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

PRESENT: Hon. Stanley L. Sklar Justice PART 29

Index Number : 109864/2004
MATOS, GIOAMAR F.
VS
MT. SINAI MEDICAL CENTER
Sequence Number : 005
COUNSEL FEES, EXPENSES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

Is 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 consolidated for disposition with motion 006 and 007 and is

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

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

Dated: 11/16/07

STANLEY L. SKLAR J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

[* 2]

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

PRESENT: Hon. Stanley L Sklar PART 29

Justice

Index Number : 109864/2004

MATOS, GIOAMAR F.

vs

MT. SINAI MEDICAL CENTER

Sequence Number : 006

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

Is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

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STANLEY L. SKLAR J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐

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

PRESENT: Hon. Stanley L. Sklar Justice PART 29

Index Number : 109864/2004
MATOS, GIOAMAR F.
VS
MT. SINAI MEDICAL CENTER
Sequence Number : 007
OTHER RELIEFS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

is 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 consolidated for disposition with motions 005 and 006 and is

MOTION DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 11/16/07

STANLEY L. SKLAR J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 29

----------x

GIOAMAR F. MATOS,

Plaintiff,

Index No.: 109864/04

-against-

MOUNT SINAI MEDICAL CENTER, MICHAEL HARRIS, MD., YONG CHI, M.D., ARTHUR A. KORNBLUTH, M.D., STEPHANIE SCHLUENDER, M.D., MOUNT SINAI RADIOLOGY ASSOC., and "JOHN DOE", M.D., RADIOLOGIST (such name being fictitious, intended to be the radiologist who read the abdominal flat plate of 1/17/04 or 1/18/04).

Defendants.

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SKLAR, J.:

Motions 005, 006 and 007 are hereby consolidated for disposition.

In this medical malpractice action plaintiff Gioamar Matos' counsel, Gair, Gair, Conason Steigman & Mackauf ("Gair"), moves (005) for an order fixing the distribution of legal fees and determining the validity and amount of disbursements claimed by the office of Mark R. Bower, P.C., Matos' former counsel. Jeffrey Bloom of Gair claims that prior counsel should be denied any fee because it was discharged for cause and because its principal, Mark Bower ("Bower") allegedly acted unethically.

Bower moves (006) on behalf of his firm for an order apportioning the attorneys' fees between the two firms, and by separate motion (007) opposes Gair's motion and seeks an order disqualifying Gair from receiving a fee because of alleged unethical conduct by that firm and Bloom.

This is a case in which it is alleged that Matos, as a result of a failure of defendant physicians at defendant Mt. Sinai Hospital to diagnose between January 17-18, 2004 a post-colectomy volvulus, suffered numerous sequelae including a 5 month hospitalization, 5 surgeries and procedures, numerous re-hospitalizations, cirrhosis of the liver and the need for an intestinal transplant in October 2004.

Bower's firm which was retained in 2004, commenced the action in July 2004 and prosecuted this action. By letter dated September 12, 2005 defense counsel, Robert Deutsch, advised me on behalf of all counsel that despite diligent efforts discovery had not yet been completed in accordance with the court schedule, but that the work and time that counsel had spent together led them to believe that there was a reasonable likelihood that mediation could resolve the case. A request was therefore made to put off the completion of "the few depositions". In response on September 13th, I granted the request with the proviso that the note of issue be served by the end of January.

By fax dated September 16, 2005 Valber Hudson, Matos' brother, who had been acting in essence as a liaison between Matos and Bower's firm in connection with the case, advised that he was depriving Bower's firm of the authority to handle the case. *See Bower letter of 9/21/05 appended to Bloom aff. in opp. as exhibit "A"* Bower's firm had hired Hudson as a paralegal several months earlier, but he was fired once Bower's firm was discharged. Bower in a September 21, 2005 letter to Hudson and Matos advised them that *CPLR Article 50-A* would reduce any verdict to present value, mandate a payout over a period of years and cause a reversion of funds if Matos died early. Bower stated that he never had the chance to discuss this with Hudson and that it was important to understand this law in light of Hudson's insistence that

the case go to verdict rather than be settled for a lump sum immediately. Id Bower asked them to have incoming counsel explain this to them and indicated that he would be happy to cooperate with new counsel in releasing the file once arrangements were made for payment of disbursements and to satisfy Bower's firm's charging lien. By letter dated September 22, 2005 (appended to Bloom's order to show cause under index# 113578/05 to substitute his firm for that of Bower's) Bower advised Robert Conason of the Gair firm that Hudson had been dissatisfied with Bower's opinion that it was in Matos' best interest to settle the "case sooner rather than later so that plaintiff [could] obtain some comfort and enjoyment from the resolution of her claims, and the collection of settlement funds within her limited life expectancy". Bower advised Conason that while Hudson was free to disagree, such a difference of opinion did not constitute a discharge for cause. A consent to change counsel dated September 28, 2005 was ultimately filed on November 4, 2005.

