

Zu Xiang Zheng v Zhuang Zhuang

2009 NY Slip Op 31027(U)

April 21, 2009

Supreme Court, Queens County

Docket Number: 18120/2005

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES
Justice

IA PART 17

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ZU XIANG ZHENG, et al.		Number <u>18120</u> 2005
-against-		Motion
		Date <u>January 14,</u> 2009
ZHUANG ZHUANG, et al.		Motion
		Cal. Number <u>54</u>
	x	Motion Seq. No. <u>7</u>

The following papers numbered 1 to 22 read on this motion by defendant Zhuang Zhuang for an order compelling his former counsel, The Law Offices of Bing Li, LLC to return the client's file; directing a hearing pursuant to Judiciary Law § 475 to determine the reasonable value of services rendered by former counsel and to return unearned fees; staying the proceedings pursuant to CPLR 321 to permit Zhuang to obtain substitute counsel; staying the proceedings pending the hearing of this matter pursuant to CPLR 2201; dismissing the fraud and all duplicate causes of action; and dismissing New York Sign City, Inc. as a plaintiff. Bing Li, Zhuang's former counsel, cross-moves for an order fixing his common-law retaining lien in the sum of \$12,715.54 as of the time of discharge on May 19, 2008; ordering Zhuang to pay forthwith said retaining lien prior to the release of the files and papers; and compelling Zhuang's new counsel to cause Bing Li to be removed from the court's records as counsel of record.

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Upon the foregoing papers the motion and cross motion are determined as follows:

Defendant Zhuang Zhuang, in a letter to the court dated January 14, 2009, withdrew, without prejudice, those branches of the motion which seek a stay of the proceeding pursuant to CPLR 321; a stay of the proceeding pursuant to CPLR 2201; the request to dismiss the fraud and all duplicate causes of action; and the request to dismiss New York Sign City, Inc. as a plaintiff.

Defendant executed a retainer with "Bing Li of counsel Reppert Kelly LLC" on August 25, 2005, at which time he paid counsel the sum of \$10,000.00, and agreed to maintain a minimum balance of \$5,000.00, to be replenished from time to time upon receipts of invoices from the attorney. The retainer agreement provided that the hourly rate legal services was \$200.00 and \$75.00 for paralegals. Mr. Zhuang also agreed to be responsible for costs and expenses, "including fees fixed by law or assessed by public agencies, court filing fees, translation/interpretation costs, deposition transcript costs, witnesses fees, messenger and other delivery fees, long distance telephone calls, postage, photocopying, parking, milage, investigation expenses, consultants' fees and other similar items." Mr. Zhuang retained Mr. Li to represent him in the within action (Action No. 1, Index No. 18120/05). Mr. Zhuang also retained Mr. Li to represent him in Action No. 2, Index No. 1606/06, but did not execute a separate retainer agreement. This court, in an order dated June 2, 2006, directed that the within action (Action No. 1, Index No. 18120/05) be jointly tried with the action commenced under Index No. 1606/06 (Action No. 2).

Mr. Zhuang discharged Bing Li as his counsel, and they executed a consent to change counsel on May 19, 2008, which named the Office of Ming Hai, P.C. as Zhuang's new counsel in this action. The court's records reflect that said consent to change attorney was filed on August 29, 2008. However, it does not appear that a consent to change counsel was executed in the action commenced under Index No. 1606/06. Mr. Li, therefore, remains the attorney of record for Mr. Zhuang in that action, although, the attorney-client relationship between Mr. Zhuang and Mr. Li has ended. Therefore, that branch of Mr. Li's cross motion which seeks to compel Mr. Zhuang and his new counsel to execute and file a consent to change attorney in Action No. 2, (Index No. 1606/06), is granted.

On May 20, 2008, following the consent to change attorney, Mr. Li, in a letter addressed to Zhuang's new counsel, stated that the total outstanding balance of Zhuang's account was \$15,771.54,

including a balance from April of \$4,335.90 and expenses of \$311.64. Mr. Li applied a credit of "trust account funds" of \$3,056.00 and stated that the total remaining balance was \$12,715.54. He asserted a charging lien and stated that once said sum was paid, he would contact new counsel for the retrieval of the file, which he estimated to include five or six, or more, bankers' boxes of litigation files, eight more boxes of business records of New York Sign City, Inc., and three more boxes of job permit applications of New York Sign Contractor, Inc. Mr. Li enclosed an eight-page itemized bill for fees and expenses up to May 20, 2008, and a five-page itemized bill for April 2008.

