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Committee on Opinions (22 NYCRR 7300.1)**

MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART 34

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NICHOLAS KALITSIS	X	
	:	INDEX NO. 10313/97
	:	
- against -	:	BY: KOHM, J.
	:	
FOX COURT REALTY, INC., et al.	:	DATED: MARCH , 2002

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X

Plaintiff instituted this negligence action seeking to recover damages for personal injuries suffered in an accident on a construction site on January 11, 1997. The case was settled for \$2.1 million, following a five-day trial with a directed verdict on the issue of liability, and before commencement of the trial on the issue of damages. David H. Perecman and Associates, P.L.L.C., a law firm, seeks a determination pursuant to Judiciary Law § 475 concerning a dispute between counsel over the net contingency fee. By order dated November 15, 2001, a hearing was directed on the issue of the apportionment of the legal fees.

David H. Perecman and Associates, P.L.L.C. asserts that plaintiff retained David Kuznicki, Esq., on a contingency fee basis, to represent him relative to his claim for personal injuries. It further asserts that Kuznicki introduced plaintiff, while in the hospital being treated for his injuries, to David Perecman, Esq., of Perecman & Dersovitz, P.C., a law firm. According to David H. Perecman and Associates, P.L.L.C., Kuznicki recommended that plaintiff retain Perecman & Dersovitz, P.C. based upon the trial experience of Perecman in connection with negligence and Labor Law cases. David H. Perecman and Associates, P.L.L.C.

asserts that plaintiff retained Perecman & Dersovitz, P.C. and that Kuznicki entered into an oral fee-sharing agreement with Perecman, on behalf of Perecman & Dersovitz, P.C., whereby Kuznicki was to receive one-third of the net contingency fee recovered, and Perecman & Dersovitz, P.C. was to receive the remaining two-thirds of the net contingency fee. Perecman & Dersovitz, P.C. commenced this action on behalf of plaintiff by filing the summons and complaint on April 29, 1997.

Perecman and Roni Dersovitz, Esq. were each 50% shareholders and the only officers of Perecman & Dersovitz, P.C. prior to its dissolution, which occurred during the pendency of this action. David H. Perecman and Associates, P.L.L.C. asserts that following the dissolution of Perecman & Dersovitz, P.C., it assumed the representation of plaintiff through the conclusion of the case. David H. Perecman and Associates, P.L.L.C. contends that Kuznicki is entitled to recover one-third of the net contingency fee pursuant to the oral fee-sharing agreement, and that it is entitled to recover at least 75% of the remaining two-thirds of the net fee. David H. Perecman and Associates, P.L.L.C. also contends that Perecman & Dersovitz, P.C. is entitled to a distribution of no more than 25% of that two-thirds portion of the net contingency fee.

David Kuznicki, Esq. asserts he is entitled to one-third of the net contingency fee, claiming that he had an enforceable oral fee-sharing agreement with Perecman & Dersovitz, P.C.

Roni Dersovitz, Esq. contends that Perecman & Dersovitz, P.C. is entitled to be apportioned at least

two-thirds, but no less than one-half, of the net contingency fee, and that David H. Perecman and Associates, P.L.L.C. should be awarded no more than the remaining one-third of the net fee. Dersovitz objects to any apportionment of the contingency fee to Kuznicki. Dersovitz disputes the existence of any oral fee-sharing agreement between Perecman & Dersovitz, P.C. and Kuznicki, and argues that Kuznicki is not entitled to recover a referral fee, on the ground Kuznicki failed to file a retainer statement under the rules of the Appellate Division, Second Department.

In accordance with the order dated November 15, 2001, a hearing was held before this court, on December 3, 2001, on the issue of the apportionment of the legal fees. At the hearing, Kuznicki, Perecman and Dersovitz each testified and the court had the opportunity to hear their testimony and observe their demeanor, and consider those exhibits admitted into evidence.

David Kuznicki, Esq., testified that he was retained to represent plaintiff in a negligence action on a contingency fee basis, and that he thereafter recommended to plaintiff that David Perecman, Esq., of Perecman & Dersovitz, P.C., also be retained as trial counsel. According to Kuznicki, plaintiff agreed and engaged Perecman & Dersovitz, P.C. as counsel. Perecman likewise testified that plaintiff retained Kuznicki, plaintiff was referred to Perecman & Dersovitz, P.C. by Kuznicki, and plaintiff retained Perecman & Dersovitz, P.C. on a contingency fee basis.