Meanwhile Gair served an order to show cause signed by me on October 6, 2005 under index# 113978/05 seeking an order substituting it for Bower's firm, directing the firm to transfer the file to Gair and provide a list of disbursements, directing a determination of any dispute which may arise regarding any claimed disbursements and directing the court at the end of the case to decide what fee if any Bower's firm was entitled to receive. The County Clerk's file on that application contained Bloom's moving affirmation in which he asserted that Matos "believe[d]" that Bower's firm was fired for cause "for reasons explained ... in her affidavit" and asked the court to decide "whether" the firm was discharged for cause. Matos asserted in her affidavit in support of that application that cause existed because Bower allegedly told her that he would "personally handle" her case, but that she thereafter learned that he did not try cases but

instead referred them to outside counsel. Matos stated that if she had known this she would not have retained that firm. In addition she claimed that cause existed because Bower "pressured" her to settle her case for $2 million, a sum Matos believed to be grossly insufficient in light of her expenses, permanent injuries and a substantial Medicaid lien (evidently of close to $1 million).

In response Bower asserted that he only told Matos that he would personally handle the case up until trial, that he never told her he would personally try it, and that it had always been his expectation that the case would be referred to outside trial counsel if it did not settle. Bower also stated that there was never an offer of $2 million but rather that he told Hudson that the defendants were interested in mediating the case and would probably start negotiating with an offer in the $2 million range. Bower asserted that Hudson was advised as to the benefits and drawbacks of settling, including that settling was beneficial to Matos in light of her alleged precarious medical condition and doubtful long-term survival. Bower maintained that he was concerned that if the case went to trial Matos herself might not benefit financially because she might die before the end of the trial or any post-trial appeal. So, according to Bower, mediation was recommended to see what the defense would offer. However Bower alleged that Hudson and Matos refused to go to mediation and instead hired new counsel. Bower maintained that even if Hudson's/Matos' claims were true, that would not amount to a discharge for cause because they were free to ignore any advice to settle, and could have insisted that the case go to trial and "hire[d] other attorneys who accede to their wishes". *See Bower aff. of 10/10/05* in support of his motion under index# 113978/05 Bower also provided Gair with a list of claimed disbursements. In a reply affidavit of October 26, 2005 Bower added that it was untrue that he

did not try cases. Bower also maintained that he never told Matos or Hudson that he would or would not try her case and that if she wanted him to try the case he would.

In response Bloom agreed to pay Bower's firm about $11,000 in claimed disbursements but requested the court to determine the propriety and reasonableness of disbursements of about $20,000 in the alleged nature of expert's fees attributable to work performed by one Nursine Jackson, who was listed on Bower's firm's letterhead, and was listed on the firm's website as a member of the firm's "professional staff" (but who was also listed on that site as a "Legal Nurse Consultant" at the Bower firm). Bloom maintained that Jackson was the firm's employee and that the firm could not therefore bill separately for her work and that many of her services fell within the nature of office overhead and/or appeared inappropriate . Bloom also noted that Bower was romantically involved with Jackson. Bloom urged that Bower's firm by billing for Jackson's services acted improperly and that such was an additional ground to find that Bower's firm forfeited its fee. The proceeding under index# 113978/05 was resolved by a so-ordered stipulation dated October 27, 2005 which left the issue of the fee division as well as the validity and amount of Jackson's charges for the conclusion of the case.

