

Geraci v Levada

2007 NY Slip Op 30182(U)

March 1, 2007

Supreme Court, Suffolk County

Docket Number: 0008143

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/13/06
ADJ. DATES 11/17/06
HEARING DATE 1/12/07
Mot. Seq. # 009 - Mot D

-----X
SANDRA GERACI and JOHN GERACI, :
 :
 : Plaintiffs, :
 :
 : -against- :
 :
 : MARIA E. LEVADA, M.D., KMLT :
 : GYNECOLOGICAL ASSOCIATES, PC, :
 : DAMIANO BUFFA, M.D., SUFFOLK :
 : OBSTETRICS & GYNECOLOGY, LLP, QUEST :
 : DIAGNOSTICS, GEOFFREY HAJIAN and :
 : DAISY GRUESO, M.D., :
 : Defendants. :
-----X

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Upon the following papers numbered 1 to 14 read on these motions to determine attorneys' fees
_____; Notice of Motion/Order to Show Cause and supporting papers 1-3; Notice of Cross
Motion and supporting papers _____; Answering Affidavits and supporting papers _____;
Replying Affidavits and supporting papers _____; Other 4-5 (affirmation); 6-12 (memorandum); 13-14
(affirmation); _____; and after a conference with counsel on January 12, 2007 regarding the attorneys' fees application, it is

ORDERED that this motion by plaintiffs' counsel, Pegalis & Erickson, LLC, for an Order determining what portion, if any, of legal fees was earned by plaintiffs' former counsel, Queller, Fisher, Dienst, Serrins, Washor & Kool, Esqs. and Harvey F. Wachsman, MD, JD, LLP, in connection with the prosecution of this action on behalf of plaintiff, Sandra Geraci, is granted to the extent that plaintiffs' former counsel is found to be entitled to 33% of the legal fees earned, with present counsel entitled to 67% of the fee earned, and in all other respects is denied; and it is further

ORDERED that plaintiffs' counsel, Pegalis & Erickson, LLC, shall make all necessary arrangements for payment of the fee within twenty (20) days from the date of this Order, and it is further

ORDERED that movant shall serve a copy of this Order with Notice of Entry upon former counsel for plaintiffs pursuant to CPLR 2103(b)(1), (2) or (3) within twenty (20) days of the date herein and thereafter file the affidavit of service with the Clerk of the Court.

Plaintiffs were initially represented by Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP and Harvey F. Wachsman, MD, JD, LLP. When Mr. Wachsman terminated his relationship with the Queller, Fisher firm and affiliated himself with a Texas law firm, plaintiffs were solicited by both firms as the attorney of record. As explained in her affidavit, plaintiff, Sandra Geraci, did not want Texas attorneys representing her, was dissatisfied with the fact that the case was taking so long, and decided not to sign with either firm. On August 16, 2004, Pegalis & Erickson, LLC were retained by plaintiffs to represent them in connection with their medical malpractice action. The action was settled on or about October 5, 2006.

Since prior and present counsel could not agree on what fee, if any, prior counsel should receive, this Court, by Order dated November 11, 2006, set the matter down for a hearing to be held on January 12, 2007. Both sides were directed to submit, twenty (20) days prior to the hearing, all necessary documents to establish their respective fee requests. However, the Court only received the submissions on the day of the scheduled hearing. Accordingly, after consultation with both counsel, it was agreed that the matter would be submitted on the papers supplied and a hearing would be held only if the Court believed one was necessary after reviewing the submissions.

Present counsel argues that the outgoing attorneys are not entitled to any legal fees since it is claimed that the discharge was for cause. It is argued that the discharged attorneys failed to bring a claim against the doctor who actually rendered care to plaintiff.

A review of the work performed by each counsel is in order. Prior counsel obtained all medical records from treating doctors and hospitalizations, instituted a motion for pre-action discovery, and commenced an action on March 22, 2002. The answers of the relevant defendants admitted that Dr. Maria F. Levada rendered medical services to plaintiff. Prior counsel served verified bill of particulars and various discovery demands. They also attended a preliminary conference, prepared the plaintiffs for their depositions on November 19, 2003 and conducted the deposition of Dr. Levada on February 17, 2004. As noted above, a business dispute developed between the two prior counsel firms and plaintiffs then retained present counsel.

From the time of retention of the prior counsel on July 12, 2001, plaintiff, Sandra Geraci, insisted that her treating doctor was Dr. Levada and continued in that belief at a November 12, 2001 interview. Dr. Levada was listed as the referring physician on the pap smear cytology report. After said plaintiff initially insisted at her deposition that Dr. Levada was her doctor, the issue of possible misidentification of the treating physician and the role that Dr. Daisy Grueso played was broached by opposing counsel. At the February 17,

2004 deposition of Dr. Levada the issue confirmed. It is to be noted that Dr. Grueso was employed by defendant K.M.L.T. Gynecological Associates, P.C. (hereinafter "K.M.L.T") and said defendant would be vicariously liable for any treatment rendered by Dr. Grueso.