Kuznicki and Perecman each credibly testified that at the time of the engagement of Perecman & Dersovitz, P.C., in early January 1997, they entered into an oral agreement, whereby Kuznicki

was to receive one-third of the net contingency fee, ultimately received upon the disposition of the case by settlement or verdict, and Perecman & Dersovitz, P.C. was to receive the other two-thirds of the net fee. Perecman further testified that plaintiff was present when the oral fee-sharing agreement was reached and that plaintiff assented to its terms. Perecman explained that, on occasion throughout his career, including during the period he was associated with Perecman & Dersovitz, P.C., he had entered into oral fee-sharing agreements with referring attorneys. Perecman and Kuznicki each testified that Perecman & Dersovitz, P.C. had referred Workers' Compensation matters to Kuznicki, for which Kuznicki shared his fee with Perecman & Dersovitz, P.C. In addition, they testified Kuznicki had previously referred his own wife's personal injury case to Perecman & Dersovitz, P.C., and Perecman, on behalf of the firm, had agreed to waive entitlement to one-third of the contingent fee recovered on her behalf, in recognition of the fact a referral fee otherwise would be owed to Kuznicki.

Roni Dersovitz, Esq. testified that he was unaware, until a number of weeks prior to the hearing, of the existence of the oral fee-sharing agreement reached by Perecman, on behalf of Perecman & Dersovitz, P.C., with Kuznicki. Nevertheless, Dersovitz admitted he knew plaintiff's case had been referred to Perecman & Dersovitz, P.C. by Kuznicki. Dersovitz further admitted that he was aware of other instances in which Perecman & Dersovitz, P.C., shared counsel fees with referring attorneys based upon oral agreements entered into by Perecman, on

behalf of Perecman & Dersovitz, P.C. He offered no proof that he ever inquired of Perecman as to whether any arrangement had been made with Kuznicki to share a fee. Rather, he testified that plaintiff's case was considered a "heavy case" in the firm, Perecman was the attorney in the firm who primarily worked on the "heavy" cases, and Perecman often kept such cases "close to the vest."

Kuznicki credibly testified that he interviewed plaintiff at the hospital, and served as the contact person for plaintiff, and plaintiff's father-in-law, throughout the case. He also testified that, although he did not attend the trial, he served as an intermediary between plaintiff and plaintiff's father-in-law, and Perecman & Dersovitz, P.C., and consulted with Perecman & Dersovitz, P.C. concerning issues related to plaintiff's earnings capacity, and the structure of the settlement. Perecman likewise credibly testified that Kuznicki was involved in the case, by keeping in close contact with plaintiff and Perecman & Dersovitz, P.C. Kuznicki admits that he has received a separate attorney's fee for handling the Workers' Compensation portion of plaintiff's case, which has not been shared with Perecman & Dersovitz, P.C.

Perecman, in his affirmation submitted on behalf of David H. Perecman and Associates, P.L.L.C., stated, that during the period in which Perecman & Dersovitz, P.C. represented plaintiff, the firm conducted preliminary investigations, commenced the action, accumulated medical and lost earning documentation, served bills of particulars, conducted "a significant amount of

discovery," and placed the matter on the trial calendar. Perecman credibly testified that prior to its dissolution, Perecman & Dersovitz, P.C. had spent 100 total hours on the case, including the taking of depositions, the preparation and submission of a motion for summary judgment, and the evaluation of the case for settlement purposes. Perecman estimated the expenses incurred by Perecman & Dersovitz, P.C. totaled \$4,000.

Perecman also credibly testified at the hearing, that during the period in which David H. Perecman and Associates, P.L.L.C. managed the representation of plaintiff, the firm (1) arranged for an additional physical examination of plaintiff, (2) collected financial information from and about plaintiff, (3) prepared and forwarded authorizations to various doctors, (4) forwarded responses to discovery requests, (5) arranged additional depositions, (6) reviewed and annotated deposition testimony (for at least 20 hours), (7) reviewed medical records and reports, (8) consulted with and retained experts regarding economic, medical and engineering issues, (9) prepared and forwarded responses to expert witness requests, (10) researched the law and corresponded with defense firms regarding the adequacy of the response to the expert witness requests, (11) evaluated the case for settlement value purposes, (12) met with plaintiff approximately five times, (13) arranged for the obtaining and copying of x-rays, and the creation of a medical illustration, (14) reviewed the illustration and arranged for its revisal, (15) obtained blow-ups of a large group of photographs, (16) attended a mediation for a full day, (17) prepared a dozen

