NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable Bernice D. Siegal Part 5
Justice

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SIDNEY HIRSCHFELD, Director, Mental Hygiene Legal Service, Second Judicial Department, and MARVIN BERNSTEIN, Director, Mental Hygiene Legal Service, First Judicial Department,

Plaintiffs,

-against-

POLLY B. HORTON, in her official capacity as the Director, Assigned Counsel Plan, The City of New York Office of the Mayor,

Defendant.
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Index No. 16340/08
Motion Date: 8/19/09
Calendar No. 16
Motion Seq. No. 2

The following papers numbered 1 to 15 read on this motion and cross-motion for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	1-4
Memorandum of Law in Support of Motion.....	5-6
Notice of Cross-Motion -Exhibits.....	7-9
Defendant's Reply Memorandum of Law.....	10-12
Reply in Support of Cross-Motion.....	13-14
Stipulation.....	15

The court's order of January 8, 2010, is hereby, sua sponte, vacated and amended and the following order substitutes in its place and stead:

Upon the foregoing papers, it is ordered that this motion is determined as follows:

In July 2008, Plaintiff, Mental Hygiene Legal Services (hereinafter "MHLS") initiated this proceeding against Defendant Assigned Counsel Plan (hereinafter "ACP") for compensation for services rendered under County Law 18-B as court appointed counsel for indigent allegedly incapacitated persons (hereinafter "AIP"). MHLS

requests a permanent injunction directing compensation from ACP for all existing and future judgments and orders under County Law 18-B.

Defendant moves pursuant to CPLR §3212 on the grounds that defendants are entitled to summary judgment as a matter of law dismissing the proceeding as the City is not responsible for compensating a New York State entity for legal representation pursuant to Article 81 and MHLS cross-moves for summary judgment seeking the following relief: (1) pursuant to CPLR §3001, ACP is required to compensate MHLS when MHLS is appointed and serves as counsel to represent indigent AIPs in guardianship proceedings and the court awards counsel fees to MHLS under County Law §18-B; (2) a permanent injunction directing that where existing and future judgments and orders require payments to MHLS under County Law 18-B in connection with MHLS's appointment as assigned counsel to indigent AIPs in guardianship proceedings brought in any of the five counties comprising New York City, that ACP forthwith compensate MHLS in full accordance with the terms of such judgments.

Pursuant to the Mental Hygiene Law, an AIP has a right to be represented by counsel in an Article 81 Proceeding who will be paid out of her estate. (Mental Hygiene Law §81.10). If an AIP cannot afford an attorney, the court appoints counsel as required by statute. (Mental Hygiene Law §81.10 [c]). The statute is silent as to the source of funds for payment of such court appointed counsel.

The facts are undisputed. MHLS is a salaried state institution and its role in the court system is established by Mental Hygiene Law

§47.01. Article 81 of the MHLS authorizes court appointment of MHLS as counsel.

Prior to 2007, the Assigned Counsel Plan (ACP), a city organization, compensated MHLS, First and Second Appellate Divisions respectively, for its representation as court appointed attorneys in guardianship proceedings for indigent AIPS pursuant to its reading of Article 81 of the Mental Hygiene Law. In August of 2005, the defendant, Polly Horton, became the Director of ACP, is responsible for overseeing office operations, including making payments to court appointed counsel for indigent parties.

In 2007, Horton, in an attempt to extinguish these longstanding issues of compensation, reviewed case law and concluded that ACP was not obligated to compensate MHLS for its work as counsel in guardianship proceedings even if MHLS was appointed by the courts. Horton rested this view on a "fresh reading" of *In re St. Luke's-Roosevelt Hosp. Ctr.*, 159 Misc. 2d 932, 607 N.Y.S.2d 574 (Sup. Ct. N.Y. County 1993), aff'd, 640 N.Y.S.2d 73 (N.Y. App. Div. 1996), aff'd, No. 259, 89 N.Y.2d 889 (N.Y. Dec. 20, 1996) (hereinafter "*St. Luke's I*"). This reading of *St Luke's* included a finding that the "ACP is responsible for compensating attorneys for services only in cases where MHLS is not appointed counsel." (*In the Matter of St. Luke's Roosevelt Hospital Center (Marie H.)*, Sup. Ct. New York County, July 21, 1995, Glenn, J., Index No. 500202/93(Hereinafter *St. Luke's II*)).

Horton informed DeLia and Felice Wechsler, of the First Department of its new policy via letter dated on or about April 10, 2007. This letter indicated that as of March 30, 2007, ACP would no longer be responsible for compensation from an Article 81 proceeding in which the court appointed an MHLS employee as counsel.

Although ACP had indicated its new policy, ACP continued processing payments for MHLS. ACP processed a total of 22 payments prior to April 2007 and another 58 payments from all of 2007 amounting to $45,673.25. Further, in 2008, 15 more payments were processed by ACP for a total of $7,239.90. The last payment processed by ACP was on August 14, 2008.

The court continues to appoint MHLS to represent indigent AIPS in Article 81 Proceedings. MHLS appointed counsel remain the anomaly, as ACP has singled out MHLS as the lone organization that it cannot compensate.

Summary Judgment

A summary judgment motion requires a prima facie showing of entitlement to judgment as a matter of law. (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Upon such a prima facie showing, the opposing party bears the burden of producing evidence creating a genuine issue of fact in order to defeat summary judgment. Matter of Suffolk County Dept. of Social Servs. (*Ex rel Michael V. v. James M.*, 83 NY2d 178, 182 [1994]). Lacking a genuine and substantial issue of fact, the court must judge the matter upon the law. (*Ball v United*

Artists Corp., 13 AD.2d 133 [1st Dept. 1961]). Both sides concede there is no question of fact before the court.

