

AT STAMFORD
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DOCKET NO: FST-CV-22-6055088-S

CONNECTICUT SUPERIOR COURT

STEPHEN M. TUNICK
PLAINTIFF-APPELLANT

2024 MAY 28 P 12:29

LD OF STAMFORD/NORWALK

AT STAMFORD

V.

RICHARD S. DIPRETA, TEMPORARY
ADMIN. FOR ESTATE OF SYLVIA
TUNICK, Et Al
DEFENDANTS-APPELLEES

MAY 28, 2024

MEMORANDUM OF DECISION

I. INTRODUCTION

By summons and complaint returnable to the Superior Court on March 8, 2022, the plaintiff who is a remainder beneficiary of the David H. Tunick Trust Agreement, dated October 1, 1981, as amended January 7, 1983, May 18, 1984, June 6, 1991, and January 31, 1993 (The Trust) appeals a decision of the Greenwich Probate Court dated December 21, 2021, in which the Probate Court found "after reviewing the written submissions and taking into account the oral arguments made and the Hayward factors, the claimed attorney's fees proposed by DiPreta and Castiglione are fair and reasonable. It is therefore ordered and decreed, that the application to pay fees of Richard S. Dipreta dated May 20, 2019, and August 6, 2021, and on the application to pay fees of Richard E. Castiglione dated May 12, 2019, [from the Trust] be and they hereby are allowed."

In his revised complaint, the plaintiff alleges that the total of the applications for attorney's fees that the Probate Court found fair and reasonable and allowed totaled \$182,900.20, which exceeds the remaining corpus of the trust which is \$85,562.00. The plaintiff further alleges that the order was improper because it exceeded the amount remaining in the trust, and that the Probate Judge did not consider the totality of the trust as required by *Hayward*

v. Plant, 98 Conn. 374 (1923). The plaintiff further alleges that he is aggrieved by said order and appeals from the same, because the order depletes the trust, though the Probate Court had made a previous order dated January 31, 2017 authorizing the current trustee to enter into contractual obligations and promises to third parties for goods and services, specifically, that on January 31, 2017, the Probate Court ordered that a forensic accounting be conducted by a specific accounting firm and that the firm was to be compensated by The Trust.

The order of accounting was limited to the period between 1997 and September 11, 2013. The plaintiff alleges that the appealed order allowing the attorney fees is in conflict with the Hayward case, as it depletes the value of The Trust to a negative balance, and that the court did not consider the remaining balance of The Trust, as its order creates a negative balance and fails to consider expenses that will be incurred to complete the ordered accounting. The plaintiff alleges that the forensic accounting has not been completed as of this date, and that any order approving fees that may be removed from The Trust is premature, as the forensic analysis has not yet been completed.

II. PROCEDURAL BACKGROUND AND THE STANDARD OF REVIEW

The Probate Court conducted a hearing on the subject applications for approval of fees and expenses filed by two law firms on September 2, 2021. The parties agree that the hearing was an “on the record hearing before the Probate Court”, and filed with this Court as exhibits the transcripts of that proceeding as well as the exhibits before the Probate Court during that proceeding. Beside the transcripts of the hearing, the exhibits include the Probate Court order of January 31, 2017, the petitions for approval of attorney’s fees, the Trust agreement, affidavits by the various attorneys setting forth the amount of time that each of the attorneys spent in representation of the trustees coupled with an explanation of the services as set forth in their

bills. The Court also admitted into evidence several documents including two Memorandums of Decision by Judge Povodator in the case of *Tunick v. DiPreta*, Judicial District of Stamford-Norwalk, at Stamford, CV-196042945, which were pertinent to the defendant's special defense of *res judicata* and or collateral estoppel.

While most appeals from Probate Court decisions are handled in Superior Court as trials *de novo*, § 51-72 of the Connecticut General Statutes provides that,

“Whenever, in any court of probate, the parties or their attorneys so agree in writing, the judge of the court may call in a competent and disinterested person who is capable to act as the official stenographer in the whole or in such portion of the cause or matter as made be agreed upon.”

Section 51-73 states:

Appeals from any decision rendered in any case after a record is made under this section and section 51-72, shall be on such record, and shall not be a trial *de novo*.

See also Probate Court Rule 65.1. The parties have presented this case to this court, with the understanding that it was not a trial *de novo* and introduced no evidence other than that, that was before the Probate Court, with the exception of the documents related to the special defenses of collateral estoppel and *res judicata* that the court admitted as relevant and material to those special defenses.

However, the parties do not agree on the standard of review applicable to this appeal from the on-the-record decision of the Probate Court.

In the case of *Andrews v. Gorby*, 237 Conn.12 (1996), the Connecticut Supreme Court had occasion to comment on the language contained in C.G.S. § 51-72 and § 51-73, after quoting the language, the Andrews court stated:

“In other words, § 45a-186 provides that if a record including a transcript of the testimony was made before the Probate Court pursuant to § 51-72 and § 51-73, the Superior Court shall review the decree of the Probate Court using an abuse of the discretion standard.”

