

**Moshe D. Fuld, P.C. v William G.
Sayegh, P.C.**

2008 NY Slip Op 32284(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0116518/2006

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EILEEN A. RAKOWER

PRESENT: _____ **J.S.C.**
Justice

PART 5

Moshe D. Fuld, P.C.

INDEX NO. 116518/06

The Law Firm of
William G. Sayegh, P.C.

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits	<u>3, 4, 5</u>
Replying Affidavits	<u>6, 7, 8</u>


Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
AUG 15 2008
NEW YORK
COUNTY CLERKS OFFICE

Dated: August 12, 2008


EILEEN A. RAKOWER J.S.C.
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: PART 5

-----X

MOSHE D. FULD, P.C.,
Plaintiffs,
- against -

Index No.
116518/06

The Law Firm of WILLIAM G. SAYEGH, P.C.,
Defendants.

DECISION
and ORDER
Mot. Seq. 003

-----X

HON. EILEEN A. RAKOWER

On March 22, 2004, Wasfi Sadat was driving with his wife, Nancy, and child, Bahaa, when they were involved in a motor vehicle accident with a car driven by Thomas J. Kelly. Both Sadat and Kelly are residents of Poughkeepsie, New York and the accident occurred on the Bear Mountain Parkway in Westchester County. Sadat contacted petitioner Moshe D. Fuld (Fuld), seeking to retain him as counsel in connection with the accident.

On March 29, 2004, petitioner met with the still hospitalized Sadat and spent three quarters of the day interviewing him with respect to the accident, his injuries and his work status. Sadat signed a retainer agreement in which he agreed to pay petitioner one-third of any recovery that he may receive as a result of his claim. Thereafter, petitioner filed an action in New York County on behalf of Sadat, his wife and child, seeking damages for personal injuries they sustained in the accident.

In May, 2004, petitioner was contacted by respondent, the Law Firm of William G. Sayegh, P.C. and informed that it was Sadat's new counsel. Respondent requested that petitioner send the Sadat file to it and execute a Consent to Change Attorney form. By letter dated May 5, 2004, petitioner contacted the insurance carrier for the other party involved in the accident to inform it that "we have a lien on a percentage of the proceeds in this case." Petitioner sent a copy of its file to respondent on June 14, 2004.

In November, 2006, petitioner filed papers for a special proceeding and in February, 2007, it filed a request for judicial intervention seeking a declaration that it has a charging lien on the claim by Wasfi Sadat, determining the percentage of the

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NEW YORK COUNTY CLERK

entire contingency fees due it and compelling respondent to disburse all legal fees owing to the petitioner. Respondent opposed this application stating that petitioner is not entitled to recover any fees as it was discharged for cause. On May 10, 2007, this court referred the matter to a Special Referee with the direction "to hear and report to the Court on the issues of whether Petitioner is owed attorney's fees by Respondent for the work Petitioner did in the case of Wasfi Sadat v. Thomas J. Kelly, Jr., and , if so, the amount of the fees owed him."

On October 23, 2007, a hearing was held before the Special Referee in which petitioner Fuld testified and respondent offered no evidence. The Special Referee filed his report on December 27, 2007, concluding that petitioner established, by a fair preponderance of the credible evidence, that it is owed attorney's fees from respondent for work performed in connection with Sadat v. Kelly, index number 105567/04. The Special Referee found that petitioner is owed \$1,500 in fees by respondent.

In January, 2008, petitioner moved for an order from this court rejecting the report of the Special Referee and awarding it 50% of the legal fees recovered by respondent in the Sadat matter. Petitioner argued that the Special Referee's decision was wrong because Fuld had elected to receive a percentage of the contingent fee rather than a fixed dollar amount for its services. Petitioner stated that the Special Referee's valuation of his services was arbitrary, irrational, and incorrect as a matter of law.

Respondent opposed and took the position that "[s]ince the Petitioner is challenging the recommendations of the Special Referee, then [it] takes the position that Petitioner is not entitled to any fees in this matter." Respondent stated that petitioner failed to make out a prima facie case of entitlement to a lien at the hearing before the Special Referee and it reiterated that petitioner is not entitled to fees because it was discharged for cause.

Respondent provided a notarized affidavit from their former client, Sadat, which states that he fired petitioner on May 3, 2004 because petitioner told him to fill out his own paperwork for his insurance carrier. He stated that he had difficulty understanding the paperwork and needed the assistance of an attorney to represent his interests. While the Special Referee took judicial notice of Sadat's affidavit, Sadat did not testify and was not cross examined.