subpoenas, (18) prepared plaintiff at length for trial testimony, (19) attended pretrial conferences, (20) selected jurors over approximately three days, (21) made daily telephone calls to plaintiff during jury selection and the trial on liability, (22) negotiated towards settlement, (23) made a motion to withdraw certain claims as a matter of strategy, (24) tried the liability portion of the case over five days, calling five witnesses, cross-examining two defense witnesses and offering photographs into evidence, (25) researched the issue of the parties' respective entitlement to a directed verdict, (26) communicated and advised plaintiff relative to settlement offers, (27) negotiated the ultimate settlement, (28) drafted, amended and reviewed the settlement agreement, (29) explained the settlement agreement to plaintiff in person and on the telephone, (30) met with plaintiff several times and prepared letters regarding the tax consequences of the settlement, and (31) arranged the setting up of a safe haven account to expedite payment to plaintiff. Perecman estimated that David H. Perecman and Associates, P.L.L.C. spent 200 hours on plaintiff's case, and testified it incurred \$10,842 in taxable disbursements.

Dersovitz testified that Perecman & Dersovitz, P.C. spent "hundreds of hours" in representing plaintiff on the case, but did not detail the work performed. Instead, he offered, into evidence, a computer printout listing the various services rendered by Perecman & Dersovitz, P.C. and David H. Perecman and Associates, P.L.L.C. in the representation of plaintiff. He also

estimated Perecman & Dersovitz, P.C. spent approximately \$4,000 in expenses.

Based upon the credible testimony, and the documents admitted into evidence, the court finds that plaintiff initially retained, on a contingency fee basis, Kuznicki, who, in turn, engaged Perecman & Dersovitz, P.C. to represent plaintiff in the personal injury case. The court further finds that Kuznicki and Perecman, on behalf of Perecman & Dersovitz, P.C., reached an oral agreement, pursuant to which any net contingency fee recovered, was to be shared between Kuznicki and Perecman & Dersovitz, P.C., on a one-third, two-thirds basis. The court further finds that, upon the dissolution of Perecman & Dersovitz, P.C., David H. Perecman and Associates, P.L.L.C. was substituted, albeit not formally, for Perecman & Dersovitz, P.C., and represented plaintiff to the conclusion of the case.

The court notes that the fact the fee-sharing agreement was oral does not render it unenforceable (see, Stinnett by Stinnett v Sears Roebuck & Co., 201 AD2d 362; Clark v Vicinanza, 151 AD2d 951). The court finds that plaintiff was aware and consented to the employment of Perecman & Dersovitz, P.C., and the substitution of David H. Perecman and Associates, P.L.L.C. for Perecman & Dersovitz, P.C., upon its dissolution. Plaintiff was also aware, after full disclosure, that a division of fees would be made between Kuznicki and Perecman & Dersovitz, P.C. The court also finds that Kuznicki, Perecman & Dersovitz, P.C. and David H. Perecman and Associates, P.L.L.C. all actually contributed to the legal work. The court notes there is no claim that any of the

attorneys refused to contribute more substantially (see, Benjamin v Koepfel, 85 NY2d 549; Sterling v Miller, 2 AD2d 900, affd 3 NY2d 778).

To the extent that Kuznicki did not file a retainer statement, Kuznicki filed the statement on December 5, 2001, following the hearing, and submitted an affirmation with it, indicating that his failure to do so earlier, was due to inadvertence. Under such circumstance, where the omission to file was not wilful and has been belatedly cured, the court finds that Kuznicki's right to recover a legal fee, to the extent it was earned, is preserved (see, Warren v Myers, 187 Misc 2d 668; cf., Matter of Abreu, 168 Misc 2d 229, 234). The court further finds that Dersovitz, as a member of Perecman & Dersovitz, P.C., is bound by the one-third/two-thirds oral fee-sharing agreement with Kuznicki, notwithstanding his prior lack of awareness of its existence. Dersovitz has made no showing that Perecman, as an officer of Perecman & Dersovitz, P.C., was without requisite authority to enter into the oral fee-sharing agreement on the part of the firm (see, Business Corporation Law § 1513).

