

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IAS PART 22
Justice

-----		Index No. 20337/05
SANG SEOK NA,		
	Plaintiff,	Motion
		Date November 13, 2007
	-against-	
		Motion
JAN BERMAN,		Cal. No. 8
	Defendant.	
-----		Motion
		Sequence No. E003

The following papers numbered 1 to 4 read on this motion by Sivin & Miller, LLP, for an order determining that Walia & Walia, PLLC was discharged by plaintiff for cause and therefore is not entitled to an attorney's fee, or alternatively, apportioning legal fees between Sivin & Miller, LLP and Walia & Walia, PLLC.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits.....	1-2
Answering Affirmation.....	3-4

Upon the foregoing papers it is ordered that, after a hearing held on December 18, 2007, this motion is determined as follows:

I. BACKGROUND

On December 28, 2004, Sang Seok Na was injured when an automobile owned and operated by Jan Berman rear-ended his stopped vehicle, causing him to sustain serious personal injuries. On or about February 1, 2005, Mr. Na retained Bobby Walia, Esq. of Walia & Walia, PLLC (hereinafter "W&W") to represent him in an action for personal injuries. Thereafter, they entered into an agreement that provided for a contingency fee of twenty-five percent to W&W if the case was resolved favorably. On September 16, 2005, W&W filed a summons and complaint in this court against Jan Berman.

On December 13, 2005, Mr. Na discharged W&W and retained Silvin & Miller, LLP (hereinafter "S&M") to represent him. In or about September 2007, the case was settled for the amount of

\$750,000.00, and therefore, the gross legal fee to be received by S&M pursuant to the retainer agreement is the sum of \$250,000.00.

S&M now moves this Court to set the legal fees of W&W. It alleges that W&W was dismissed for cause and is not entitled to any legal fee. On the other hand, W&W asserts that it has a charging lien on the file and is entitled to 33-1/3% of S&M's attorney's fee. By order of this court dated November 19, 2007, this matter was set down for a hearing to determine whether Walia & Walia, PLLC was discharged with or without cause by Mr. Na and to determine the value of the legal services rendered, if any that Walia & Walia, PLLC is entitled as compensation (see *Andreiev v Keller*, 168 AD2d 528 [2d Dept 1990]; *Katsaros v Katsaros*, 152 AD2d 539 [2d Dept 1989]; *Williams v Hertz Corp.*, 75 AD2d 766 [1st Dept 1980]; *Marschke v Cross*, 82 AD2d 944 [3d Dept 1981]). On December 18, 2007 a hearing was conducted. At the hearing Edward Sivin, Esq. and Glenn Miller, Esq. testified on behalf of the petitioner S&M and David Cho testified on behalf of the respondent W&W. At the conclusion of the hearing, the Court reserved decision.

II. DISCUSSION

Under New York law, attorneys can assert two types of liens to secure the payment of fees from their clients. First, under New York common law, an attorney may obtain a retaining lien on a client's files, papers and property in the attorney's possession (see *In re Heinsheimer*, 214 NY 361, 364 [1915]; *Goldstein, Goldman, Kessler & Underberg v 4000 E. River Road Associs.*, 64 AD2d 484, 487 [4th Dept 1978]). Absent exigent circumstances, an attorney may withhold turning over a client's files to a successor attorney until a court determines the amount of the lien and whether turnover of the files should be conditioned on payment or the posting of security (see *Renner v Chase Manhattan Bank*, No. 98-926 [CSH], 2000 U.S. LEXIS 16150, at *2-3 [SDNY Nov. 8, 2000]).

The second way an attorney can secure a lien is under Judiciary Law § 475. This statute provides the basis upon which an attorney may assert a charging lien against the proceeds resulting from the attorney's assertion of an affirmative claim on the client's behalf. The rationale behind the charging lien under this provision is that the attorney is entitled to a lien against a fund created through the attorney's own efforts (*Greenberg v State*, 128 AD2d 939, 940 [3d Dept 1987]). The charging lien may also attach to a fund created to settle a client's claim (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 187 [1st Dept 2002]).

A. Was W&W Dismissed for Cause?

S&M argues that W&W was dismissed by Mr. Na for cause and is not entitled to any legal fee (see *Friedman v Park Cake, Inc.*, 34 AD3d 286, 287 [1st Dept 2006] [stating that where an attorney is discharged for cause, she is entitled to no compensation]). In support of this argument, S&M asserts that the verified complaint filed by W&W listed the incorrect date of the accident and failed to allege that plaintiff fell within one or more exceptions of CPLR 1602 with respect to joint and several liability. The court finds that the verified complaint filed by W&W did make appropriate claims under New York Insurance Law §§ 5102(a) and (d). Moreover, S&M admitted that W&W entered into a stipulation with the defendant prior to defendant filing an Answer agreeing to amend the complaint with the correct date of the accident. (Respondent's Exhibit "B"). Thus, S&M's claim of a defective complaint on this ground is without merit.