Bing Li has asserted a common-law retaining lien, rather than a charging lien pursuant to Judiciary Law § 475 (see Wankel v Spodek, 1 AD3d 260 [2003]), and claims that Mr. Zhuang owes an outstanding balance of \$12,715.54 for legal services rendered in connection with this action. Mr. Zhuang seeks to have the files turned over to his new counsel and states in his affidavit that when he retained Mr. Li, he was told that the legal fees and expense would be around \$20,000.00, but that due to various "tactics, threats and duress," he has paid Mr. Li \$128,649.13 for legal services. Mr. Zhuang asserts that the work performed by Mr. Li was not satisfactory, and that after the motion for a joint trial was granted, nothing happened in Action No. 2 that was independent of the within action. Mr. Zhuang asserts that after the notice to change attorney was served, Mr. Li called him, his mother, his sister and other relatives and friends over 20 times, in an attempt to continue his representation and made defamatory comments regarding Zhuang's new counsel. Mr. Zhuang states that the court's records reveal that there was no activity in this action in 2006, that in 2007 and 2008 there were a total of 10 dates for motions, which include six adjournments, that no appearances were required, that three motions were submitted without opposition, and only one motion was submitted with opposition. Mr. Zhuang states that Mr. Li was entitled to be paid \$20,000.00 and that the remainder of the legal fees paid are excessive and do not reflect the value of the legal services he received. It is also asserted that Mr. Li is not entitled to an additional fee. Mr. Zhuang, thus, seeks a refund of the legal fees previously paid.

Mr. Li states that there was no flat fee arrangement in the sum of \$20,000.00, and he has submitted a copy of the retainer agreement. Mr. Li has submitted invoices for the legal services rendered, which he also sent to Mr. Zhuang's present counsel. He states that for all legal services rendered in Action No. 1, Mr. Zhuang paid a total of \$115,670.63 by the time of discharge, and that Zhuang also paid a total of \$12,978.50 for legal services

rendered in Action No. 2, as of the time of discharge. The legal services include responding to a motion and cross motion, engaging in pre-deposition discovery, reviewing corporate books and records, preparing Zhuang and others and taking various depositions, issuing and enforcing subpoenas, investigating an action against the co-defendant, making a motion to vacate the note of issue, and making a partial summary judgment motion, and opposing a cross motion, as well as various communications with Zhuang and others. He states that he sent Mr. Zhuang 48 invoices for legal services over the years, which are submitted here. He further states that he made six telephone calls to Mr. Zhuang and other family members solely to determine the reason for his discharge as counsel, but was unable to speak to the parties he called.

It is well settled that courts have the traditional authority to supervise the charging of fees for professional services under the court's inherent and statutory power to regulate the practice of law (see Hom v Hom, 210 AD2d 296 [1994]; Matter of Greenwald v Scheinman, 94 AD2d 842 [1983]). The court also has the inherent power to compel an attorney to restore assets, moneys, or papers of the client received or retained in violation of the attorney's professional obligations (see Matter of Cox v Scott, 10 AD2d 32 [1960]). It is also fundamental that an attorney must refund promptly any part of a fee paid in advance that has not been earned (see Code of Professional Responsibility DR 2-106[A] [22 NYCRR 1200.11 (a)]).

It is also well settled that a client has the absolute right to discharge an attorney at any time. If the discharge is without cause before the completion of services, then the amount of the attorney's compensation must be determined on a quantum meruit basis (see Jacobson v Sassower, 66 NY2d 991, 993 [1985]; Teichner v W & J Holsteins, 64 NY2d 977 [1985]; Henry v Brenner, 271 AD2d 647, 648 [2000]; Atkins & O'Brien v ISS Intl. Serv. Sys., 252 AD2d 446 [1998]; Hom v Hom, supra; Theroux v Theroux, 145 AD2d 625 [1988]). Where, "a client requests that papers in the possession of his former attorney be returned to him, and the attorney asserts a claim for compensation for services rendered, the attorney is entitled to a determination fixing the value of his services, and the amount so fixed must be paid or otherwise secured to the attorney before any such turnover may be enforced" (Hom v Hom, supra at 298, quoting Rosen v Rosen, 97 AD2d 837 [1983]; Picott v ATA Hous. Corp., 306 AD2d 393 [2003]). Whether the fee so fixed shall be presently payable or secured by a lien on the cause of action rests in the sound discretion of the trial court (Hom v Hom, supra; Theroux v Theroux, supra).

Here, in view of the fact that Bing Li has asserted a retaining lien, and as a dispute exists as to the counsel fees previously paid, a hearing is required to determine these issues. Defendant Zhuang's motion for an order directing Bing Li to turn over the file in this matter to his current counsel is held in abeyance, pending a hearing to determine the issue of counsel fees to be held on May 7, 2009 at 9:30 A.M. in this part. Mr. Li's cross motion to fix the amount of the retaining lien at \$12,715.54, and to order Mr. Zhuang to pay said amount prior to the turning over of the file is denied, as the amount of legal fees owed, if any, shall be determined at said hearing. That branch of the cross motion which seeks to compel Mr. Zhuang's new counsel to cause Bing Li to be removed from the court's records as counsel of record, is granted to the extent that Mr. Zhuang and Mr. Li are directed to execute a consent to change attorney in Action No. 2, within five days from the service of this order, together with notice of entry.

Dated: April 21, 2009

J.S.C.