While the language in the *Andrews* case is *dicta*, since in *Andrews*, the parties did not dispute that no record was made before the Probate Court, it is clear and instructive as to the standard that the Superior Court should use, when reviewing a decision of a Probate Court, in which a record was made pursuant to § 51-72 and § 51-73. The court will review the record to determine whether the Probate Court abused its discretion in granting the applications for approval of attorneys' fees.

III. THE PROBATE COURT PROCEEDING

A review of the transcript of the Probate Court proceeding reveals the following. The plaintiff was represented by counsel and in his introductory remarks, plaintiffs' counsel stated "I don't have an objection to the substance of the fees. Both counsels are very fine counsel, and I'm sure their representations to this court about the work they've done are accurate. We are not objecting to the fees, per se. But I do have a general objection so it might be more appropriate if I spoke at the end." The transcript also reveals that the present trustee appeared at the Probate Court hearing, and informed the Court that the current balance in The Trust was \$85,562.00. The petition for approval of the "Castiglione fees" evidenced that his firm spent in excess of 160 hours working on litigation pending in the Superior Court and Appellate Courts, which litigation was instituted by the plaintiff herein. The transcript also reveals that Attorney Castiglione's firm was successful in prevailing in that litigation. The hourly rate charged by the various member of the Castiglione firm was also before the Probate Court, and based upon the representation of plaintiff's counsel to the Probate Court there was no basis for determining that either the hours spent, or the rate charged were unreasonable. The affidavit and bills submitted to the Probate Court by the DiPreta Law Firm, evidenced that members of the DiPreta Law Firm had been representing

the Trustee since 2019, both within the Probate Court and also within the Superior Court, representing one or more of Trustees at various points and times. The affidavits coupled with the bills evidence extensive representation. In the case of the DiPreta firm, from 2019 through 2021 involving matters before the Probate Court and sophisticated and time-consuming matters before the Superior Court and Appellate Court. Based upon the representations of plaintiff's counsel at the hearing, there is no claim that either the hourly rate, quality of the work, or amount of time spent, is contested.

The heart of the plaintiff's complaint, is that the amount of fees allowed is inconsistent with the factors to be considered by the Probate Court, based on the case of *Hayward v. Plant*, because the Court did not consider that the fees exceeded the balance of the corpus of the trust, nor, did the Court consider that it had issued an order in 2017, authorizing the Trustee to retain a firm of accountants to conduct a forensic audit, which forensic audit has not yet been completed.

This Court agrees that time spent, and reasonable hourly rates are only one of multiple factors that a court should consider in determining whether an attorney's fee is fair and reasonable.

“In this connection, ‘reasonable’ means what is fair in view of the size of the estate, the responsibilities involved, the character of the work required, the special problems and difficulties met in doing the work, the results achieved, the knowledge, skill and judgment required of and used by the [attorneys], the manner and promptitude in which the estate has been settled and the time and service required, and any other circumstances which may appear in the case and are relevant in material to this determination.”

Hayward v. Plant, 98 Conn. 374 (1923) See also *Shapiro v. Mercedes*, 262 Conn. 1, 8 (2002); *Andrews*, at 24. Likewise, the balance of funds remaining in the trust is only one of many factors that a court should consider in determining what constitute reasonable attorneys' fees.

Considering these factors, the Probate Court had before it evidence that while the size of the Trust estate was now only \$85,562.00, it had at one time been as much as \$6,000,000.00; the responsibilities involved included defending several lawsuits of varying sophistication, including Superior Court work and Appellate Court work. Special problems and difficulties included multiple and extensive litigation. The results achieved appeared to be satisfactory to the Trustees, and to the estate. The time and service required was extensive and significant.

The Probate Court was also aware that it had ordered a forensic accounting for the years 1997 through September 11, 2013. The Probate Court, based upon the Trustees representations, could have determined that the accountants had been paid to date for the services that they had rendered to date. While the plaintiff suggests that the Court order will leave The Trust without assets to complete the forensic accounting, the same is not necessarily true. The Probate Court found the fees to be fair and reasonable and "allowed" the fees. It will still be up to The Trustee to marshal the assets of the trust and allocate them to the various creditors who seek to be paid (notably, including himself). The Probate Court did not order The Trustee to pay all of the corpus to the attorneys, the Probate Court merely allowed the fees. The Trustee is free to seek Probate Court guidance on the allocation of the fees to the various creditors involved. Indeed, this is not the first estate in Connecticut or elsewhere, where the remaining expenses exceeded the balance of the assets in The Trust. There is nothing in the Probate Court order that eliminates the ability of the Trustee to allocate assets of the Trust to the claims of the creditors. There is nothing in this Court's determination that is intended to limit the Trustee's powers consistent with The Trust agreement and

Connecticut law. This Court merely holds that the Probate Court did not abuse its discretion in finding the fees of the petitioners to be fair and reasonable, and in ordering that they be allowed.

