

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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GEORGE CELIFIE and MARTHA CELIFIE,

Index No: 26331/05

Hearing Dates: June 13, 2008

June 16, 2008

Plaintiffs,

Final Submission Date: September 19, 2008

-against-

Decision and Order After Hearing

CLIFFORD A. ELLIS, KRANDELL BEEF CO.,
and JAMES L. ROGERS, JR.,

Defendants.
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By order of this Court dated April 28, 2008, this matter was set down for a hearing on May 23, 2008 for a determination of the issues raised on the motion by the law offices of Shaevitz & Shaevitz, Esqs. (“Shaevitz”), the attorney for plaintiffs George Celifie and Martha Celifie (“plaintiffs”), for an order allocating the attorneys’ fees between its law firm and the law offices of Katz & Kern, LLP (“Kern”), plaintiffs’ former attorney. The hearing was held on June 13, 2008, and continued on June 16, 2008, at which time Shaevitz and Kern were permitted to serve and file post-hearing memoranda of law on or before September 2, 2008, which date was extended to September 19, 2008. Pursuant to the Post Hearing Memorandum and Submissions, Kern contends, inter alia, that as it did majority of the work on the case, it is entitled to a large portion of the attorneys’ fees.¹ Conversely, in the Post-Attorney’s Fee Hearing Brief and Memorandum of Law, Shaevitz contends, from the outset, that Kern is not entitled to any portion of the disputed fees due to its failure to sustain its burden of proof with respect to quantum meruit. Alternatively, Shaevitz asserts that if it is determined by this Court that Kern is entitled to fees on a contingency fee basis, Kern is entitled to one percent of the net fees.

¹ Subsequent to the post hearing submissions, counsel for Shaevitz, by letter dated September 19, 2008, raised an objection to three exhibits annexed to the submission of Kern, which he contends were neither proffered at the hearing or offered into evidence. Counsel further requested leave to serve a supplemental memorandum in response, which this Court hereby denies, however, this Court will make a further determination as to whether such documents will be considered on this application following its review of such exhibits.

Relevant Facts

The underlying action was commenced on behalf of plaintiffs by Katz, which drafted a summons and complaint, and purchased an index number on December 8, 2005, seeking damages for personal injuries resulting from an automobile accident which occurred on February 1, 2005. Shortly after the filing of the pleadings, plaintiffs retained Shaevitz as their new attorney on December 13, 2005, and subsequent thereto served defendants. On October 3, 2007, Shaevitz negotiated a settlement of the instant lawsuit for \$250,000.00, of which, apportionment in the amount of \$82,874.63 is sought, which represents attorneys' fees arising from services rendered on behalf of plaintiffs in this matter by the respective law firms.

Discussion

It is well settled that the award of reasonable counsel fees is within the sound discretion of the trial court based upon factors such as the time and labor required, the difficulty of the questions involved, the skill required to handle the matter, and the attorneys' experience, ability, and reputation. See, Lodovico v. Lodovico, 51 A.D.3d 731 (2nd Dept. 2008); Glick v. Glick, 25 A.D.3d 533 (2nd Dept. 2006); Palumbo v. Palumbo, 10 A.D.3d 680, 782 N.Y.S.2d 106 (2nd Dept. 2004); M. Sobol, Inc. v. Wykagyl Pharmacy, Inc., 282 A.D.2d 438 (2nd Dept. 2001). "The issue of the apportionment of attorneys' fees is controlled by the circumstances and equities of each particular case (citation omitted), and the trial court is in the best position to assess these factors [citation omitted]." Ebrahimian v. Long Island R.R., 269 A.D.2d 488, 489 (2nd Dept. 2000); see, Mazza v. Marcello, 20 A.D.3d 554 (2nd Dept. 2005); Juste v. New York City Transit Authority, 5 A.D.3d 736 (2nd Dept. 2004). Nevertheless, as a preliminary matter, it must first be determined by this Court whether Kern, as the former attorney for plaintiffs, is entitled to attorneys' fees on a quantum meruit or a contingency fee basis.

