

Brooks v Lewin

2005 NY Slip Op 30017(U)

July 29, 2005

Supreme Court, New York County

Docket Number: 0_30012/0947

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. LELAND DEGRASSE

PRES 0120947/1993

PART 25

— BROOKS, STEVI
VS
LEWIN, HARLEY I., ESQ.

SEQ 14

CONFIRM/REJECT REFEREE REPORT

NO. _____
DATE MAR 31 2005
SEQ. NO. _____
CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted in accordance with
accompanying Memorandum Decision.

JUL 29 2005

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
STEVI BROOKS,

Plaintiff,

-against-

Index No. 120947/93

HARLEY I. LEWIN, ESQ. and LEWIN & LAYTIN, P. C.,

Defendants.
-----X

DeGrasse, J.:

Plaintiff, Stevi Brooks, moves for an order confirming with modifications the report of Special Referee Nicholas Doyle. Curtis & Associates, P. C., plaintiff's former attorneys, cross-moves for an order rejecting the report. By order dated February 2, 2004, this court directed a reference on the issues of (1) whether Curtis's right to a charging lien has been forfeited by attorney misconduct, unjustified abandonment of the matter or discharge for cause; (2) the amount of the charging lien based on quantum meruit in the event that it has not been forfeited; and (3) the amount of Curtis's retaining lien.

This is a legal malpractice action. Defendants, Lewin & Laytin, P. C. (L&L), represented Brooks in Beverly Hills Design Studio (N. Y.), Inc. (BHDS) v Morris, an action which was pending in the United States District Court for the Southern District of New York. In this action, Brooks alleges that L&L committed malpractice and caused her to lose her garment design business by failing to move for an order preliminary enjoining Morris's alleged breaches of a confidentiality agreement. By written agreement dated October 14, 1998, Curtis undertook Brooks's representation in this action on a contingency fee basis. On or about September 9, 2001, Brooks and Curtis entered into a second retainer agreement which set forth hourly billing

rates. The second retainer agreement also provided for a fee to be computed at the end of the representation on the basis of the greater of the accumulated hourly charges or 33% of Brook's recovery. Curtis and Brooks differ as to whether this second retainer agreement was a contingency fee agreement.

On November 13, 1998, Brooks, the President of BHDS, commenced an action in this court against Zurich-American Insurance Group seeking indemnification for losses in her garment design business. Brooks was represented in that action by John Fried, Esq. of Fried & Epstein LLP, the firm which now appears for her. By order entered on July 2, 2001, the IAS court (Jane Solomon, J.) granted summary judgment dismissing certain claims Brooks asserted against Zurich. By decision dated December 24, 2002, the Appellate Division modified Justice Solomon's order by reinstating a contract cause of action against Zurich (*Brooks v Zurich-Am. Ins. Group*, 300 AD2d 176 [2002]). As found by the special referee, Brooks intentionally failed to inform Curtis of the status of the Zurich action. As also found by the special referee, Curtis did not learn of the reinstatement of the contract claim until March 13, 2003 when it was referenced in papers he received from L&L's attorneys. Curtis asserts that a perceived inconsistency between Brooks's claims against Zurich and those she asserts against L&L jeopardize her position in this action. Brooks asserts that she discharged Curtis for cause based upon the events which followed.

By notice dated October 8, 2003, L&L made a motion for summary judgment. The motion was originally returnable on November 3, 2003. By stipulation dated November 24, 2003, the hearing date of the motion was adjourned to January 12, 2004. The stipulation required that L&L receive Brooks's opposition papers on or before December 3, 2003. Invoking the doctrine of

judicial estoppel, L&L asserted Brooks's claim against Zurich as one of its grounds for summary judgment. By letter to Brooks dated October 30, 2003, Curtis proposed a modification of the retainer agreement which would have required Brooks to pay all outstanding fees from her share of the proceeds of the Zurich action. Following a telephone conversation, Curtis sent another letter, dated November 6, 2003, by which he asserted that the September 9, 2001 engagement agreement was not a contingent fee agreement. In the letter, Curtis also said the following: "Your attempt now to have us finance your legal malpractice action is completely unacceptable and requires us to stop all work." By subsequent letter dated November 11, 2003, Curtis informed Books that he would seek leave to withdraw as her attorney if she did not change her position that the firm was working on a contingency fee basis. The special referee determined that Curtis never stopped working as Brooks's attorney until discharged on December 3, 2003.

According to the special referee's report, Curtis was discharged for cause based upon its alleged infraction of the Code of Professional Responsibility DR 5-104 (a) (1) and (2) (22 NYCRR 1200.22 [a] [1] and [2]). Where pertinent, DR 5-104 provides that:

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client; [and]

(2) the lawyer advises the client to seek the advice of independent counsel in the transaction;

The special referee found that Curtis violated DR 5-104 by failing to advise Brooks to seek the advice of independent counsel before entering into the second retainer agreement on September 9, 2001. Generally courts will not disturb the findings of a referee to the extent that the record

substantiates such findings and they may reject findings not supported by the record (*Kardanis v Velis*, 90 AD2d 727 [1982]). The parties have not cited and the court has not found any judicial authority which makes DR 5-104 applicable to retainer agreements for legal services. In *Beltrone v General Schuyler & Company* (252 AD2d 640, 641 [1998]), a case involving a partnership between attorney and client, the court held that:

where an attorney enters into a business relationship with a client *while also acting* [emphasis added] as the client's attorney with respect to the relationship, the attorney must fully and fairly inform the client of the consequences of any action taken in furtherance of the relationship and certainly may not exploit the client's trust for his or her own benefit (see, *Greene v Greene*, 56 NY2d 86, 92-93; see also, Code of Professional Responsibility DR 5-104 [A] [22 NYCRR 1200.23 (a)]).

