

Rakower v Lavi

2009 NY Slip Op 31905(U)

August 20, 2009

Supreme Court, New York County

Docket Number: 106597/09

Judge: Marilyn Shafer

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

PRESENT: Hon. Martin Shafer

PART 8

Index Number : 106597/2009
RAKOWER, MICHAEL C.
vs.
LAVI, OZ
SEQUENCE NUMBER : 001
COUNSEL FEES, EXPENSES

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

this 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 decided in accord with the annexed memorandum.

FILED

AUG 25 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/20/09

MARTIN SHAFER 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 - NEW YORK COUNTY

PRESENT: Hon. MARILYN SHAFER

PART 8

Justice

RAKOWER, MICHAEL C.,

INDEX NO. 106597/09

Petitioner

MOTION DATE

-against-

LAVI, OZ,

Respondent.

FILED
AUG 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that petitioner's motion is decided as follows:

This is a motion for counsel fees and expenses by the petitioner, attorney Michael C. Rakower ("Rakower"), against his former client, Oz Lavi ("Lavi"), respondent.

Lavi retained Rakower in 2005 to represent him in a cause of action alleging violation of his federal constitutional rights during an arrest by a New York City police officer (Petition ¶ 2). Rakower and Lavi signed a Retainer Agreement ("Retainer") providing for a contingency fee arrangement whereby Rakower's fees would be one-third of the gross amount recovered by Lavi in any judgment or settlement (*Id.* at ¶ 4). The Retainer provided that all expenses were to be paid by Lavi (Pet., Ex. A, 1). It further provided that any sanctions award

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in the form of attorney fees and/or costs would be paid to Rakower (*Id.*).

Rakower filed a civil rights action on Lavi's behalf in the United States District Court for the Southern District of New York (Pet. ¶ 7). In 2007, he successfully moved for discovery sanctions pursuant to Fed. R. Civ. P. 37 against the City of New York and individual members of the New York Police Department (*Lavi v. City of New York*, 2007 WL 1573904 [SDNY 2007]). Rakower requested \$19,593.50 in attorney's fees and costs in association with the successful motion for sanctions (Respondent's Affirmation in Opposition ¶ 19). The City disputed the amount of fees and the parties agreed to delay the Court's determination until after the trial (Aff. in Opp. ¶ 20-21).

The Court never heard arguments on Rakower's application because the parties settled before trial (*Id.* at ¶ 22). The settlement precluded any claim for attorney's fees or sanction fees against the City (*Id.*, Exh. F). By its terms, Lavi received \$120,000 from the City in return for dismissing the action "without costs, expenses, fees, or sanctions" (*Id.*). Rakower claims that the large size of the settlement amount relative to Lavi's compensable claims against the City was "almost

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entirely a function of the attorney's fees already owed, as a result of the sanctions award, and the attorney's fees that would have been awarded following a trial victory" (Petitioner's Reply ¶ 21).

Rakower asks the Court to determine and enforce his lien on the total of the Settlement Funds in the amount of \$62,578.90 and direct Lavi to accept \$7,141.97 as payment in full of the unpaid portion of his share of the Funds (Pet., 3). Rakower also requests the costs of this proceeding.

Lavi asks the Court to find that Rakower is not entitled to any legal fees because he failed to file retainer and closing statements with the Office of Court Administration pursuant to 22 NYCRR § 603.7 (Aff. in Opp., 14). In the alternative, Lavi asks the Court to find that Rakower's fee is limited to one-third of Lavi's net recovery calculated after subtracting litigation expenses (*Id.*). He asks that the litigation expenses not include fees paid to other attorneys or legal research costs and requests copies of bills, invoices, and other records of expenses (*Id.* at 14-15).

Discussion

1. *Applicability of 22 NYCRR § 603.7*

Lavi's contention that Rakower is not entitled to attorney's fees is without merit. Section 603.7 does not apply to a federal cause of action to recover damages for a violation of constitutional rights. Lavi's claim that his suit against the City was a personal injury claim of the type contemplated by § 603.7 is incorrect. Claims for violation of constitutional rights are not subject to the same limitations on attorney's fees as personal injury claims (See *City of Riverside v. Rivera*, 477 U.S. 561, 586 [1986] [Powell, J., concurring]).