IV. RES JUDICATA AND COLLATERAL ESTOPPEL

The Court has also considered defendant's special defenses of *res judicata* and collateral estoppel.

“The doctrines of collateral estoppel and *res judicata*, also known as issue preclusion and claim preclusion, respectively, have been described as related ideas on a continuum. Both doctrines share common purposes, namely, to protect the finality of judicial determinations, [to] conserve the time of the court, and [to] prevent wasteful litigation. The doctrine of collateral estoppel prevents a party from re-litigating issues and facts [that have been] actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them [on] a *different claim*; whereas the doctrine of *res judicata* prevents a party from re-litigating the same claim following a final judgment on the merits, regardless of what additional or different evidence or legal theories might be advanced in support of it.”

Solon v. Slater, 345 Conn. 794, 810 (2023). (Internal citations and quotations omitted). (Emphasis in original).

Res judicata, or claim preclusion, expresses no more than the fundamental principle that once a matter has been fully and fairly litigated, and finally decided, it comes to rest. Generally, for *res judicata* to apply four elements must be met: (1) the judgment must have been rendered on the merits by a court of competent jurisdiction; (2) the parties to the prior and subsequent actions must be the same or in privity; (3) there must have been an adequate opportunity to litigate the matter fully; and (4) the same underlying claim must be at issue.

Wheeler v. Beachcroft, LLC, 320 Conn. 146, 156-157 (2016). (Internal citations and quotations omitted).

“For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided, and the decision must have been necessary to the judgment.”

Solon at 810


The court concludes that the defendants special defense of *res judicata* is not applicable and cannot bar the plaintiff's assertion that the attorney's fees at issue in the subject probate court decision, cannot be contested consistent with the principles of the case *Hayward v. Plant*, 98, Conn. 374 (1923), and other cases dealing with the factors that a court can consider in determining the reasonableness of attorney's fees. The issue of whether attorney's fees that were incurred, subsequent to a prior decision, approving attorney's fees, even involving the same parties in similar issues, cannot preclude a party from contesting the claim that subsequently incurred attorney's fees are reasonable and should be allowed. The reasons are somewhat obvious; a court could not have adjudicated the claim of the reasonable of subsequently incurred attorney's fees that had not been presented to it on a prior occasion. The circumstances that exist subsequently may be different, and the court is empowered to review any new claim for attorney's fees consistent with the standard set forth in *Hayward* and its progeny. When Judge Povodator entered summary judgment with regard to the previous claim for attorney's fees allowed to Attorney Castiglione, that was not a ruling on a claim for subsequently incurred attorney's fees.

However, the issue of collateral estoppel is a closer question. The defendants assert that the plaintiff should be collaterally estopped from raising the claim that an uncompleted audit previously ordered by The Probate Court, to cover the years 1997 - September 11, 2013, prevented the approval of attorney's fees. In the prior case in which the court (*Povodator, J.*) entered summary judgment in favor of upholding the Probate Court's decision approving attorney's fees, the plaintiff in taking that appeal, argued that attorney's fees should not be approved until such time, as the forensic audit had been completed. In granting summary judgment, Judge Povodator held that there was no requirement that the audit be completed prior

to the Probate Court allowing attorney's fees incurred for work performed subsequent to the term of the audit. In the present claim the plaintiff did not assert in the on the record proceeding before the Probate Court that there was anything unreasonable about the attorney's fees, except for (1) the fact that the audit had not yet been completed, and (2) there were insufficient assets remaining in The Trust to pay the attorney's fees and other expenses of The Trust including the audit. To the extent in the present case, the defendant claims, that the attorney's fees could not be approved prior to the completion of the previously ordered audit, the court agrees with the defendant that limited claim has already been decided by the court in the case of *Tunick v. DiPreta* and finds that the plaintiff is collaterally estopped from raising that issue on this appeal. Judge Povodator did not address the issue of the relationship of the assets of the Trust as a component of the *Hayward* analysis and the plaintiffs are not collaterally estopped from raising that issue.

V. CONCLUSION

For all these reasons, this court finds that The Probate Court did not abuse its discretion in allowing the attorney's fees before it and that the plaintiff is collaterally estopped from asserting that the previously ordered audit be completed and paid for as a prerequisite of any approval of attorney's fees incurred subsequent to September 11, 2013. Accordingly, the court dismisses the appeal and enters judgment in favor of the defendant.

DECISION ENTERED IN
ACCORDANCE WITH THE
FOREGOING ON 5/28/24.
JDN SENT 5/28/24.




Robert L. Genuario

Judge Trial Referee