix filed a cross-motion seeking to vacate that order or, in the alternative, to enforce the alleged settlement. The cross-motion also sought sanctions. Both

motions were denied in an order dated November 7, 2008. That order also required that the fees be paid to Knapp, but required Knapp to make a pro rata reimbursement to plaintiffs to the extent of any payment already received. This appeal followed.

During the pendency of the appeal, Knapp wrote to the presiding judge for administration and the clerk of the court asking that the matter be scheduled for an appellate settlement conference. In the letter, he asserted that plaintiffs had not paid him any fees. We note, however, that plaintiffs' current counsel represented to the probate judge that Knapp had been

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paid. There are no documents in the record supporting either representation.

Our Supreme Court has noted that "fee determinations by trial courts will be disturbed only on the rarest of occasions, and then only because of a clear abuse of discretion." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). Our earlier opinion affirmed the probate judge's determination to grant fees, vacating the award only because there was no articulation of reasons to support the quantum of the award. Having reviewed the record on appeal, especially the judge's several supplemental explanations of her calculation and subsequent correction of the amount, we conclude that there was no clear abuse of her discretion. Consequently, we affirm the fee award.

We also conclude that the issue of releases was so inextricably intertwined with the financial terms of the proposed settlement that the probate judge correctly concluded that there was, in fact, no binding settlement. We also affirm the judge's decision not to award sanctions against the proponents of the codicil.

Nevertheless, we have some concern about the issue of whether the fees should be paid to plaintiffs themselves or to Knapp. Clearly, the award was based upon the work performed by

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Knapp, and premised on the assumption that plaintiffs had either paid Knapp or were under an obligation to pay him for his services. We read Rule 4:42-9(a)(3) as permitting an award of fees to the client, as opposed to the attorney directly. We base that view on the following language in Rule 4:42-9(a)(3) (emphasis added): "If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate." We see no reason to believe that a different approach is applicable with respect to the other portions of that subsection.

It would, however, be inequitable to reimburse a party for fees that the party has not paid, is not obligated to pay, or does not intend to pay. It would also be inequitable to permit the use of Rule 4:42-9(a)(3) to reimburse someone other than the persons specified in the rule, in this case the plaintiffs who were the unsuccessful proponents of the codicil. It has been suggested that the litigation was being funded by Walter Riley, the disinherited son. While there is no specific support for that assertion in the record, we discern no specific support for the contrary position. That fact, together with the inconsistent statements about whether Knapp had been paid and

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the refusal of plaintiffs' current counsel to respond to the judge's questions about payment, give us considerable pause.

Consequently, we remand to the Probate Part (1) for verification that the litigation is being funded by plaintiffs as opposed to a third party; and (2) for a determination of the amount, if any, already paid to Knapp by plaintiffs and the amount, if any, still owed by them to Knapp. The remand judge shall then enter an appropriate

order for disbursement of the fee award. The purpose of the remand is to ensure that (1) Knapp is or has been paid the full amount of the award and (2) Rule 4:42-9(a)(3) is not being used to reimburse fees paid or payable by a non-party.

In summary, we affirm the order on appeal, except as modified by our remand.

Affirmed in part; remanded in part.