S&M submitted evidence to suggest that Mr. Na was dissatisfied with the services of W&W, and because of this dissatisfaction he elected to change attorneys. Evidence of a general dissatisfaction with an attorney's performance or a difference of opinion between attorney and client does not establish that the attorney was discharged for cause absent some evidence that the attorney failed to properly represent the client's interest (*Costello v Kiaer*, 278 AD2d 50, 50 [1st Dept 2000]).

Moreover, "[a]ttorney-client relationships frequently end because of personality conflicts, misunderstandings, or differences of opinion having nothing to do with any impropriety by either the client or the lawyer." (*Klein v Eubank*, 87 NY2d 459 [1996]). Something more than a personality conflict or difference of opinion is required to establish discharge for cause and "[c]ourts typically find a discharge for cause where there has been a significant breach of legal duty." (*D'Jamoos v Griffith*, 2006 WL 2086033, at 5 [EDNY July 25, 2006] (quoting *Allstate Ins. Co. v Nandi*, 258 F. Supp 2d 309, 312 [SDNY 2003])). Here, there is no evidence that the conduct of W&W breached any trust and confidence with Mr. Na.

Additionally, the court notes that in *Vallejo v Builders for Family Youth*, 2007 WL 10386, at 5 (Sup. Ct. Kings Co., Jan. 2, 2007), the court found that because the letters to previous counsel regarding his discharge never mentioned cause and referred to the matter of his compensation, counsel was not discharged for cause. (See also *Realuyo v Diaz*, 2006 WL 695683, at 7 [SDNY, March 17, 2006] [finding no evidence of discharge for cause because, *inter alia*, the client's termination letter to attorney failed to specify the reason for termination and requested an accounting of the lawyer's fee]). Here, neither the

letter requesting transfer of the file from S&M to W&W dated December 13, 2005, nor the discharge letter from Mr. Na to W&W, dated December 13, 2005 make any reference to cause. (Respondent's Exhibit "C"). Indeed, the letter from S&M to W&W requesting transfer of the case file mentions that S&M "acknowledge that [W&W] are entitled to a lien against the proceeds of any eventual recovery in [the case] and we are agreeable to having the amount of that lien determined at the conclusion of [the] case." This statement clearly demonstrate that at the time of discharge of W&W, S&M believed that W&W would be entitled to some fee, the amount of which would be determined at final disposition of the case. Therefore, the Court finds that W&W was not discharged for cause and maintains a charging lien for its fee (see *Calabro v Bd of Educ of City of New York*, 39 AD3d 680, 681 [2d Dept 2007]).

B. Calculation of the Fee

A discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based upon his or her proportionate share of the work performed (*Fernandez v New York City Health and Hospitals Corp.*, 238 AD2d 544, 545 [2d Dept 1997]). In determining a discharged attorney's proportionate share of the work, the court considers the time and labor involved, the difficulty of the case, the skill required to handle the matter, the results achieved, the amount of money involved, and the fee customarily charged for similar services (see *Buchta v Union-Endicott Central School Dist.*, 296 AD2d 688, 689-90 [3d Dept 2002]). Here, W&W requests a fee of 33-1/3% of the attorney fee recovered by S&M. On the other hand, S&M asserts that if this court should find that attorney's fees are warranted, it should limit W&W's proportionate share to 5% based upon the fewer hours it spent on the case in proportion to the vastly extensive time expended by S&M.

Respondent elicited evidence to show the work performed by W&W. It was undisputed that it engaged in, among other things, preliminary interviews and fact gathering, and drafted, served, and filed the summons and complaint that commenced the action. However, this court finds that S&M's share of the total work performed in this case was far more extensive and disproportionately greater than the amount of work performed by W&W. S&M, among other things, conducted and responded to discovery, amended the complaint, conducted depositions, retained experts, appeared in court, prepared for trial, partially tried the case and secured the settlement. In light of the foregoing, the court finds that a fee of five percent of the gross attorney's fees of \$250,000.00, namely the sum of \$12,500.00, is reasonable for W&W's legal work on the case (see *Podbielski v KMO 361 Realty Assocs.*, 6 AD3d 597, 597 [2d Dept 2004] [granting

counsel five percent of the net contingency fee for providing advise to appellate counsel and arranging for the collection of judgment]; *Greenberg v Cross Island Industries, Inc.*, 522 F. Supp 2d 463, 2007 WL 3285810 [EDNY 2007] [granting attorney's fees of five percent of the net attorney's fee to originating attorney who performed preliminary fact gathering and drafted and filed the complaint]).

III. CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that attorney's fees in the amount of \$12,500.00 be paid by Sivin & Miller, L.L.P. to Walia & Walia, PLLC either (1) within twenty (20) days after receipt of the settlement amount, or (2) if the settlement amount has already been paid, within twenty (20) days after a copy of this decision and order is served on Sivin & Miller, L.L.P. with notice of entry.

The parties are directed to immediately contact the clerk of IAS Part 22 at (718) 298-1210 to make arrangements to pick up any exhibits admitted into evidence and left with the court at the conclusion of the hearing.

Dated: February 6, 2008

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Howard G. Lane, J.S.C.