

Albunio v City of New York

2007 NY Slip Op 32695(U)

August 24, 2007

Supreme Court, New York County

Docket Number: 0113037/2003

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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CAPTAIN LORI ALBUNIO AND LIEUTENANT
THOMAS CONNORS,

Plaintiff,

Index No. 113037/03

THE CITY OF NEW YORK, THE NEW YORK CITY
POLICE DEPARTMENT, INSPECTOR JAMES HALL,
INDIVIDUALLY AND AS AN EMPLOYEE,
FREDERICK PATRICK, INDIVIDUALLY AND AS AN
EMPLOYEE,

Decision and Order

Defendants.

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Hon. Martin Shulman, J.:

By order to show cause ("OSC"), Spar and Bernstein, P.C. ("S&B"), former counsel to plaintiffs, Lori Alburnio ("Alburnio") and Thomas Connors ("Connors") (collectively, "plaintiffs"), has moved to obtain a court order granting S&B an attorney's lien for legal services rendered in this action on behalf of plaintiffs and enjoining plaintiffs' present counsel, Mary D. Dorman, Esq. ("Dorman"), from distributing her attorney's fees from plaintiffs' jury award until a hearing is conducted to determine fees due S&B for such legal services prior to Dorman being substituted as new counsel. S&B also sought a temporary restraining order which this court declined to grant because counsel did not comply with 22 NYCRR §202.7.

Plaintiffs initially retained S&B on or about May 12, 2003 to initiate this action and executed identical retention agreements (Exhibit A to OSC). S&B *inter alia* prepared, served and filed the underlying summons and complaint, conducted discovery and participated in Alburnio's deposition. On March 9, 2005, Dorman telephoned S&B and advised that plaintiffs were requesting her to be substituted as

new counsel in this action. On March 14, 2005, S&B wrote Dorman and advised that it was asserting a lien against any future proceeds plaintiffs were to receive via a settlement or verdict and demanded reimbursement for itemized litigation costs (Exhibit B to OSC). By letter dated March 22, 2005, Dorman forwarded plaintiffs' checks fully reimbursing S&B for its costs and executed consent to change attorney forms, but did not address S&B's lien issue.

On November 22, 2006, a jury rendered a verdict in plaintiffs' claim for retaliation and constructive discharge against defendants and granted them loss of earnings awards respectively of \$479,473.00 and \$507,198.00. Apparently after learning of the verdict, S&B initiated this round of motion practice.

In opposition, Dorman challenges the merits of the OSC on several grounds, annexing affidavits of Albuño and Connors: (1) plaintiffs retained S&B because Joseph A. Turco, Esq. was a litigation associate there, who represented he was experienced with employment discrimination matters (Connors Opp. Aff. at ¶ 2, Albuño Opp. Aff. at ¶ 2); (2) Turco was inattentive and inefficient (Connors Opp. Aff. at ¶¶ 3-5, Albuño Opp. Aff. at ¶¶ 3-6); (3) Turco had advised plaintiffs he was leaving S&B because of a personal drug problem (Connors Opp. Aff. at ¶ 6, Albuño Opp. Aff. at ¶ 7) and S&B assigned their case to a new, inexperienced junior associate (Connors Opp. Aff. at ¶ 7, Albuño Opp. Aff. at ¶ 8); (4) plaintiffs lacked confidence in S&B's ability to adequately represent them and eventually retained Dorman (Connors Opp. Aff. at ¶ 8, Albuño Opp. Aff. at ¶ 9); (5) Albuño and Connors both paid an initial retention fee of \$1500.00 and fully paid S&B all outstanding disbursements (Connors Opp. Aff. at ¶ 9, Albuño Opp.

Aff. at ¶ 10); and (6) for the foregoing reasons, plaintiffs terminated S&B for cause (Connors Opp. Aff at ¶ 11, Albuio Opp. Aff. at ¶ 11).

Dorman further contends that S&B's affirmation in support of the OSC is not from someone with personal knowledge of the facts as to the legal services S&B actually performed; S&B's claim, if any, for compensation based on quantum meruit must fail as no contemporaneous time records were produced to support this application; plaintiffs' achieving a "win" on its constructive discharge claim was solely due to Dorman's efforts; and if S&B was not discharged for cause, then it would have to establish its entitlement to statutory fees pursuant to N.Y.C. Adm. Code § 8-502(f).

Disregarding this court's "off the record" ruling and over Dorman's objection, S&B submitted reply papers which essentially challenge plaintiffs' and their counsel's assertions that S&B was discharged for cause. As noted in the reply affirmation of Gary M. Sunshine, Esq. ("Sunshine"), inter alia, there was no requirement to fully corroborate the scope and breadth of S&B's services rendered in this application; Albuio and Connors filed mirror affidavits relying on hearsay information about the reasons for Turco's departure from S&B; plaintiffs' joint decision to discharge S&B for cause after being clients of the firm for two years allegedly occurred after Turco left the firm and not during his representation of plaintiffs, apparently disproving their claim that Turco's services were inadequate; plaintiffs' joint decision to retain Dorman was based upon their case subsequently being handled by a new S&B associate they perceived to be inexperienced; and neither plaintiffs nor Dorman ever communicated (verbally or in writing) to S&B that the firm was formally discharged for cause for inadequate legal representation.

At this juncture, S&B is not entitled to a charging lien under Judiciary Law §475 because a fund has not yet been created from any proceeds in this action. See *Chadbourne & Parke, LLP v. AB Recur Finans*, 18 A.D.3d 222, 794 N.Y.S.2d 349 (1st Dept., 2005). However, there remains a clear question as to whether plaintiffs truly discharged S&B for cause, requiring a hearing. Accordingly, it is hereby:

ORDERED that the issue of S&B's alleged discharge for cause and the amount of attorneys' fees due on a quantum meruit basis, if legally appropriate, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that final determination of this matter is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Special Referee Clerk (Room 119) to arrange a date for the reference to a Special Referee.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
August 24, 2007


HON. MARTIN SHULMAN, J.S.C.

FILED
AUG 28 2007
NEW YORK
COUNTY CLERK'S OFFICE