

Fofana v Law Offs. of David Segal

2009 NY Slip Op 31763(U)

August 4, 2009

Supreme Court, New York County

Docket Number: 109169/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

ISMAEL FOFANA,

Petitioner,

-against-

THE LAW OFFICES OF DAVID SEGAL,

Defendants.

INDEX NO. 109169/09

MOTION DATE July 22, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this petition, inter alia, to compel transfer of a file from outgoing counsel to incoming counsel

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>


Cross-Motion: Yes No

Upon the foregoing papers, the petition, *inter alia*, to compel transfer of petitioner's legal file from outgoing counsel to incoming counsel is decided in accordance with the accompanying decision, order and judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated: August 4, 2009


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 61

-----X
ISMAEL FOFANA,

Petitioner,

DECISION, ORDER
AND JUDGMENT

Index No. 109169/2009

-against-

THE LAW OFFICES OF DAVID

O. PETER SHERWOOD, J.:

This judgment has not been entered by the County Clerk and Office of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

This petition, brought on by Order to Show Cause, seeks an order compelling outgoing counsel, The Law Offices of David Segal ("the Segal firm"), to turn over the legal file of petitioner Ismael Fofana ("petitioner") with respect to a motor vehicle accident that occurred on July 11, 2008 ("the file"), and extinguishing any claimed lien by the Segal firm upon the file, or, in the alternative, fixing the amount of any such lien at 10% of the net fee recovered by incoming counsel, The Law Offices of Alvin M. Bernstone, LLP ("the Bernstone firm"), with respect to such claim and reducing the amount of such lien by \$305.00 which represents the fees and disbursements allegedly incurred by the Bernstone firm in making this application.

The facts as derived from the verified petition and the affirmation of Matthew A. Schroeder, Esq., an associate of the Bernstone firm, are as follows: On July 11, 2008, petitioner was involved in a motor vehicle accident (Ver. Pet. ¶ 1). He retained the Segal firm to represent him with respect to any claim for personal injuries arising from such motor vehicle accident (Ver. Pet. ¶ 2). Thereafter, petitioner retained the Bernstone firm, by written agreement dated April 27, 2009, to represent him in connection with his claim for personal injuries sustained in the July 11, 2008 accident (Schroeder Affirm. ¶ 3, Ex. "1"; Ver. Pet. ¶ 3). The retainer agreement provided that the Bernstone firm would receive one-third of petitioner's net recovery. That same date, each of the petitioner and the Bernstone firm, respectively, sent a letter to the Segal firm by facsimile and certified mail, return receipt requested, advising the Segal firm of petitioner's new representation, directing it to cease all work on petitioner's case, and directing it to transfer petitioner's file to the Bernstone firm (Ver. Pet. ¶ 4, Ex. "B", "C"). Two copies of a Consent to Change Attorneys form was

included with the attorney's letter, together with a stamped envelope addressed to the Bernstone firm for the return of such consent ((Schroeder Affirm. ¶¶ 4, 5, Ex. "C").

David Segal, Esq. of the Segal firm responded by letter dated April 28, 2009, stating that he had appeared at a 50-h hearing and prepared a no-fault application on petitioner's behalf, and requesting a lien of 10% for the services he had rendered to date. He stated that no expenses had been incurred (Schroeder Affirm. ¶ 6, Ex. "D").

Mr. Schroeder contends that between May 1, 2009 and June 15, 2009, he repeatedly called the Segal firm and left messages in an effort to clarify whether it was seeking 10% of petitioner's total recovery or 10% of the net legal fee, but his calls were not returned. When such efforts failed, Mr. Schroeder sent a letter dated June 15, 2009, by facsimile and certified mail return receipt requested, stating that if the Segal firm was seeking 10% of the net attorneys' fees recovered such request could be "accommodated", but if it was seeking 10% of petitioner's net recovery, such request would require further consideration in light of the "de minimis" amount of work the Segal firm had performed in prosecuting petitioner's personal injury claim. Mr. Schroeder advised further that if the Segal firm did not respond within seven days, he would be compelled to seek judicial intervention to obtain petitioner's file and protect petitioner's rights (Schroeder Affirm. ¶ 8, Ex. "E"). After Mr. Schroeder made one last unsuccessful effort to obtain the Segal's firm's cooperation in transferring the file by telephoning the Segal firm on June 22, 2009 and leaving a message with the receptionist, petitioner brought on the instant petition to compel the transfer of the file and to extinguish any lien the Segal firm may have due to its failure to prosecute petitioner's case, unnecessarily delaying transfer of the file and forcing petitioner to incur attorney's fees in the process.

