Kelly v City of New York

2009 NY Slip Op 32041(U)

September 2, 2009

Supreme Court, New York County

Docket Number: 111047/06

Judge: Eileen A. Rakower

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SCANNED ON 9/9/2009

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 5

Index Number : 111047/2006
KELLY, MARY ELIZABETH
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 005
OTHER RELIEFS

INDEX NO. 111047/06
MOTION DATE
MOTION SEQ. NO. 005
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5

Cross-Motion: Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE NEW YORK

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

Dated: 9/2/09

J.S.C.
HON. EILEEN A. RAKOWER

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
COUNTY OF NEW YORK: PART 5

---X

MARY ELIZABETH KELLY a/k/a MARY BETH KELLY, individually and as Executrix of the Estate of CARL HENRY NACHT, deceased,

Plaintiffs,

Index No. 111047/06

Seq No.: 005

- against -

Decision and Order

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, and JEAN B. MATHURIN,

Defendants.

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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HON. EILEEN A. RAKOWER, J.S.C.

Counsel for plaintiff, Gair, Gair, Conason, Steigman & Mackauf ("Gair") moves for an order declaring that plaintiff's former law firm, Weiss & Rosenbloom ("Weiss"), has been discharged for cause, and thus, is not entitled to any legal fees in connection with plaintiff's lawsuit. The underlying action is for personal injuries and the wrongful death of plaintiff's husband who died shortly after he was struck by a tow truck owned by the City of New York ("City") on June 22, 2006. Plaintiff and her husband were riding their bicycles at the intersection of the Hudson River Park bicycle path and West 38th Street when the tow truck failed to yield and struck plaintiff's husband, resulting in his death.

On June 23, 2006, plaintiff retained Weiss as her attorneys. By Order of this Court dated August 29, 2006 Gair was substituted as plaintiff's attorneys. On February 10, 2009 the Appellate Division First Department reversed this Court's denial of plaintiff's summary judgment motion, and plaintiff was granted partial summary judgment on the issue of liability. A settlement agreement was reached on March 10, 2009 in the amount of $5 million. $500,000 of the settlement was for

plaintiff's individual cause of action and the rest was allocated to the estate.

Gair, in support of its motion, submits: the Decision and Order of this court dated August 29, 2006; a copy of an Appellate Division, First Department decision, decided February 10, 2009; a copy of a retainer agreement between Weiss and plaintiff; a copy of "Certificate of Preliminary Letters Testamentary," dated July 7, 2006; a copy of the summons with notice, dated June 26, 2006; a copy of a notice of claim, dated June 28, 2006; a letter from plaintiff to Weiss, dated August 10, 2006; a receipt for an index number, dated "06 Aug 07;" a letter from Gair to Weiss, dated August 11, 2006; a letter from Gair to Weiss, dated August 15, 2006; a letter from Gair to Weiss, dated August 16, 2006; and an amended notice of claim, dated September 14, 2006. Gair argues that Weiss made numerous errors and violated several disciplinary rules. Gair claims that Weiss was financially motivated to do work on plaintiff's behalf quickly because it knew that she was seeking to change firms .

Among the errors Gair alleges are: taking a wrongful death retainer while plaintiff's husband was still alive, identifying plaintiff in legal documents as Executrix before she was appointed as such, filing a Summons with Notice against City before filing a notice of claim, neglecting to include a claim for damages on behalf of plaintiff as a consequence of her being in the "zone of danger" when her husband was struck and killed, and, filing an unverified summons and complaint after being discharged by plaintiff. Specifically as to the last charge, Gair asserts that plaintiff, via a telephone call on August 5, 2006, advised Weiss that it was discharged and should stop work. Despite plaintiff's request, Gair claims that Weiss did not cease its representation of plaintiff, as evidenced by the filing of the summons and complaint on August 7, 2006.

Weiss, in opposition, submits the following, not duplicative of Gair's submissions: an affidavit by Kathiuska Garcia, legal assistant for Weiss; and a money order receipt for a copy of the accident report. Weiss asserts that it has not engaged in any misconduct and that it was not discharged for cause. Weiss strongly objects to the allegation that it filed a summons and complaint after it was discharged by plaintiff. Weiss claims that plaintiff did not discharge it or request that it stop working on her case until she sent a letter, dated August 10, 2006, to that effect. Weiss acknowledges that it did receive a message from plaintiff on Monday, August 7, 2006 but that the message did not in any way indicate that it was discharged as counsel. To

this end, Weiss submits the affidavit of Kathiuska Garcia, a legal assistant, which attests that the message she took off the answering machine states the following:

> SHE DOESN'T WANT YOU TO MEET WITH THE CITY UNTIL SHE HAS A BETTER SENSE OF HOW SHE WANTS TO GO FORWARD. SHE'S TAKING HER KID ON COLLEGE VISITS AND CAN BE REACHED TUESDAY AFTERNOON.

Ms. Garcia further attests that she specifically recalls that "Ms. Kelly did not say in any way that she was discharging the firm or Ms. Rosenbloom or Mr. Weiss." Weiss filed the summons and complaint on August 7, 2006. Weiss claims that it followed up on the message by calling plaintiff on Tuesday, August 8, 2006. Plaintiff told Weiss that she did not have time to talk but, Weiss claims, that plaintiff did not indicate in that conversation that she had discharged the firm or that she had retained other counsel. Weiss did not hear from plaintiff again until she faxed a letter on August 10, 2006. That letter states:

> Please be advised that I have retained other attorneys for the purpose of prosecuting my civil claims regarding the accident of June 22, 2006, As I previously advised you on August 5. please do no further work on my behalf. My new attorneys will be in touch with you in the near future. Thank you for your attention to this matter.

As to the other matters, Weiss asserts that its actions were proper. Regarding the absence of a "zone of danger" claim, Weiss argues that it discussed the matter with plaintiff but that she insisted that the case was "about Henry" and not about her. Weiss further claims that its use of "Executrix" on court documents was a good faith error as it intended to list plaintiff as "Proposed Executrix." Thus, Weiss argues that there is no evidence that it was discharged for cause and that it is entitled to a fair portion of Gair's fee. Specifically, Weiss is requesting $100,000.

Judiciary Law § 475. Attorney's lien in action, special or other proceeding, states:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a

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> department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

It is well settled that a client may terminate his relationship with an attorney at any time, with or without cause . Where the discharge is for cause, the attorney has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement. Where there are conflicting claims a hearing is necessary to determine whether an outgoing attorney was discharged with or without cause. (see *Friedman v. Park Cake, Inc.*, 34 AD3d 286, [1st Dept. 2006]). Here, there are conflicting accounts of what occurred from the time of Weiss' retention until the time that Gair was substituted as plaintiff's attorneys. Most significant of these is a determination of when Weiss was actually discharged and instructed to stop working on plaintiff's behalf. The August 10, 2006 letter contradicts the accounts of both Ms. Garcia and Weiss in relation to plaintiff's instructions to the firm. Thus, a hearing is required in order to determine if Weiss was discharged for cause and what, if any, fees it is entitled to.

Wherefore it is hereby

ORDERED that a hearing on the issue of whether the law firm of Weiss & Rosenbloom, P.C. was discharged for cause, and whether it is entitled to collect a share of the settlement agreement reached on March 10, 2009 in the underlying action, shall be held on TUESDAY, OCTOBER 6, 2009 in Room 308 at 80 Centre Street at 9:30 a.m.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 2, 2009

EILEEN A. RAKOWER, J.S.C.

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SEP 09 2009
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NEW YORK