Issue

The parties do not dispute that an AIP is entitled to representation. The parties do not dispute that a local entity is better situated to compensate than a state entity in a Article 81 proceeding. (*In re St. Luke's-Roosevelt Hosp. Ctr.*, 89 N.Y.2d 889 [N.Y. Dec. 20, 1996] (hereinafter "*St. Luke's III*")). There remains the question of whether the ACP must compensate MHLS when appointed by the court in an Article 81 proceeding.

Application of *St. Luke's*

At issue is Polly Horton's "fresh look" of *St. Luke's*. The case at hand is distinguishable from *St. Luke's* on the very issues it was decided upon. Justice Glenn of the Supreme Court of New York County in *St. Luke's I* evaluated whether an AIP is entitled to counsel in addition to a court evaluator and if they were, who -- the state or city -- was better situated to compensate.

Justice Glenn held that an indigent AIP, in an Article 81 proceeding, is entitled to counsel paid by public funds in accordance with County Law Article 18-B, "at least where an Article 81 petition seeks powers for a guardian of the person to either place the AIP in a nursing home or other institutional facility, or to make major medical decisions." St. Luke's I, 607 N.Y.S.2d at 580. The Court also found

that the city was better situated for both financial and practical reasons as it had Article 18-B funds allocated for such compensation. The Court need not evaluate the compensation of a Mental Hygiene Legal Service attorney as the attorney in question was private counsel.

The defendant relies upon the Order to Show Cause of Justice Glenn from New York County Supreme Court. This order is not binding on this court. First, this is a court of concurrent jurisdiction, and although persuasive, this court is not inclined to follow this decision. While the language of this Order leads one to believe that the 18-B panel must *only* pay court appointed counsel if MHLS is not the appointed attorney, it does not cite any legal authority for the position taken. As aforementioned, Mental Hygiene Legal Service's compensation was not germane to the issues decided before the Court in *St. Luke's I*. Further, upon review by both the Appellate Division and the Court of Appeals, the issue of Mental Hygiene Legal Service's compensation is limited to a summary of prior proceedings including the Order to Show Cause and is not a holding of law by either court.

The Court of Appeals clearly indicates that the city must pay when counsel is court appointed in an Article 81, guardianship proceeding, "[W]e affirm the determination of the courts below that assignment of counsel here is appropriately funded by the City of New York." (*St. Luke's III*, 89 N.Y.2d at 892). The Court of Appeals does not limit its holding of compensation by the City of New York to only non MHLS counsel. Therefore, as is consistent with the Court of

Appeals of the State of New York, the city must compensate in Article 81 guardianship proceeding.

Mental Hygiene Law 81 does not preclude compensation to MHLS

The guardianship statute clearly anticipates that salaried state employees such as MHLS may be entitled to compensation as it gives the court discretion to determine reasonable compensation for any attorney appointed: "[t]he court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section" (*see* Mental Hygiene Law §81.10[f]). As MHL §81 provides that, [t]he court shall determine the reasonable compensation . . .," there is no distinction between compensation of an MHLS attorney and any other attorney. If the court were to uphold the defendant's claimed exception, MHLS may no longer accept these court assignments, in which case ACP would still have to pay other counsel to represent the indigent AIP. Further 22 NYCRR §622.6(a) and 22NYCRR §694.6(a) address fees for MHLS, First and Second Appellate Divisions respectively, and state that "[w]hen authorized by statute the director may request that the court award the service a reasonable fee." These regulations enhance the power of discretion given to courts in assessing the reasonability of fees for MHLS counsel. The court is able to assess such additional compensation ad hoc.

The statute only provides for payment of fees for counsel by the assets and/or estates of the incapacitated person. The Defendant argues that the statute's silence with respect to payment of MHLS

indicates a lack of authorization for such payment. However, the statute is silent as to all attorneys in guardianship proceedings, not just payment to MHLS. When a statute is silent as to the source of fees, courts may read a statute to "create a right to additional publically compensated legal assistance." (*Mahoney v. Pataki*, 98 NY2d 45, 53 [2002]).

MHLS is not in a different position than any other counsel

The defendant further argues that MHLS counsel are in a different position than other assigned counsel who are appointed to represent indigent AIPs in guardianship proceedings because they are state salaried. This distinction between MHLS and all other court appoint counsel is inconsistent with the statutory language of MHLS. "The court shall determine the reasonable compensation for the mental hygiene legal service or any attorney appointed pursuant to this section. The person alleged to be incapacitated shall be liable for such compensation unless the court is satisfied that the person is indigent." (MHL 81.10[f].) Accordingly, as other attorneys appointed pursuant to MHL to represent indigent AIPs are entitled to compensation from 18-B funds and there is nothing in St. Luke's decision that would preclude MHLS from receiving compensation from 18-B, the court rejects defendant's argument that there is a distinction between MHLS and all other court appointed counsel.

Order

For the reasons set forth above, defendant's motion for summary judgment is denied and Mental Hygiene Legal Services' cross-motion for summary judgment is granted and plaintiff is awarded the following relief: (1) pursuant to CPLR 3001, ACP is required to compensate MHLS when MHLS is appointed and serves as counsel to represent indigent AIPs in guardianship proceedings and the court awards counsel fees to MHLS under County Law 18-B; (2) a permanent injunction directing that where existing and future judgments and orders require payments to MHLS under County Law 18-B in connection with MHLS's appointment as assigned counsel to indigent AIPs in guardianship proceedings brought in any of the five counties comprising New York City, that ACP forthwith compensate MHLS in full accordance with the terms of such judgments.

Dated: January , 2010

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Bernice D. Siegal, J.S.C.