Bloom, whose firm ultimately settled the case on December 18, 2006 for $8,000,000, now asserts that Bower's firm was discharged for cause because Bower allegedly failed to take the necessary steps to assess Matos' future life expectancy and expenses and because he allegedly attempted to "bully" Matos, and her brother, Valber Hudson, into having Matos settle the case for $2,000,000. According to Bloom his "office" learned from conversations with Matos' doctor that Matos' life expectancy "was substantial". Bloom maintains that Bower failed to ascertain Matos' life expectancy and simply determined that her life expectancy was short. Bloom states

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in essence, that while Bower, through Jackson and the experts she worked with, may have evaluated whether there were departures from accepted standards of medical practice, he never obtained the records relating to Matos' transplant and her progress following the transplant and thus failed to adequately assess her prognosis and her long-term financial needs, including her future medical expenses. Indeed Jackson's notes appended to Bower's papers end in June 2004, four months before the transplant, and more than a year before Bower's discharge. Bloom then surmises that Bower wanted to settle the case for $2,000,000 because if the case were to go to trial Bower would end up sharing the sliding scale contingency fee with outside trial counsel. Bloom also suggests that it was not worth Bower's while to settle the case for its true value because the attorney's fee on any recovery over $1,250,000 would be limited to 10%. Bloom maintains that Bower failed to properly work up the case because he would only get 10% of any sum above $1,250,000, which according to Bloom, Bower likely recognized as a bad return on his investment.

Gair's papers are supported by Hudson's affidavit in which he alleges that over an extended period Bower repeatedly and in a bullying manner attempted to convince him to have his sister settle the case for $2 million. Hudson alleges that almost daily he and Bower "would have some sort of brawl over settling the case". Two million dollars was deemed unacceptable to Matos and her brother because according to Hudson his sister was not going to die soon and because that amount would substantially be eaten up by a huge Medicaid lien and would be inadequate to cover Matos' future expenses including a possible liver transplant and/or another intestinal transplant. Bower allegedly responded that Hudson should not worry about that because Matos could always go back on Medicaid and because no one was forcing Hudson to

care for his sister. Bower told Hudson that the case should settle while Matos was still alive and gave Hudson examples of cases where a plaintiff had died before settling.

Hudson alleges that he learned from another attorney in Bower's office, Valentine Wallace, who was allegedly subsequently fired, that Bower did not try cases. Wallace allegedly told Hudson that it was not a good idea to take the case to trial because Bower would bring in another lawyer, Joe Lichtenstein, who allegedly had no knowledge of the case and would have to start from the beginning. Hudson claims that after learning this, he confronted Bower who allegedly asked what Hudson would do about this. Hudson said he did not know and then suggested that Bower bring in a good trial attorney to familiarize himself with the case but that Bower refused to do that and instead wanted Hudson to attend mediation and still pressured him to accept $2 million. Hudson got the "impression" that Bower was not going to do any more work on the case unless Hudson agreed to the mediation. At that point Hudson interviewed several firms and hired Gair.

Bloom, supported by Matos' affidavit, maintains that Bower, knowing that it was important to Matos and her brother that Bower try the case, misled them, at the time his firm was retained, into believing that he would try the case so that his firm would get the case. Specifically, Bower was told when Matos first came to him that she had declined to use another firm when a partner at the firm refused to agree to personally handle the file. Matos asserts that Bower told her that he would personally handle her case. She asserts that if she had known he did not try cases himself she would not have retained Bower's firm. Bloom urges that this is another reason to deprive Bower's firm of a fee.

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Bloom further maintains that Bower acted unethically by billing approximately $20,000 in disbursements for work performed by Nursine Jackson, an individual with whom Bower was romantically involved and was allegedly an employee or someone held out to be an employee of Bower's firm. Bloom claims that the work performed by Jackson was typically performed by a law firm and was part of the office overhead. He further alleges that some items were grossly inflated and/or inappropriate. Bloom suggests that Jackson's disbursements were billed inappropriately to benefit Bower's girlfriend at Matos' expense.

In response Bower details the extensive work his firm performed on behalf of Matos and alleges that much of the work performed by Gair was unnecessary. Regarding the disbursements for work performed by Jackson, Bower and Jackson concede that they have a personal relationship but deny that it affected the claimed disbursements. At oral argument, Lichtenstein asserted that the romance was never hidden and that Matos and her brother were well aware of it soon after Bower's firm was retained. *See O.A. transcript, p.32* Detailed affidavits are provided to show that Jackson who lived in Pittsburgh was not an employee of the firm but rather an independent contractor who worked for other firms, some of which also listed her name on their letterheads. Once the potential problem with the letterhead and the firm website was brought to his attention Bower changed it to reflect Jackson's consultant status. Moreover Bower maintains, and Hudson does not deny, that he was aware of Jackson's consultant status since he worked at the firm. Bower asserts that Jackson's charges were reasonable, legitimate and did not constitute office overhead and that while a large law firm might have a nurse on staff to act as an expert, a small firm such as his would not. Bower submits affidavits from various attorneys

attesting to their use of Jackson as a medical legal consultant and the propriety of charging her fee as a disbursement.