It is well established that "[] a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney." Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 43 (1990); see, King v. Fox, 7 N.Y.3d 181 (2006); Papadopoulos v. Goldstein, Goldstein & Rikon, P.C., 283 A.D.2d 649 (2nd Dept. 2001). "An attorney who is discharged without cause before the completion of services may recover the reasonable value of his or her services in quantum meruit (citations omitted). An attorney who is discharged for cause, however, is not entitled to compensation or a lien (citations omitted)." Callaghan v. Callaghan, 48 A.D.3d 500, 500-501 (2nd Dept. 2008). Since this record is devoid of any allegations that Kern was discharged for cause, and thus is not entitled to fees on that ground, this Court's query is what basis Kern is entitled to compensation.

"As against the client, a discharged attorney may recover the 'fair and reasonable value' of the services rendered (citation omitted), determined at the time of discharge and computed on the basis of quantum meruit. Only if the client and attorney agree may the attorney receive a fee based on a percentage of the recovery." Matter of Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655, 658 (1993). "But when the dispute is between attorneys, as here, the rules are somewhat different. The discharged attorney may elect to receive compensation immediately based on quantum meruit

[for the reasonable value of services rendered] or on a contingent percentage fee based on the proportionate share of the work performed on the entire case” (citation omitted).” Byrne v. Leblond, 25 A.D.3d 640, 642 (2nd Dept. 2006); see, Lai Ling Cheng v. Modansky Leasing Co., Inc., 73 N.Y.2d 454, 458 (1989); Russo v. City of New York, 48 A.D.3d 540 (2nd Dept. 2008); Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Associates, 41 A.D.3d 367, 839 N.Y.S.2d 469 (1st Dept. 2007); Abenante v. Star Gas Corp., 33 A.D.3d 638 (2nd Dept. 2006); Ocasio v. Schwertz, 284 A.D.2d 443 (2nd Dept. 2001). Where an election is not made or sought at the time of discharge, it is presumed that the outgoing attorney elected to receive a contingent percentage fee. See, Lai Ling Cheng v. Modansky Leasing Co., *supra*, 73 N.Y.2d at 458 (1989); Matter of Cohen v. Grainger, Tesoriero & Bell, 81 N.Y.2d 655 (1993).

In the case at bar, by letter dated January 26, 2006, Kern stated, inter alia, that “under the Judiciary Law, this office maintains and your office agrees that attorney’s fees will be held in escrow and not be distributed until we agree as to the amounts of said attorney’s fee and absent any agreement, a Court of competent jurisdiction shall determine the fees due our respective offices.” Thus, it is clear that Kern “elected to receive a contingent percentage fee, as it failed to demand a fixed fee at the time of discharge.” Connelly v. Motor Vehicle Accident Indemnification Corp., 292 A.D.2d 332, 333 (2nd Dept. 2002); see, generally, Tutarashvili v. Barzilay, 39 A.D.3d 851 (2nd Dept. 2007). Despite the contention to the contrary by Shaevitz, its reliance upon Kern’s failure to proffer a retainer agreement at the apportionment hearing as evidence of Kern’s compensation being limited to quantum meruit, is misplaced. Although Shaevitz correctly asserts, and this Court determines, that the belated submissions of the three exhibits annexed to Kern’s Post Hearing Memorandum and Submissions, including the retainer agreement, which were not proffered as evidence at the hearing will not be considered, such retainer agreement is of no significance on this dispute between counsel. See, Byrne v. Leblond, 25 A.D.3d 640, 642 (2nd Dept. 2006); Benjamin E. Setareh, P.C. v. Cammarasana & Bilello, Esqs., 35 A.D.3d 600 (2nd Dept. 2006)[stating “the Supreme Court properly declined to fix the fee on the basis of quantum meruit because the appellant had not elected that manner of compensation when it was discharged.”]. Consequently, it is determined by this Court that Kern is entitled to attorneys’ fees upon a contingent percentage fee based on the proportionate share of the work performed on the entire case. Thus, the issue now is the reasonableness of attorneys’ fees based upon the proportionate share of work done by each attorney.