Similar reasoning was applied in *Clifton Country Road Associates v Vinciguerra* (195 AD2d 895, 896 [1993], *lv denied* 82 NY2d 664) where the court observed that an attorney may contract with his or her client over *nonlegal matters* as long as the attorney does not betray the fiduciary relationship and take advantage of his or her superior knowledge and position. It does not appear that an attorney - client retainer agreement is a "business transaction" within the contemplation of DR 5-104. To hold otherwise would require, for example, an attorney representing a client in a litigation matter to advise the client to seek the advice of independent counsel before retaining the attorney for a real estate transaction. Therefore, the special referee's conclusion that Curtis was discharged for violating DR 5-104 is not supported by the record. It also follows that the record does not support the special referee's conclusion that the September 9, 2001 retainer agreement was invalidated by Curtis's alleged violation of DR 5-104.

As noted above, Brooks and Curtis differ as to whether the September 9, 2001 retainer agreement was a contingency fee agreement. Citing *Shalom Toy v Each and Every One of the*

Members of the New York Property Insurance Underwriting Association (239 AD2d 196 [1997]), the special referee found that the agreement should be construed against Curtis, the drafter. The court has found no New York case law on the point. However, payment of legal fees under such hybrid hourly / contingency fee agreements has been sanctioned under the laws of at least one other jurisdiction (*see e. g. In re Western Real Estate Fund*, 922 F2d 592 [10th Cir 1991]). Moreover, the New York State Bar Association Committee on Professional Ethics has opined that a hybrid or modified contingent fee is permissible as a matter of ethics as long as the total fee is not excessive, a claim not made here (NY Eth Op 697 [1997], 1997 WL 1068501). The September 9, 2001 retainer agreement provided for monthly statements which set forth billable services and disbursements. It provided for interest on outstanding balances that remained unpaid for more than 30 days. The agreement further required Brooks to make a nonrefundable \$1, 500 payment toward legal fees each month.¹ The agreement provides for the payment of a fee which may possibly exceed the 33% contingency rate. Therefore, the record does not support the referee's determination that the second retainer agreement is a contingency fee agreement.

The special referee also found that Curtis's aforementioned letters of November 6 and 11, 2003 were attempts to improperly influence Brooks to execute a new retainer agreement and may have constituted a violation of DR 7-101 (a) (2) (22 NYCRR 1200.32). DR 7-101 (a) (2) provides that an attorney shall not intentionally fail to carry out a contract of employment entered into with a client for professional services. The special referee's determination that Curtis

¹The the nonrefundable payment provision is invalid (*see Matter of Cooperman*, 83 NY2d 465 [1994]). Nevertheless, the court may still determine the reasonable value of Curtis's services (*see Hom v Hom*, 210 AD2d 296 [1994]).

continued working on Brooks's behalf until discharged precludes a finding that DR 7-101 was violated. Similarly, the record does not support the special referee's determination that Curtis may have violated DR 7-101 (a) (2) by failing to provide Brooks with a copy of a memorandum of law submitted in opposition to L & L's motion for summary judgment.

As noted above, Brooks concealed the status of the Zurich action from Curtis. Upon learning of same, Curtis had reason to believe that Brooks's recovery in this action could be offset, if not precluded, by the Zurich settlement. Therefore, the record does not support the special referee's conclusion that Curtis improperly attempted to coerce Brooks into signing a new retainer agreement. On the contrary, Curtis's letters to Brooks dated November 6 and 11, 2003 constituted a legitimate effort to secure the payment of a fee for services rendered. In all other respects, the evidence does not support the special referee's conclusion that Curtis's attempt to negotiate a new engagement agreement while the summary judgment motion was pending was an attempt to improperly influence Brooks to execute the agreement. For the foregoing reasons, the special referee's finding that Curtis was discharged for cause is not supported by the record.

The special referee has found the reasonable value of Curtis's services to be \$82, 979. 05. It is well settled that an award of attorney's fees should be "reasonable in light of the skill, experience and background of . . . counsel, the nature of the services rendered, the difficulty and complexity of the issues of fact and law involved in the case, as well as the time actually spent on [the case]" (*Willis v Willis*, 149 AD2d 584 [1989]). Inasmuch as the special referee considered these factors his findings in this regard should not be disturbed. The special referee also properly charged Curtis the sum of \$1, 031. 55 for the unnecessary videotaping of defendants' depositions. Accordingly, Curtis's charging lien is fixed at \$81, 947. 50. Citing *Steves v Serlin* (125 AD2d

780 [1986]), the special referee limited Curtis's retaining lien to the amount of its disbursements based upon the premise that the September 9, 2001 agreement, if valid, was a contingency fee agreement. For reasons stated above, the agreement is not a contingency fee agreement and the special referee's report is rejected to the extent that he found that it is. Therefore, Curtis's retaining lien is also fixed at \$81, 947. 50. In addition, the report is rejected to the extent that the special referee found that the September 9, 2001 retainer agreement was invalidated by Curtis's conduct. The report is further rejected to the extent that the special referee found that Curtis was discharged for cause. Brooks's motion and Curtis's cross motion are granted to the foregoing extent. Settle order.

Dated: July 29, 2005



J. S. C.