Bower also asserts that he was not discharged for cause and that the real reason Matos sought another attorney was because of Bower's belief that Hudson was not being candid with him about the existence of notes he allegedly took on his computer while at the hospital visiting his sister. According to Bower Hudson told him that he took notes throughout the hospitalization, including on the night of the alleged malpractice, detailing Matos' signs, symptoms and complaints and communications with the hospital staff and physicians. Bower states that Hudson told him that he (Hudson) had told the nurses and doctors at the hospital that he was taking such notes in order to ensure that they would properly care for his sister. Bower could not get Hudson to produce these notes, including from a Sony VAIO computer, which defendants were aware of and repeatedly demanded, including via motion seeking, inter alia, all notes taken by Hudson on any computer or electronic device regarding treatment at Mt. Sinai Hospital. Bower over time began to suspect that Hudson's notes were not as helpful as Hudson once stated. Hudson ultimately produced some notes but Bower states that those notes involved treatment months after the malpractice. Bower asked Hudson for his laptop so that Bower's technicians could extract the notes, and Hudson allegedly responded that a computer repairperson had deleted them while removing a virus from his laptop, but had saved them to a disk, which Hudson asserted was lost. Bower then told Hudson that if the disk were missing the defendants might be able to get a missing documents charge against his sister. In response Hudson allegedly said that the defendant hospital could investigate his hard drive, and that it did not know he had information on his desktop. Bower replied that Hudson would not want defendants investigating

his hard drive and that he would be deposed and asked about all his computers. Bower urged Hudson to tell the truth because lost records could devalue the case. These communications occurred on September 14, 2005, and according to Bower precipitated an argument which is really why Matos retained new counsel.

Bower further maintains that he in fact demanded $7 million dollars (at some unspecified time) to settle the case and that one of the defense counsel, Robin Gregory of Wilson, Elser, Moskowitz, Edleman & Dicker, LLP, had conveyed that demand to her client's insurer F.O.J.P., in writing. Bower asserts that he and Hudson had a disagreement over the value of the case because Hudson valued the case at more than $20 million, whereas Bower's firm thought it was worth about $7 million. Bower contends that such a disagreement over the value of the case would not be grounds for a discharge for cause. Interestingly Bower did not refer to the $7 million demand in response to the order to show cause brought earlier under the other index number when Matos alleged that Bower was trying to pressure her to settle the case for $2 million. Bower asserts that Hudson's claim that Bower's firm was discharged because he wanted the trial attorney to handle the case from start to finish is false, and that Hudson "knew", evidently at some unspecified point during the limited time during the pendency of the case when he was employed by Bower's firm, that if the case went to trial Lichtenstein would try it or co-try it with Bower. Bower adds that Lichtenstein was "regularly apprised" of the developments in the case. *See Bower aff. of 3/20/07.*

Bower, who had Matos' EBT testimony videotaped in case she died, rejects Bloom's claim that he improperly assessed Matos' prognosis in valuing the case, noting that not only is the recitation of Matos' injuries set forth in Gair's own supplemental bill of particulars at odds

with the "rosy picture of good health and longevity that Mr. Bloom falsely projects" but also that even the report of Dr. Gabriel Gondolesi, Mt. Sinai's Director of Intestinal Transplant, served by Gair on defense counsel in February 2006 and upon which plaintiff relies, does not bode especially well for Matos' long-term survival. *See Bower affidavit of 3/20/07* For example according to Dr. Gondolesi's report the long term survival rate at 5 years for those who had an intestinal transplant was 55%. Bower also maintains that he learned from Hudson that Dr. Gondolesi at some unspecified time had told Hudson that within 3 years of the transplant there was a "good possibility" that Matos' immune system "could" reject the transplanted intestine, thereby requiring another transplant. In addition, another expert retained by Gair, Dr. Barry Root, indicated in a report which was part of the CPLR 3101(d) statement served on defense counsel in October 2006, that since her transplant Matos had been hospitalized 10 times, that she was at risk for transplant rejection and failure and liver failure and that the 5 year graft survival rate was 45%. Root opined that Matos faced a greater than 50% chance of requiring another transplant and noted that the availability of donor intestine was limited. Also, the expert economist referred by Gair, Jeffrey Siedenberg, Ph.D, in his report appended to the CPLR 3101(d) statement listed Matos as having a permanent and total disability.