It is a well-established principle under New York law that a client may discharge an attorney at any time, with or without cause (*see, Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457 [1989]; *Matter of Montgomery*, 272 NY 323, 326 [1914]). An attorney forfeits his or her entitlement to recover compensation for services rendered only when he or she is terminated for cause or withdraws without cause (*id.*; *see, Klein v Eubank*, 87 NY2d 459, 464 [1996]). An attorney who is discharged without cause is entitled to recover the reasonable value of services rendered from the client through means of: (1) a retaining lien; (2) a charging lien; or (3) a plenary action for a *quantum*

meruit recovery (see, *Schneider, Kleitnick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 [1st Dept 2002]).

The record before the Court does not establish that the Segal firm was discharged for cause. However, the Court agrees with petitioner that since outgoing counsel neither appeared as attorney of record in an action or proceeding as required under Judiciary Law § 475 nor filed a proper notice of lien pursuant to Judiciary Law § 475-a, it was not entitled to a charging lien under the Judiciary Law (see, *Matter of Picciolo v State*, 287 AD2d 721, 722 [2d Dept 2001]; *Kats v Missry*, 272 AD2d 378, 379 [2d Dept 2000]; *Matter of Jaghab & Jaghab*, 256 AD2d 342, 343 [2d Dept 1998]).

Nevertheless, even though the Segal firm was notified that it was being discharged before it had instituted an action, it had a retaining lien as security for the value of the preliminary services it performed before the commencement of an action which permitted it to retain all the client's papers and files in its possession until its claim for services is paid (see, *Wankel v Spodek*, 1 AD3d 260 [1st Dept 2003]). Immediately upon its discharge, the Segal firm was entitled to compensation "measured by the fair and reasonable value of the services rendered" (*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d *supra* at 457).

Here, it appears that the Segal firm elected to be paid a contingent percentage fee based upon the proportionate share of the work that it performed on the case. Although petitioner seeks to have outgoing counsel's right to any fee extinguished on the ground that it unnecessarily delayed his action and caused him to incur unnecessary fees in compelling the transfer of his file to his new attorneys, this position loses sight of the fact that the Segal firm performed some preliminary legal services and was, therefore, entitled to retain petitioner's papers until the issue of its claim to services was resolved or its claim to such fees was protected by other security (see, *Lai Ling Cheng, supra* at 459; *Matter of Mongitore v Murphy*, 42 AD2d 800 [3d Dept 1973]; *Turner v Steve Brody, Inc.*, 24 AD2d 904 [2d Dept 1965]; *Lebovic v P. Ballantine & Sons, Inc.*, 12 AD2d 494 [2d Dept 1960]). Since petitioner argues, in the alternative, that the amount of any lien for fees claimed by the Segal firm should be fixed at ten percent (10%) of the net legal fee recovered and respondent agrees, the Court finds that such percentage fee was elected by outgoing counsel and is an appropriate method for determining the amount of legal fees to which the Segal firm is entitled for services rendered to petitioner prior to its discharge.

Accordingly, it is

ORDERED, that the petitioner's application is granted to the extent that respondent The Law Offices of David Segal is granted a retaining lien in the amount of ten percent (10%) of the net legal fee recovered by the Law Office of Alvin M. Bernstone, LLP, which shall serve to secure its retaining lien; and it is further

ORDERED, that the Law Offices of David Segal is directed to execute a Consent to Change Attorney within ten (10) days of service of this order with notice of entry and to turn over the petitioner's file in this matter at that time; and it is further

ORDERED, that petitioner shall serve a copy of this Order with notice of entry upon the respondent and upon the County Clerk within twenty (20) days of entry; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the court.

DATED: August 4, 2009

ENTER,



O. PETER SHERWOOD
J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).