

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX: KINGSHILL

IN THE MATTER OF THE ESTATE OF	)	CASE NO. SX-08-PB-123
	)	
	)	PETITION FOR REVIEW
	)	
	)	
EARL L. SMALL, JR.	)	
_____	)	

OPINION AND ORDER

Petitioners Mickey Kalloo and Harry Dipchan appeal from the Magistrate's January 28, 2013 Order, ordering the payment of Twenty Four Thousand Eight Hundred and Eleven Dollars and Eighty-One Cents (\$24,811.81) in attorney's fees to Robert Waldman Esq., on behalf of the Estate of Earl J. Small, Jr.

For the reasons which follow, this Court **AFFIRMS** the Magistrate's Order, and **DENIES** the Petitioner's Petition For Review.

Factual and Procedural Background

On November 28, 2006, Petitioners were involved in an auto accident with Earl Small, Jr. (hereafter, Mr. Small) Following the accident, on January 19, 2007, petitioners commenced a personal injury action against Mr. Small in the Superior Court of the Virgin Islands, Division of St. Croix, seeking damages.¹

¹ Case No. SX-07-CV-30. As of the date of this order, this separate personal injury action is currently still pending.

Mr. Small died testate on October 19, 2008. Following Mr. Small's death, on December 2, 2008, the decedent's wife filed a Petition to admit Mr. Small's Will in the Magistrate's Division of the Superior Court of the Virgin Islands. The petition to admit Mr. Small's Will failed to list Petitioners as creditors of the estate. In January and February of 2009, the Estate of Mr. Small ("the Estate") published notices of the commencement of probate proceedings in a St. Croix newspaper. The Estate also published notices of the hearing on the estate's final accounting in October and November of 2009. On December 18, 2009, the Magistrate issued an Order of Final Adjudication and Distribution of the Estate ("decree").

On January 13, 2010, Petitioners filed a Motion to Set Aside the Order of Final Adjudication and Distribution against the Estate. The Estate was represented by Robert Waldman, Esq. In their motion, Petitioners alleged they were due actual, individualized notice of the commencement of probate proceedings as potential creditors, and had been denied such notice. The petition was denied on June 4, 2010. A petition to the Superior Court followed. The Superior Court affirmed the Magistrate's Decree on November 10, 2010.

On November 19, 2010, Petitioners appealed the Superior Court's ruling to the Virgin Islands Supreme Court. The Supreme Court affirmed the Superior Court decision on September 17,

2012. Following the Supreme Court's ruling, the Estate filed a Motion for Attorney's Fees with the Supreme Court. On September 28, 2012, the Supreme Court denied the motion and ordered that the motion be re-filed with the Magistrate. The Estate did so, and on January 28, 2013, the Magistrate awarded attorney's fees in the amount of Twenty Four Thousand Eight Hundred and Eleven Dollars and Eighty-One Cents (\$24,811.81) to the Estate.

This Petition for Review regarding the legality of the award for attorney's fees followed. In their Petition, the Petitioners allege that the Magistrate Court erred as a matter of law in 1) Awarding attorneys' fees in a personal injury action; and 2) Not considering the Petitioners' ability to pay in awarding attorneys' fees.

Standard of Review

The standard of review for this Court's examination of the Magistrate's legal findings, statements of law, and the application thereof, is plenary. Super. Ct. R. 322(b)(2).

Discussion

1. Whether this action is based in Personal Injury law

Petitioners argue that the Magistrate erred as a matter of law in awarding attorneys' fees. Since, according to the Petitioners, the underlying action is a Personal Injury claim for which attorney's fees are not *generally* authorized under Virgin Islands law, the Magistrate was not authorized to award

attorney's fees in this case. However, because the action before the Magistrate was based in Probate - and not a Personal Injury Action, as Petitioner claims - Petitioners' argument must fail. Under Virgin Islands law, each Magistrate may hear all probate matters. 4 V.I.C. § 123(a)(4).

In the courts of the Virgin Islands, the American Rule against shifting fees to the losing party *does not apply*. Rather, "there shall be allowed to the prevailing party in the judgment such sums as the court in its discretion may fix by way of indemnity for his attorney's fees in maintaining the action or defenses thereto." 5 V.I.C. § 541(b). *Williams v. United Corp.*, 2009 WL 321339 (V.I.), 1. Nevertheless, the award of attorney's fees in Personal Injury actions is prohibited unless the Court finds that the complaint filed or the defense is frivolous. 15 V.I.C. 541(b).

Thus, the Court is cognizant that Virgin Islands law prohibits the award of attorney's fees in personal injury suits. However, in reviewing the record, the Court finds that this action has always been based in Probate and never in Personal Injury.

While the court acknowledges that the petitioners' claims against the Estate may be motivated a by personal injury claim, motivation does not, in itself, transform an action grounded in one area of law into that of another. Petitioners entered into

this action by petitioning the Magistrate to reconsider its final Decree on the Estate, an action adjudicated according to probate law. Furthermore, Petitioners commenced their action as creditors of the Estate, which reflects that the matter at hand is one in Probate.