Based on the foregoing Bower asserts that his firm is entitled to a substantial portion of the total attorneys' fee as well as its disbursements. In addition Bower moves to disqualify Gair from receiving a fee because of alleged unethical behavior. Bower surmises that Matos hired Gair because that firm would allow Hudson to lie about the computer records and hide critical documents. Bower also asserts that Gair's fee should be forfeited because the firm, without the

hospital's knowledge, contacted Dr. Gondolesi, who worked for the hospital, which according to Bower violated DR7-104.

Bower further asserts that Gair forfeited its fee by bringing false charges against Bower's firm in an effort to reduce its fee interest. In this regard Bower cites cases where monetary sanctions were imposed pursuant to 22 NYCRR §130-1.1 for frivolous conduct in civil litigation, including against counsel who had falsely claimed that former counsel had been discharged for cause in an effort to cause former counsel to take a reduced fee or withdraw his application for a retaining lien. *See Dwaileebe v. Six Flags Darien Lake, 11 Misc.3d 958 (Sup. Ct, Cattaraugus Cty, 2006); Drummond v. Drummond, 305 AD2d 504 (2d Dept, 2003), lv. den. 1 NY 3d 504* Bower argues that Gair's claims against his firm are false and were the product of "greed and gall". Bower further alleges that Bloom as part of his campaign to deprive Bower's firm of any fee, intentionally attempted to suppress information demonstrating that Bower was trying to settle the case for $7 million dollars, rather than the $2 million claimed by Bloom. Specifically Bower asserts that defense counsel Robin Gregory had recalled that Bower had made a $7 million settlement demand which she had conveyed to her client's insurance carrier, F.O.J.P., in writing. According to Bower, upon hearing that Gair was claiming that Bower had been discharged for cause, Gregory advised Bower that, although she had other cases pending with Gair and could not take sides in the fee dispute, if subpoenaed she would tell the truth about the $7 million demand. She then called Bloom to tell him what she would testify to. Gregory thereafter allegedly called Bower and indicated that Bloom had responded angrily, told her to "shut up", asserted that she had lacked the authority to discuss such matters, and told her that she should retain counsel to protect her interests. Gregory also allegedly informed Bower that Bloom

had called Gregory's client's insurance adjuster at F.O.J.P. demanding that they instruct Gregory not to cooperate with Bower. In light of the foregoing Bower asserts that Bloom knowingly and falsely claimed that Bower's demand was $2 million and attempted to suppress the truth by seeking to intimidate Gregory and calling F.O.J.P.

Bloom opposes Bower's application to disqualify Gair from receiving a fee and reiterates his claims as to why Bower's firm should receive no fee. He adds that he had a good faith basis for the claim that Bower was seeking $2 million to settle the case, namely the assertions of Hudson and that of co-defendants' counsel, Robert Deutsch. Bloom characterizes the $7 million demand as an "initial" demand and provides Deutsch's affirmation to the effect that to the best of his recollection there was only a single discussion between him and Bower during which a dollar settlement came up and that was at co-defendant's counsel's office during a break in the deposition of defendant Dr. Michael Harris. Deutsch asserts that Bower told him that it would take about $2 million to settle the case. Deutsch responded that his clients' carrier was interested in proceeding to mediation and that he would bring that demand to the insurer's attention. Bloom maintains that an angry tone to Gregory in a phone call would not have intimidated her. Bloom states that Gregory informed him on the day of the phone call that she would be testifying as to her recollection at a hearing, if there were one. Bloom further claims that on that same day he spoke by phone to someone at FJOP and merely "mentioned his dismay that [Gregory] would want to get herself involved". See Bloom affidavit of 5/1/07.