Prior counsel claims that the intention, prior to discharge, was to conduct a non-party deposition of Dr. Grueso and seek to establish the elements under the relation back theory so an amendment of the complaint could be made to add her as a direct party defendant. That course of action was followed by present counsel. However, this Court held in a short form Order dated May 1, 2006 that the third prong of the relation back doctrine was not satisfied by the application made by present counsel and the motion to strike the affirmative defense of statute of limitations was denied. Prior counsel argues that the failure of present counsel to question Dr. Grueso as to when she was contacted by the insurance carrier as to her involvement with plaintiff lead to the denial of the application to strike the affirmative defense.

The Court notes that this matter was settled with payments made on behalf of Dr. Grueso and Dr. Damiano Buffa, despite the fact that Dr. Grueso had a pending motion to strike the amended complaint based upon this Court's Order of May 1, 2006. Present counsel does not explain why settlement was made more difficult due to the failure to name Dr. Grueso as an original party defendant. As noted, defendant K.M.L.T., was vicariously liable for the actions of Dr. Grueso. Under these circumstances, where plaintiff is initially adamant as to the name of her treating doctor and where that defendant doctor admitted that relationship in a verified answer, it is hard to say that prior counsel's actions support the claim of discharge for cause. In fact, plaintiff, in her affidavit, clearly states that the discharge was due to the fact that she did not want her case handled by Texas based attorneys. Such is a reasonable justification for discharge, but it is not one for cause.

On the facts presented, prior counsel acted appropriately, just as present counsel believes they acted appropriately in discontinuing the action against defendants, Quest Diagnostics and Geoffrey Hajjan. Based upon the detailed submissions offered by both sides, the Court cannot agree that present counsel met its prima facie burden on the claim of discharge for cause and a hearing on that issue is not necessary. This is not a case where the conflicting claims as to discharge mandate a hearing (*cf Byrne v Leblond*, 25 AD3d 640, 811 NYS2d 681 [2d Dept 2006]). The papers before the Court demonstrate that outgoing counsel was prosecuting the action diligently prior to discharge.

The remaining issue is the apportionment of attorneys' fees. As stated in *Abenante v Star Gas Corp.*, 33 AD3d 638, 821 NYS2d 911 (2d Dept 2006):

When there is a fee dispute between outgoing and incoming attorneys, '[t]he outgoing attorney may elect to take compensation on the basis of a presently fixed dollar amount based upon quantum meruit for the reasonable value of services or, in lieu thereof, the outgoing attorney has the right to elect a contingent percentage fee based on the proportionate share of the work performed on the whole case'(citation omitted).

Here, at the January 12, 2007 conference, prior counsel made clear its intention to seek a contingent percentage fee. Therefore, the Court must determine the amount of the contingency fee based upon the proportionate share of the work performed by the prior firm on the whole case, taking into consideration the relative contributions of the lawyers thereto (*see Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458-9, 541 NYS2d 742 [1989]). The burden of proving value of services rests upon prior counsel. The Court has previously set forth the actions of prior counsel in prosecuting this matter.

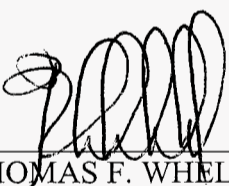
Present counsel served an amended complaint upon Dr. Grueso, which lead to the above described motion practice. Further bills of particulars were served, along with standard discovery demands. A second deposition of plaintiff was held, as were depositions of Dr. Buffa and Dr. Grueso. Medical records were obtained and court conferences attended. Motion practice included an application for disclosure of communications between Dr. Grueso and her insurance carrier within the applicable statute of limitations. The settlement occurred while these motions were outstanding.

The Court has to look to many factors in determining an attorney fee award (*see Ebrahimian v Long Is. R. R.*, 269 AD2d 488, 703 NYS2d 731 [2d Dept 2000]). The Court finds that the time and skill required and the experience, ability and reputation of the prior and present attorneys are of an equal and very high caliber. The deciding issues include the amount involved, the benefit resulting to the client from the services, and the result obtained by the attorney who actually brought about the settlement of the matter. The most significant work in this case, in light of the outstanding motions, was the actual settling of the case. Still, it must be remembered that the award here was not the result of a trial verdict or even a settlement during trial. That fact distinguishes this case from the various cases cited in the Memorandum of Law submitted by present counsel.

Accordingly, the Court finds that based upon the facts as set forth above, prior counsel is entitled to a contingency fee award of 33% of the recovered attorney fee and present counsel is entitled to an award of 67%. Such value reflects the settlement efforts and result obtained by present counsel.

Accordingly, the motion is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED: 3/1/07



THOMAS F. WHELAN, J.S.C.