“In fee-sharing disputes between attorneys, ‘the courts will not inquire into the precise worth of the services performed by the parties as long as each party actually contributed to the legal work and there is no claim that either refused to contribute more substantially’ (citation omitted).” Reich v. Wolf & Fuhrman, P.C., 36 A.D.3d 885 (2nd Dept. 2007). The Court’s role is to “consider ‘evidence of the time and skill required in that case, the complexity of the matter, the attorney’s experience, ability, and reputation, the client’s benefit from the services, and the fee usually charged by other attorneys for similar services (citations omitted).”” Callaghan v. Callaghan, 48 A.D.3d 500 (2nd Dept. 2008); see, Abenante v. Star Gas Corp., 33 A.D.3d 638 (2nd Dept. 2006); Byrne v. Leblond, 25 A.D.3d 640 (2nd Dept. 2006); Malerba v. Clifford, 18 A.D.3d 451 (2nd Dept. 2005). The reasonableness of a counsel fee request “‘can be determined only after consideration of the difficulty of the issues and the skill required to resolve them; the lawyers’ experience, ability and reputation; the time and labor required; the amount involved and benefit resulting to the client from the services;

the customary fee charged for similar services; the contingency or certainty of compensation; the results obtained and the responsibility involved.”” Bankers Federal Sav. Bank FSB v. Off West Broadway Developers, 224 A.D.2d 376, 377 (1st Dept. 1996); see, Diaz v. Audi of America, Inc., 50 A.D.3d 728 (2nd Dept. 2008) [stating that “in general, factors to be considered include (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved.”]; see, generally, NYCTL 1998-1 Trust v. Oneg Shabbos, Inc., 37 A.D.3d 789 (2nd Dept. 2007).

Here, in the Post Hearing Memorandum and Submissions, Kern contends, in pertinent part, the following:

The Kern firm is entitled to a majority of the attorney fee as the quality and expertise used by the Kern firm in carefully analyzing and separating the conflicting medical information of [plaintiff] from this accident and his prior medical conditions and all his previous accidents which were meticulously analyzed by the Kern firm. Kern filed a summons and complaint and effectuated service of process, filed the no fault applications and SUM claim, negotiated the property damage claim, settling with the offending truck’s insurance carrier. Appeared at an Examination Under Oath on behalf of and with [plaintiff] and secured a loan for [plaintiff]. The current firm expended a prodigious amount of time on this matter.

In the Post-Attorney’s Fee Hearing Brief and Memorandum of Law, Shaevitz contends, in relevant part:

Between December 12, 2005 and May 22, 2008, Shaevitz generated numerous pleadings on behalf of [plaintiff] with respect to his February 1, 2005 automobile accident. Without listing them individually, plaintiff’s Exhibit 9 amounts to a case chronology that includes all pleadings, motions, discovery requests and Examinations Before Trial from the time that Shaevitz took over the representation of [plaintiff’s] automobile accident case until its resolution. The Court will note that it includes seventy-one separate items.

[B]etween March 21, 2006 and March 26, 2008, an attorney from Shaevitz attended court on behalf of [plaintiff] approximately fifteen (15) times.

In further support of its application, Shaevitz further states the following regarding the contribution of Kern:

Save the Summons and Complaint that was filed immediately after [plaintiff] indicated to Kern that he was unhappy with the progress of his case and wanted to take his case to another firm, all work done by Kern was during the pre-litigation phase.

In this connection, pre-litigation work undertaken by Kern included reviewing the police report, reviewing no-fault correspondence, reviewing hospital records and the treating physician's medical records, settling a property damage claim, securing a personal loan for [plaintiff], purportedly preparing, then attending an EUO with him, and running a post-EUO search for prior automobile accidents involving [plaintiff]. This is the full extent of work undertaken on [plaintiff's] February 1, 2005 motor vehicle accident by Kern.

The hearing testimony established that on December 13, 2005, Shaevitz was substituted as plaintiffs' attorney, and just prior thereto, Katz commenced this action on behalf of plaintiffs on December 8, 2005, seeking damages for personal injuries resulting from an automobile accident occurring on February 1, 2005. The testimony and exhibits admitted into evidence also established that Katz, had a pre-existing professional relationship with plaintiff as it commenced other actions on plaintiffs behalf arising from unrelated claims. Attorney Chet Kern testified that as a result of the other incidents, particularly a labor law case in which plaintiff allegedly sustained injury to his left hip, ankle and foot, as well as a fractured rib, his firm spent a significant amount of time carefully parsing out the "medical overlap problems that occurred in [plaintiff's] medical history." [(See, Transcript at p. 24 (6/13)]. He further testified that this "had to be carefully analyzed in order to protect this particular action and to protect the 240 action." [(See, Transcript at p. 24 (6/13)]. Attorney Kern stated that the summons and complaint was the only pleading filed by his law firm, and it did not file a Bill of Particulars or conduct a Preliminary Conference. When further probed about the pleading work done by his law firm, he indicated that the work done by Shaevitz was routine, and stated [(See, Transcript at p. 26 (6/13))]:

Well, with all due respect, this is correspondence generated by the defendant to which the Shaevitz firm responded to. The Shaevitz firm in substance was to take the medical, do a Bill of Particulars, file for a Preliminary Conference, hold two depositions, one of [plaintiff], one of the driver. The matter was placed on the trial calendar. [Plaintiff] was then submitted to several physicals in the matter and then set up for mediation. Case on trial. We settled.

Attorney Kern asserted that he reviewed numerous documents in this matter, as well as plaintiff's medical history, obtained a settlement for property damage and "enlisted the use of a nurse paralegal [] to separate out the injuries that happened in the construction accident and the auto accident to see which ones overlapped []. [(See, Transcript at pgs. 41- 44 (6/13)]. Although he maintained the difficulty his law firm had in discerning and separating the injuries in the labor law case which involved plaintiff's left hip, ankle and foot, as well as a fractured rib, Attorney Kern nevertheless

acknowledged that there were no claims made in the labor law case for a torn meniscus and surgery, or a wrist fracture, as claimed in the instant automobile action. [(See, Transcript at pgs. 47- 48 (6/13)]. Lastly, he stated in response to the query that his law firm secured \$2000.00 on the instant matter which Shaevitz settled for \$250,000.00, that the amount represent what plaintiff wanted at the time and “if [plaintiff] wanted more, [Kern] would have been able to secure more.” [(See, Transcript at p. 51 (6/13)].

Attorney Shaevitz testified, with respect to the legal services his law firm provided to plaintiff, that he initially met with plaintiff to discuss the case and issues in detail, attempted to contact Kern while plaintiff was in his office, to no avail, and had plaintiff sign all the necessary papers, such as the retainer agreement and a letter to Kern indicating that his law firm had been retained, and that Kern should transfer the file. [(See, Transcript at pgs. 59- 66 (6/16)]. Plaintiff testified that he attended an Examination Under Oath conducted by his insurance company in August of 2005, whereby he was prepared by Kern in the ten to fifteen minute walk to where the examination was to take place. When asked if he was prepared by Kern for a half a day, as affirmed by Kern, plaintiff stated no. He further stated that despite Kern’s affirmation, the examination was very brief, “about an hour and change,” and did not take a half a day either. [(See, Transcript at pgs. 100- 102 (6/16)]. Lastly, plaintiff stated that he discharged Kern because was not satisfied with its representation, stating [(See, Transcript at p. 102 (6/16)]:

Briefly, because many occasions I have been trying to call him. I could never get him on the phone. They would say he is not there. He was on vacation. He was never available to talk to me. [] I wanted to know something about my case. Every time I called they told me he is the only one that will talk to me. I was getting angry with what was going on. I went to the office myself. I tell them I want my file because I want to bring it to another lawyer. They said I cannot have it unless the lawyer that I was going to get requests for it.

Here, there is no question that both attorneys provided legal services for plaintiff and are entitled to receive attorneys’ fees based upon each of their proportionate share of the work performed. Nevertheless, this case involved an uncomplicated motor vehicle accident that neither presented unusual or difficult questions of law nor required extraordinary legal skills. Despite Kern’s emphasis upon the difficulty it encounter in parsing out the respective injuries between the labor law case and the instant action, this Court finds that argument disingenuous and unavailing. The evidence established that although Kern and Shaevitz each provided legal services on plaintiff’s behalf, it was Shaevitz who vigorously pursued plaintiff’s claim and effectuated a settlement on his behalf. Despite Kern’s contention to the contrary, the lion’s share of the work was done by Shaevitz, and not Kern. Indeed, the record is wholly devoid of evidence which would remotely support that contention, and other than perfunctory and pedestrian work incident to the commencement this matter, Kern has not demonstrated its entitlement to a modest portion of the subject fees, no less a significant portion thereof. Moreover, Kern failed to proffer time records in support of the services it rendered, or any credible indicia of its entitlement to the proportionate

share of the legal fees in this matter exceeding a de minimis percentage. The Appellate Division, Second Department decision, Brown v. Governele, 29 A.D.3d 617 (2nd Dept. 2006), is illustrative of this point. There, the supreme court apportioned 60% of the net contingency fee in the action to plaintiff's current attorney and 40% thereof to the former counsel. In modifying the underlying decision on the facts to the extent of awarding the current attorney 95% of the net contingency fee and former attorney 5% of the fees, the Appellate Division, Second Department stated [29 A.D.3d at 618]:

Harry I. Katz, P.C., the outgoing counsel, commenced this action on the plaintiff's behalf. Trief & Olk, the incoming counsel, filed an amended summons and complaint on behalf of the plaintiff, conducted discovery, successfully opposed a motion for summary judgment on the issue of the liability of the defendant Federal Express Corporation, and represented the plaintiff at mediation, which resulted in a settlement for the sum of \$300,000.

Considering the amount of time spent by the attorneys on the case, the nature of the work performed, and the relative contributions of counsel (see Lai Ling Cheng v Modansky Leasing Co., 73 NY2d 454, 458 [1989]; Podbielski v KMO 361 Realty Assoc., 6 AD3d 597 [2004]; Matter of Gary E. Rosenberg, P.C. v McCormack, 250 AD2d 679 [1998]), we find that the Supreme Court's assessment of the legal services provided by Harry I. Katz, P.C., was significantly overvalued and constituted an improvident exercise of discretion (see Podbielski v KMO 361 Realty Assoc., *supra*; Lanfranchi v Polatsch, 246 AD2d 513 [1998]; Lai Ling Cheng v Modansky Leasing Co., 153 AD2d 839 [1989]).

See, Podbielski v. KMO 361 Realty Associates, 6 A.D.3d 597 (2nd Dept. 2004); Jacoby & Meyers Law Offices, LLP v. Gorayeb & Associates, 282 A.D.2d 573 (2nd Dept. 2001); *see, also*, Abenante v. Star Gas Corp., 33 A.D.3d 638 (2nd Dept. 2006)[stating “when considering the amount of time spent by each attorney on the case, the work performed, and the amount of recovery for the client (citation omitted), the Supreme Court providently exercised its discretion in fixing Weisberg's fee at \$10,699.64, which was 1% of the total attorney's fee.”]; Malerba v. Clifford, 18 A.D.3d 451 (2nd Dept. 2005)[stating “considering the amount of time spent on the entire case, the nature of the work performed, and the relative contributions of counsel (citations omitted), there is no reason to disturb the Supreme Court's determination awarding the plaintiff an attorney's fee of “2% of the fee collected on the total \$200,000 settlement” in the underlying personal injury action.”]; *compare*, Schneebalg v. Lincoln Sec. Life Ins. Co., 225 A.D.2d 684 (2nd Dept. 1996)[stating “the outgoing attorney in this case, the appellant, elected to receive a contingent percentage fee. Since both the appellant and the incoming attorney for the plaintiff appear to have equally contributed to the final settlement of this action, the fee should be divided equally between them.”].

Conclusion

Accordingly, in determining the appropriate apportionment of the legal fees, this Court finds, based upon the totality of the evidence and equitable considerations applicable to the facts of this particular case, that Shaevitz & Shaevitz, Esqs., the attorney for plaintiffs George Celifie and Martha Celifie, is entitled to retain 94% of the attorneys' fees and that Katz & Kern, LLP, plaintiffs' former attorney, is entitled to a fee distribution of 6% of the \$82,874.63 legal fee remaining in escrow, and it is hereby

ORDERED, that Shaevitz & Shaevitz, Esqs., is entitled to retain 94% of the attorneys' fees in this matter, representing their contingent percentage fee based upon its proportionate share of the work performed on the entire case, in the amount of \$77,902.15; and it is further

ORDERED, that Katz & Kern, LLP, is entitled to a fee distribution of 6% of the attorneys' fees in this matter in the amount of \$4,972.48, such amount representing their contingent percentage fee based upon its proportionate share of the work performed on the entire case; and it is further

ORDERED, that Shaevitz & Shaevitz, Esqs., is directed to make a fee distribution of the attorneys' fees remaining in escrow in the amount of \$4,972.48, to the law offices of Katz & Kern, LLP, within twenty (20) days of service of a copy of this decision and order of this Court with notice of entry.

Dated: October 29, 2008

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J.S.C.