Bloom further asserts that there were troubling discrepancies between two sets of invoices submitted by Nursine Jackson which Bloom believes points to her disbursements being inflated, altered and improper. Bloom also maintains that there was nothing improper in his

getting an opinion from Dr. Gondolesi as to Matos' prognosis, since she was plaintiff's subsequent treating physician [as reflected in a bill of particulars (at ¶ 9) dated October 14, 2004, prepared by Bower] and was not involved in the alleged malpractice which was not claimed to have been committed by those treating Matos at Mt. Sinai's Transplant Institute.

Bloom denies that his firm allowed Hudson to commit perjury. Bloom observes that any notes were made not by plaintiff, but by her brother, a non-party, and that any such notes were insignificant to establish malpractice. Moreover Bloom asserts that his firm produced everything his firm believed was discoverable which Hudson told Bloom's firm he had. Bloom believes that if Hudson had anything damaging to the defendants' case he would have furnished it. Bloom further observes that if defense counsel disbelieved Bloom's assertion, at Hudson's EBT, that some of the notes were irrelevant, they could have moved for them to be turned over or sought an in camera review, which they did not.

In reply Bower asserts, inter alia, that Bloom's claim that Bower wanted to settle the case quickly and cheaply because after the first $1,250,000, he would only get 10% is baseless. Bower also submits a new affirmation from Deutsch in which he supplements his prior affirmation by relating a recent conversation he had with Gregory. During that conversation, Gregory told Deutsch about her recall of conversations she had with Bower and informed Deutsch that she had a written record referable to her conversation with Bower in which he stated that his client was interested in settling the case for $15 million but that he (Bower) believed it could be settled for $7 million. Deutsch in his second affirmation denied having any recollection of such a conversation with Bower or Gregory and had no documentation reflecting that conversation.

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Discussion

Bloom's claim that Bower would settle an $8 million case for $2 million because of the sliding scale fee schedule or because he would have to share fees with trial counsel if the case did not settle makes no sense since 10% of the amount over $2 million is still a substantial amount and because if the case were settled before it went to trial Bower presumably would keep the entire fee. I further find as a matter of law that even assuming arguendo Bower urged his client to settle the case for $2 million that standing alone would not constitute cause for discharging Bower's firm. Given the reports obtained by Gair, including those of Dr. Gondolesi and Dr. Root, which gave Matos approximately only a 55% chance of surviving 5 years, when coupled with the likelihood that within that same period Matos would need another intestinal transplant, an organ that was in limited supply, it cannot be said that urging the client to take a $2 million settlement sooner, while she was still alive, amounted to incompetence justifying the forfeiture of the fee.

So the real issue is whether Bower failed to honor his client's absolute right not to agree to settle the case by bullying the client, through her brother, to the extent that a poisoned atmosphere of harassment was created warranting a discharge of counsel. Obviously, merely because an attorney and client disagree about a settlement amount or because the attorney attempts to persuade the client to agree to an amount the attorney sincerely believes after doing an appropriate analysis is an appropriate settlement figure, would not amount to cause. However where the attorney's attempts to get the client to agree to a settlement figure go beyond a repeated recommendation to the creation of a poisoned atmosphere of harassment making the continued relationship untenable, cause to discharge counsel might exist. Also there is an issue

as to whether Bower in an effort to have Matos retain his firm intentionally misled her into believing he would try the case. *See EC 2-8; EC 2-9*

In addition the papers raise issues as to the proprietary and amount of the disbursements referable to Jackson, and whether any impropriety in the bill for her disbursements was under circumstances and of such a magnitude so as to warrant a forfeiture of counsel's fees. Obviously the mere fact that an attorney might list as a disbursement something that is actually office overhead would not in and of itself result in a fee forfeiture. This frequently happens, and the remedy is simply to disallow the item or parts of it improperly claimed. The issue is one of magnitude and intent. *CF Matter of Lowell, 14 AD3d 41, app dsmd. 4 NY3d 846, lv. to app. den. 5 NY3d 708; Matter of Aaron, 232 AD 2d 119; Matter of Segall, 218 DD2d 331; Quinn v. Walsh, 18 AD3d 638; See also DR-102.* Also that Bower and Jackson were romantically involved would not necessarily mean that her claimed disbursements were improperly billed.