At no time did the Magistrate either consider or adjudicate any actions or claims between the Petitioners and the Estate in Personal Injury. In addition, Petitioners, in their Opposition to the Estate's Motion for Attorney's Fees, clearly delineate between their civil action against Mr. Small and the Probate action against Mr. Small's Estate.² Furthermore, the record does not indicate joinder of Personal Injury claims with the Probate action before the Court. As this court noted earlier in this order, the personal injury action continues to be adjudicated separately from this probate matter.³

For the reasons stated above, upon review of the record, this Court finds that this action is one governed by Probate law, not Personal Injury. Thus this Court rejects Petitioners' argument in this regard.

2. Magistrate's authority to consider Petitioners' ability to pay.

In their brief, Petitioners allege that the Magistrate

² St. Ct. Civ. No. 2010-0096, Opposition to Motion for Attorney's Fees, p. 11.

³ See Note 1.

erred as a matter of law in not considering the Petitioners' ability to pay in the award of attorneys' fees. In its January 28, 2013 Order, the Magistrate noted that there was no legal basis in the Virgin Islands to consider Petitioners' ability to pay. Petitioners point specifically to several cases from the Third Circuit Court of Appeals and the U.S. District Court of the Virgin Islands, arguing that such cases create a legal prerogative to consider Petitioners' ability to pay. We disagree.

This Court is bound, absent a contrary instruction from the Supreme Court, to continue to apply the Third Circuit and the Appellate Division of the District Court of the Virgin Islands' interpretation of local law. *Garcia v. Garcia*, S.Ct. Civ. No. 2012-0075, at 16. *In re People of the V.I.*, 51 V.I. 374, 389, n. 9 (V.I. 2009). Nonetheless, the Court disagrees with Petitioners' interpretation of Virgin Islands case law.

For example, in *Smith v. Gov't of V.I.*, the Third Circuit held that large and burdensome awards of attorneys' fees should be avoided in *taxpayer suits* so as not to discourage taxpayers' suits which are legitimate and not frivolous. *Smith v. Gov't of V.I.*, 361 F.2d 469, 471-72 (3d Cir. 1966). Thus the Third Circuit discouraged attorneys' fees as a matter of policy in taxpayers' suits, of which this current matter is clearly not one.

In *Smith v. V.I. Port Auth.*, the District Court overruled the appellant's objections to award of fees, claiming such fees were inequitable due to her dire straits. *Smith v. V.I. Port Auth.*, 2013 WL 152178 (D.V.I. Jan. 11, 2013). In its opinion, the Court did state that financial capacity is a factor to be considered. However, the Court also noted that an individual's assertions of financial burden need not be entirely heeded by the court. Thus the Court did not create a requirement, as a *matter of law*, that a party's ability to pay attorneys' fees be considered in such an award. *Id.*

More tellingly, in *Richardson v. V.I. Port Auth.*, the District Court held that Section 541(a) of the Virgin Islands Code sets no minimum standard for the award of attorneys' fees. *Richardson v. V.I. Port Auth.*, 2009-136, 2013 WL 1686338 (D.V.I. Apr. 16, 2013). Furthermore, the Court exercised its full discretion in declining to award them in that instance. As such, at no point was ability to pay made a required factor in considering award of attorney's fees.

As such, this Court believes that neither the District Court nor the Third Circuit established a requirement, as a matter of law, for ability to pay to be considered. Furthermore, this Court has received no instruction from the Supreme Court contrary to its interpretation of existing, binding precedent. As such, the Court finds that consideration

of a party's ability to pay is not required in determining an award of attorney's fees under Section 541. Thus, while the Court finds that the Magistrate may have considered Petitioners' ability to pay attorney's fees in his award, he was not required, as a matter of law, to do so. Therefore, on this point, Petitioners' argument is rejected.

In sum, having considered the Petitioners' arguments, the Court finds that Magistrate's Order of January 28, 2013, not contrary to Virgin Islands law. The Magistrate, in his award of attorney's fees, committed no error in his application of law. Thus, the Magistrate's January 28, 2013 Order awarding Attorney's Fees is **AFFIRMED**.

Therefore the Court, having been advised in the premises, it is hereby

ORDERED that the Magistrate's January 28, 2013 Order Granting Motion for Attorney's Fees is **AFFIRMED**; it is further

ORDERED that Petitioners' Petition for Review is **DENIED**; it is further

ORDERED that this Opinion and Order be served on Rhonda R. Small, Executrix of the Estate of Earl L. Small; Robert A. Waldman, Esq., counsel to the estate; and to Lee J. Rohn, Esq., counsel to petitioners Mikey Kalloo and Harry Dipchan.

DONE AND SO ORDERED this 1st day of October, 2013.

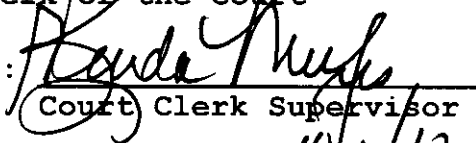


DENISE A. HINDS ROACH, JUDGE

A T T E S T:

Venetia Harvey-Velazquez Esq.,
Clerk of the Court

By:


Court Clerk Supervisor
10/1/13