Proportional limits on attorney's fees in successful claims for violation of constitutional rights would defeat Congress' intent to encourage attorneys to take on these types of claims, thereby limiting plaintiffs' ability "to obtain redress from the courts" (*Id.* at 578). Recognizing that compensatory damages awards in a successful civil rights claim are often quite small, Congress enacted 42 U.S.C. § 1988 to allow a successful plaintiff's attorney to recover reasonable fees from the defendant (*Id.* at 576). Congress thought that the previous scheme did not provide sufficient motivation to attorneys to represent these clients, and the resulting lack of legal representation left legitimate claims to go unprosecuted (See *Kassim v. City of Schenectady*, 415 F.3d

[*6]
246, 252 [2d Cir. 2005]).

The compensation scheme created by Congress for civil rights claims is not overridden by 22 NYCRR § 603.7. Section 603.7 was enacted to protect unsophisticated personal injury and wrongful death plaintiffs from agreeing to unconscionable fee arrangements with unscrupulous lawyers. That purpose would not be served were the Court to apply § 603.7 in this case, where Rakower's dedication to Lavi's claim paid off in the form of a much larger settlement than Lavi was originally offered by the City. In fact, Rakower's fees under the retainer agreement between Rakower and Lavi are significantly less than Rakower could have sought from the City under § 1988. The City's desire to avoid paying a larger fee to Rakower after trial may have been a major factor in Lavi's receipt of such a large settlement.

The Court finds the compensation scheme created by Congress in § 1988 to be controlling. And while 42 U.S.C. § 1988 does not preclude attorneys and clients from agreeing to contingency fee arrangements, it does prohibit the imposition of such arrangements. For this Court to apply § 603.7 in this case would be "totally inconsistent with Congress' purpose in enacting" the

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scheme it has created to ensure civil rights claims can be litigated (*Id.* at 578).

As this Court holds 22 NYCRR § 603.7 not to apply to the matter at hand, the Retainer governs the fee arrangement. Pursuant to its terms, Rakower's fee is one-third (1/3) of the gross recovery received by Lavi (\$120,000), or \$40,000. The remainder, \$80,000, is payable to Lavi.

2. Expenses

Rakower's legitimate costs incurred in representing Lavi are to be paid by Lavi from his portion of the Settlement Funds. On consent, Rakower will furnish Lavi with copies of bills, invoices, and other records documenting all such expenses. Lavi's claim that he is not responsible for the costs of legal research on his behalf is without merit. However, despite citing *In re Estate of Clinton*, 157 Misc 2d 506 [Sur. Ct. 1993], which is not on point, Lavi is correct that he is not responsible for the cost incurred by Rakower in hiring outside counsel. Such payment was not agreed upon in the Retainer (See *Missouri v. Jenkins*, 491 U.S. 274 [1989] [holding compensation appropriate in § 1988 claims so long as consistent with marketplace norms]; *Shaw v. Manufacturers Hanover Trust Co.*, 68 NY2d 172, 177 [1986]

[*8]
[holding agreement between client and attorney must be construed in light most favorable to client]).

The Court directs Lavi to pay \$7,626.57 in expenses to Rakower, which is the sum of the expenses incurred by Rakower in representing Lavi excluding the \$1,890 incurred in hiring outside counsel (Aff. in Opp. ¶ 25).

3. Sanctions

The Retainer directs that any sanctions awarded will be paid to Rakower, but no sanctions were actually awarded in this matter. The stipulation of settlement between Lavi and the City expressly indicated that the action was dismissed with prejudice and without costs, expenses, fees, or contemplated sanctions (Aff. in Opp., Exh. F). To the extent that the sanctions provision in the Retainer is unclear, the burden is on Rakower to demonstrate that Lavi fully knew and understood the provisions (See *Siagha v. David Katz & Assocs., LLP*, 2007 NY Slip Op 51650 [U], *9-10 [Sup Ct 2007]; *Shaw*, 68 NY2d at 176). Rakower has shown that Lavi understood any sanctions award was to be received by Rakower. (Reply ¶ 25.) However, Rakower has not shown that Lavi intended Rakower to receive compensation from a settlement negotiated after a successful motion for sanctions but before an award of fees. Therefore, because Rakower has

not met his burden to show that the Retainer contemplated his receipt of sanction fees in the event of a settlement, he is not entitled to fees in excess of the contingency fee arrangement.

Conclusion

Accordingly, it is

ORDERED that the motion by petitioner Michael C. Rakower for counsel fees and expenses is granted, and the Clerk of the Court is directed to order judgment in favor of petitioner and against respondent Oz Lavi in the sum of \$47,626.57.

This reflects the decision and order of the court.

Dated: _____

8/20/09

~~MADONN SHAFFER~~

J.S.C.

Check one: FINAL DISPOSITION

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FILED

AUG 25 2009

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