Bower's claims that Bloom's firm should forfeit its fee because Bloom got an opinion from Dr. Gondolesi about Matos' then current condition and prognosis is without merit. Dr. Gondolesi was Matos' treating physician who saw her even after this action was commenced in July 6, 2004 and while Bower's firm represented her *(See Bill of Particulars of 10/14/04, ¶9).* There is no claim that Dr. Gondolesi or Mt. Sinai's transplant department was negligent. All the claims of malpractice antedate when Matos was seen in connection with an intestinal transplant. Thus it was not inappropriate for the Gair firm to get an opinion from Dr. Gondolesi as to Matos' current condition and prognosis. That Mt. Sinai, a defendant, may have employed Dr. Gondolesi is irrelevant. *See Niesig v. Team I, 76 NY2d 363* I further note that Mt. Sinai was well aware that Gair obtained a report from Dr. Gondolesi during the pendency of this action since his report

was served by Gair on Mt. Sinai's counsel *(See Motion 005, Exh. "Q")*, and there is no claim by Bower that Mt. Sinai's counsel raised any objection.

Bower has also failed to raise any issue requiring a hearing regarding his claim that Gair should forfeit its fee because it allegedly facilitated perjury by non-party Hudson in connection with alleged notes that he supposedly kept from defense counsel. First Bower's claim is wholly speculative. He does not truly know whether Hudson in fact had notes from his computer or otherwise that were relevant and discoverable because Bower himself could not extract them from his client. Why he would think that Gair would fair any better with Hudson than Bower did is unclear. Second, as Bower's papers reveal, defense counsel were well aware, presumably from their clients, of Hudson's claim that he was keeping contemporaneous computer records of what transpired at the hospital. Defendants served discovery demands for Hudson's computer records and notes and if rebuffed could have demanded inspection of the hard drive of all of his computers. In addition at Hudson's deposition when Bloom asserted that certain of Hudson's notes were irrelevant defense counsel could have moved for Bloom to produce the notes and/or for an in camera inspection. Bower's further claim that Bloom suppressed notes to the effect that Dr. Gondolesi stated that Matos could require another transplant is undercut by the fact that Dr. Gondolesi's report served on defense counsel indicates that Matos may need a new transplant, and by the report of Dr. Root, also served on defense counsel, which indicates that the three year graft survival rate is 52% and after five years it decreases to 45%.

Nonetheless, Bower's allegations, albeit currently based on hearsay statements of Robin Gregory who evidently would not give an affidavit on these applications but who will allegedly testify if subpoenaed, that Bloom was attempting to intimidate Ms. Gregory and suppress the truth about Bower's alleged settlement demand of $7 million, if established at a hearing as to the

fees and disbursements, if any, to which each firm is entitled, might be relevant on the issue of Bloom's motive in urging certain grounds to deprive Bower's firm of fees and disbursements and could have a bearing on Bower's claim that Bloom and his firm's motion was frivolous in whole or in part and was undertaken primarily to harass and maliciously injure Bower *[See Murray v. National Broadcasting Co., 217 AD2d 6510 (2d Dept, 1995); See also Dwaileebe, Supra]* and thus on whether the imposition of sanctions is warranted pursuant to *22 NYCRR 130-1.1.*

In light of the foregoing this matter is referred to the Judicial Support Office for assignment to a special reference to hear and report with recommendations as to:

1) whether Bower's firm was discharged for cause for allegedly exerting undue pressure on his client to settle the case at a figure deemed unacceptable to the client or for allegedly misleading Matos, in an effort to get her as a client, as to whether Bower would be trying the case if it went to trial; or engaged in conduct, after the discharge, amounting to dishonesty, fraud, deceit or misrepresentation in connection with the claimed disbursements attributable to Jackson, thereby warranting a forfeiture of Bower's firm's fee,

2) whether Bloom and/or his firm's motion was frivolous in whole or in part and undertaken primarily to harass and maliciously injure Bower, and if so whether the imposition of sanctions in a specific amount are warranted,

3) the amount of any disbursements awarded to each firm and,

4) the amount of any legal fee to be awarded to each firm.

Pending receipt of the report and a motion pursuant to CPLR 4403, final determination of these applications are held in abeyance. Counsel are directed to file a copy of the order to be settled hereon with notice of entry with the Legal Support Office, Room 311 for the purpose of obtaining a calendar date.

Settle order.

Dated: November 16, 2007
60 Centre Street
New York, NY

J.S.C.

STANLEY L. SKLAR