Respondent argued that petitioner improperly instituted Sadat's action in New York County rather than Dutchess County where it was adjudicated after a change of venue. Respondent stated that petitioner failed to recognize a potential conflict of interest between the infant child and Wasfi Sadat, and failed to enlist the services of another attorney to represent the infant child, as respondent did. It argued that petitioner's retainer agreement only pertained to Wasfi Sadat, not his wife and child, and petitioner wrongly instituted an action in their name. Respondent argued that petitioner failed to prove how much time he spent on Sadat's case because he did not enter any time records into evidence before the Special Referee. Respondent argued that petitioner's failure to pursue Personal Injury Protection (PIP) under no fault insurance benefits, as he did, is evidence that petitioner is not entitled to fees.

This court read the transcript of the hearing before the Special Referee and reviewed his report. Pursuant to CPLR §4403, by Interim Order dated April 15, 2008, the court concurred with the Special Referee's unstated finding that petitioner was discharged for a reason other than cause. The court stated that the former client's affidavit failed to establish impropriety, misconduct or abandonment of the matter and that since petitioner was discharged shortly after being retained, he was precluded from taking any further action for his client's benefit. (*Greenburg v. Cross Island Industries, Inc.*, 522 F.Supp2d 463 [EDNY 2007]).

After review of the Special Referee's report, the court was constrained to reject that portion which awarded petitioner the flat fee of \$1,500.00, as petitioner had clearly retained a right to a contingent percentage fee from Sadat's settlement. Accordingly, the court ordered a new hearing to take additional testimony regarding the attorney's fee ultimately collected, the work that each attorney did and the contingency percentage fee that petitioner is entitled to. (CPLR§ 4403).

A new hearing was held on June 17, 2008, at which petitioner Moshe D. Fuld, Esq. testified on behalf of his firm and Andrew W. Humphreys, Esq. (Humphreys) testified on behalf respondent William G. Sayegh, P.C..

Petitioner testified at this hearing, much the same as he did before the Special Referee, that he spent three quarters of a day interviewing Sadat. Thereafter, as evidenced by the file that he forwarded to respondent, petitioner obtained the police accident report and medical records. He wrote letters to the insurance carriers involved and negotiated a property settlement with Chubb Insurance Company for the value of the Sadat car. Petitioner also filed an action in New York County Supreme

Court on behalf of the Sadat family. The complaint filed on behalf of the Sadat family indicates a simple personal injury matter, as the complaint is fourteen paragraphs and just over two pages in length. Petitioner, retained on March 29, 2004 and discharged on May 3, 2004, represented the Sadat's for 36 days.

Humphreys testified that Fuld's involvement in the Sadat matter, rather than being beneficial, was detrimental to the client. The Sayegh firm's position is that any preliminary work that was done by Fuld had to be done over and his having filed an action in New York County only necessitated a change of venue motion which occasioned a great deal of delay in the case. Humphreys, the supervisor of the firm's personal injury department at the time, testified that attorneys from the firm met with Sadat, at his home, a number of times. The preliminary work involved an investigation, filling out paperwork, photographing Sadat's injuries, getting authorizations from the client. Sadat's injuries required numerous doctor visits, physical therapy sessions and diagnostic tests, all of which needed to be catalogued and documented by the firm for the insurance carrier.

The Sayegh firm also filed a no-fault claim for lost wages on behalf of Sadat. Sadat had quit his job as a barber shortly before the accident with the intention of opening his own barber shop. That plan, however, was delayed by Sadat being incapacitated by his injuries. Humphreys testified that the carrier had "some initial issues" with the wage claim but the firm documented Sadat's prior employment and, through tax records and an investigation of the United States Department of Labor Statistics, was able to establish Sadat's entitlement to lost wage benefits. Humphreys testified that the firm also had to negotiate a settlement with Medicaid which, at one point, put a lien on the case. Humphreys stated that reaching that resolution required research and diligence to establish the Medicaid did not take the appropriate steps to establish their lien. In addition, the Sayegh firm filed a summons and complaint in Dutchess County, prepared additional pleadings, demanded and responded to discovery, conducted depositions, arranged for IMEs, participated in approximately eight court conferences and prepared for a jury trial. The Sayegh firm produced its Sadat file to substantiate its claims, including its retainer agreement which provided for the usual one-third as the firm's fee. The file also reflects that the firm spent over one hundred seventy hours on the case over the course of approximately two years. Ultimately, the case settled before trial for \$300,000.00. Accordingly, after disbursements, and pursuant to the firm's retainer agreement, the attorney's fee collected was \$98,930.25.