David H. Perecman and Associates, P.L.L.C., Perecman and Dersovitz agree that the settlement agreement dated April 24, 2001 (and made effective on March 1, 2001), dissolving Perecman & Dersovitz, P.C. (and settling various monetary disputes related to the firm and to two other entities) is applicable to, and covers, the apportionment of the two-thirds portion of the net contingency fee between Perecman & Dersovitz, P.C., as the outgoing firm and David H. Perecman and Associates, P.L.L.C., as the

incoming firm (see, Santalucia v Sebright Transp., Inc., 232 F3d 293; see also, Grant v Heit, 263 AD2d 388; Shandell v Katz, 217 AD2d 472; DelCasino v Koeppel, 207 AD2d 374). The parties to the agreement contemplated that Perecman would form a successor law firm, and required Dersovitz to recommend to clients of Perecman & Dersovitz, P.C. that they remain with the successor firm. The agreement provided that with respect to any contingency fee obtained in plaintiff's case, Dersovitz had the right to exercise his option to accept the division of the fee, as between Perecman & Dersovitz, P.C. and the incoming firm, in accordance with a schedule found in paragraph 10,<sup>1</sup> or to seek a mutual agreement with the incoming counsel. The dissolution agreement further provided that, in the event Dersovitz did not choose to accept the division of the fee in accordance with the schedule, or could not reach an agreement with the incoming firm, the matter would be arbitrated or determined by the court. Upon Dersovitz's refusal to accept the division of the contingency fee pursuant to the schedule, and to agree with David H. Perecman and Associates, P.L.L.C. concerning the division of the fee, David H. Perecman and Associates, P.L.L.C. sought a judicial determination. Perecman and Dersovitz, by participating in the hearing, have waived any right to compel arbitration of the issue.

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The copy of the agreement admitted into evidence is partially redacted. It appears, from the redacted paragraph, that certain percentages of fees earned in various matters are to be distributed to Perecman & Dersovitz, P.C.

The dissolution agreement provides that the sharing of the fee, as between Perecman & Dersovitz, P.C. and the incoming firm, must be "determined in accordance with the applicable provisions of the New York State Judiciary Law." It states "[i]t shall not be an issue in any proceeding regarding the division of legal fees that the work performed prior to the effective date of the herein agreement was performed by either Perecman or Dersovitz individually, or by any other employees of the P.C. Such work performed prior to the effective date of the \*\*\* agreement shall be considered the work of the P.C."

Under the Judiciary Law, an outgoing firm has the right to elect to take compensation on the basis of a fixed dollar amount based upon quantum meruit for the reasonable value of services, or a contingent percentage fee based on the proportionate share of the work performed on the whole case (see, *Lai Ling Cheng v Modansky Leasing Co., Inc.*, 73 NY2d 454, 458). In this instance, Dersovitz, Perecman and David H. Perecman and Associates, P.L.L.C. all request that the court fix the compensation of Perecman & Dersovitz, P.C. based upon a percentage share of the contingency fee. The court has considered the respective testimony of Perecman and Dersovitz and the documents in evidence, including the computer printout of the work performed. It has evaluated the efforts expended and difficulty of the matters handled by the respective firms, the skills and experience each firm possessed, and the effectiveness of David H. Perecman and Associates, P.L.L.C. in trying the case and bringing the case to resolution, including the making of decisions and employment of strategies necessary to place this case in a

favorable position for settlement. The court has considered the affidavit of plaintiff, wherein plaintiff avers it was through the advice and assurances given by David H. Perecman and Associates, P.L.L.C., that he rejected a series of settlement offers ranging from \$450,000 to \$2 million, obtained through the firm's persistence during the course of the trial, and finally accepted the \$2.1 million offer. The court finds that the ultimate value of the contingency fee for the \$2.1 million settlement was primarily achieved by David H. Perecman and Associates, P.L.L.C., after the dissolution of Perecman & Dersovitz, P.C., and that Perecman & Dersovitz, P.C., as the outgoing firm, is entitled to 25% of the two-thirds share of the net contingency fee, and David H. Perecman and Associates, P.L.L.C., as the incoming firm is entitled to 75% of the two-thirds share of the net contingency fee.

Settle order.

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J.S.C.