An attorney who is discharged for a reason other than cause may “elect between a fixed fee, measured by quantum meruit, or a contingent percentage fee, also measured by quantum meruit.” (*Lai Ling Cheng et al., v. Modansky Leasing Co., Inc., et al.*, 73 NY2d 454 [1989]). To be eligible for such a lien, the attorney must participate in a legal proceeding on the client’s behalf, thereby contributing to the client’s monetary recovery and the creation of a fund from which he may be paid. “An attorney discharged before he or she has instituted an action has the right to compensation on a quantum meruit basis only.” (*Picciolo v. State of New York*, 287 AD2d 721 [2nd Dept. 2001]). The factors to be considered in apportioning legal fees are “evidence of the time and skill required in that case, the complexity of the matter, the attorney’s experience, ability and reputation, the client’s benefit from the services, and the fee usually charged by other attorneys for similar services.” (*Padilla v. Sansivieri*, 31 AD3d 64 [2nd Dept. 2006] citations omitted).

Although there is no written agreement between petitioner and respondent to shed light on their intentions, petitioner testified that they agreed to attempt to reach an amicable agreement and if they could not, the court would decide. As petitioner did institute an action in this matter, the Fuld firm may recover a contingent percentage fee. (*Picciolo v. State of New York, supra*).

New York County may well have been a *forum non conveniens*, (CPLR §327(a)) for the parties in the Sadat matter but CPLR § 509 gave petitioner herein the right to file the Sadat action in New York County. Petitioner credibly states that he instituted the action on behalf of the entire Sadat family because he anticipated that Mrs. Sadat would sign the retainer agreement he left with her husband. Petitioner admits that he did not consider that another attorney should represent the infant child because he did not anticipate a potential conflict between the infant child and the parents. While respondent herein enlisted the assistance of another attorney to represent the infant child, the court notes that all separate causes of action brought on behalf of the infant were ultimately withdrawn.

Considering the factors enunciated in *Padilla, supra*, the court notes that petitioner did not submit any records to verify the amount of time that he spent on the Sadat matter but since he was hired on a contingency basis, rather than for an hourly fee, the lack of time records is understandable. (*Costello v. Kiaer*, 278 AD2d 50 [1st Dept. 2000]). Petitioner did contribute to Sadat’s monetary recovery and the creation of a fund from which he may be paid by gathering reports and filing the initial paperwork with the insurance companies, thereby protecting Sadat’s right to recover.

(*Picciolo v. State of New York, supra*). While the client did benefit from petitioner's services, the documents submitted as evidence of the Fuld firm's work on the Sadat matter reveal simple fill in the blank forms and the type of form letters normally written to insurance carriers to simply apprise them of the client's claims and representation in order to protect their client's interest, as well as their own. Additionally, petitioner failed to pursue PIP no fault benefits because Sadat told him he was unemployed and, in good faith, he believed that was not entitled to such benefits.

In contrast, respondent, after the considerable effort documented in its letter to Sadat's insurance carrier dated August 23, 2004, eventually succeeded in securing PIP benefits for Sadat. Once the Sayegh firm took over, it carefully and competently ushered Sadat through the personal injury suit process. While the matter may have initially appeared straightforward, the case was more complex. Sadat's injuries were fairly serious, and occasioned numerous visits to doctors, therapists, diagnosticians and IMEs,(which attorneys from the Sayegh firm attended) necessitating the retrieval of records and extensive documentation in preparation for trial. Respondent's client file, submitted to the court as evidence of the scope of the work done on the Sadat case, amply demonstrates the degree of the Sayegh Firm's involvement and verifies its claim of vigilant attention to the client's need for nearly two years.

"Considering the amount of time spent by the attorneys on the case, the nature of the work performed, and the relative contributions of counsel," under the circumstances presented here, the court finds petitioner is entitled to a contingent percentage fee of five percent (5%) of the gross attorney's fees, namely the sum of \$4,946.51. (*Podbielski v. KMO 361 Realty Associates*, 6 AD3d 597 [2nd Dept. 2004]; *Sang Seok v. Berman*, 18 Misc 3d 1133(A) [Sup. Ct., Queens Cty, Feb. 6, 2008]).

This constitutes the decision and order of the court.

Dated: August 12, 2008


Eileen A. Rakower, J.S.C.

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