

Beede v Fox

2010 NY Slip Op 30980(U)

April 6, 2010

Supreme Court, Rensselaer County

Docket Number: 3-178

Judge: George B. Ceresia

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

IRENE BEEDE,

Plaintiff,

-against-

STEPHEN D. FOX and STEPHANIE M. CROSBY,

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 19-03-0959 Index No. 03-178

Appearances: Basch & Keegan, LLP
Attorneys For Plaintiff
307 Clinton Avenue
P.O. Box 4235
Kingston, NY 12402

L.A. Beesecker, Esq.
Law Offices of L.A. Beesecker
246 Main Street, Suite 4
Cornwall, NY 12518

Mitchell H. Spinac, Esq.
P.O. Box 3748
325 Wall Street
Kingston, NY 12402

Martin, Harding & Mazzotti, LLP
PO Box 15141
Albany, NY 12212-5141

**INTERIM
DECISION/ORDER**

George B. Ceresia, Jr., Justice

Plaintiff commenced the above-captioned action to recover damages for personal injuries arising out of two separate motor vehicle accidents which occurred in Greene

County, New York. The first occurred on March 3, 2000. The second occurred on November 17, 2000. The action was recently settled for the sum of \$150,000.00 by her attorneys, the law firm of Basch & Keegan, LLP (“Basch & Keegan”). Attorney L.A. Beesecker, Esq., who had previously represented the plaintiff in this matter, but who was permitted to withdraw as her attorney by court order, has made a motion for an order fixing and determining an attorneys lien. Another attorney, Mitchell H. Spinac, Esq., who claims to be the first attorney to represent the plaintiff, has submitted papers in which he joins in the motion, and requests that his own attorneys lien be fixed and determined.

Attorney Spinac indicates that he was retained by the plaintiff shortly after the March 3, 2000 accident. In May 2001 plaintiff and Attorney Spinac allegedly executed a consent to change attorneys to permit the law firm of Martin, Harding and Mazzotti LLP to assume the representation of the plaintiff. According to Attorney Spinac, he made it known at that time that he was seeking a “quantum meruit attorneys lien”. Thereafter, Martin, Harding and Mazzotti LLP retained L.A. Beesecker, Esq. as trial counsel. Attorney Beesecker commenced the action as the attorney of record (not as trial counsel) in February of 2003. In June 2006 a settlement conference was conducted at the Greene County Courthouse during which a joint offer was made by the defendants to settle the action for the sum of \$90,000. The offer was rejected by the plaintiff, apparently against the recommendation of Attorney Beesecker. By order to show cause dated June 29, 2006 Attorney Beesecker then moved to be relieved as counsel for the plaintiff. During the pendency of the motion, in late August 2006, plaintiff retained the law firm of Basch & Keegan to represent her. By order dated September 7, 2006, Supreme Court Justice Leslie E. Stein relieved both Attorney

Beesecker and the law firm of Martin, Harding and Mazzotti from their representation of the plaintiff. Basch and Keegan subsequently proceeded forward with the action, and brought it to conclusion by way of settlement in the sum of \$150,000.00.

The plaintiff has submitted an affidavit in opposition to the application in which she claims, inter alia, that Attorney Beesecker was not prepared to go to trial, and that he abandoned her as a client after she refused to accept the settlement offer in June 2006. With respect to Attorney Spinac she indicates “I am unsure how Mitchell H. Spinac became involved . . . As far as I know, Mitchell H. Spinac did nothing on my case at all.” Plaintiff requests a hearing on the issues.

As a part of the relief requested in the motion, Attorney Beesecker seeks “an order setting the attorney lien of L.A. Beesecker *and the firm of Martin, Harding and Mazzotti* in accordance with the prior order of this court. . .” (emphasis supplied). Inasmuch as the law firm of Martin, Harding and Mazzotti had not been served with a copy of the motion papers (and did not otherwise appear and/or join in the motion), the Court directed that Attorney Beesecker serve a copy of the motion papers on the Martin, Harding and Mazzotti law firm. This has now been accomplished. The Martin, Harding and Mazzotti law firm has submitted an affirmation which confirms that they were retained by plaintiff to handle her personal injury claims, and that they referred the case to Attorney Beesecker “as trial counsel”.

Under Judiciary Law § 475, an attorney who appears for a party in an action has a charging lien on his client’s cause of action, which attaches to any judgment, verdict or court order (see *City of Troy v Capital District Sports, Inc.*, 305 AD2d 715, 716 [3d Dept.,

2003]). The lien attaches only when proceeds in an identifiable fund are created by the attorney's efforts in that action or proceeding (see id.; see also Judiciary Law § 475). The charging lien inures to the benefit of the “attorney who appears for a party” (see Judiciary Law § 475; see Cheng v Modansky Leasing Co., 73 NY2d 454, 458 [1989]). By way of contrast, “[a] common-law retaining lien, also known as a general possessory lien, entitles the attorney ‘to retain all papers, securities or money belonging to the client’ that come into the attorney's possession in the course of the representation, as security for payment of attorneys' fees” (Hoke v Ortiz, 83 NY2d 323, 331 [1994], quoting People v Keeffe, 50 NY2d 149, 155, and citing 1 Warren's Weed, New York Real Property, Attorneys at Law, § 6.02 [4th ed]).

The Court notes that the law firm of Martin, Harding and Mazzotti did not appear in the instant action on plaintiff's behalf; and it has presented no evidence that it furnished any legal services to the plaintiff. Nor has it demonstrated that legal papers, securities or money of the plaintiff are in its possession. As such, the Court finds that it has not demonstrated its entitlement to either a charging lien or retaining lien. Accordingly, the Court concludes that any claim asserted on behalf of Martin, Harding and Mazzotti, LLP has no merit and must be dismissed.

With respect to the claim of Attorney Spinac, the Court observes that since March 4, 2002 it has been required that an attorney provide client a letter of engagement or enter into a signed written retainer agreement with the client (see 22 NYCRR 1215.1). Attorney Spinac's representation of the plaintiff pre-dated this rule, having commenced (as indicated by Attorney Spinac) shortly after the March 2000 accident and continuing to early April

2001. In addition, it has been held that a failure to comply with said rule does not bar counsel from recovering in quantum meruit (see Nabi v Sells, 70 AD3d 252 [1st Dept., 2009]). As noted, the statutory charging lien under Judiciary Law § 475 is only applicable to an attorney who is or was an attorney of record with respect to the underlying litigation (see Judiciary Law § 475; Cheng v Modansky Leasing Co., *supra*). Where, as here, this is not the case, counsel is ordinarily relegated to a common-law retaining lien on the client's file (see *id.*). If, however, outgoing counsel relinquishes his or her retaining lien as a part of an agreement with incoming counsel by which outgoing counsel will be compensated at the conclusion of the litigation, such facts may give rise to a lien in quantum meruit for a contingent percentage fee (see *id.*). Attorney Spinac has submitted a copy of a letter from Attorney Paul B. Harding, Esq. of Martin, Harding & Mazzotti, LLP dated May 3, 2001 in which Mr. Harding states “[i]f you are claiming an attorney lien please set forth your claim in writing and we will discuss the same upon the conclusion of these cases.” In a letter dated September 5, 2002 Mr. Harding stated “[u]pon successful conclusion, I will be able to discuss your quantum meruit attorney's lien.” This, on its face, provides some evidence to support Attorney Spinac's claim to a retaining lien in quantum meruit.

Notably however, plaintiff disputes Attorney Spinac's entitlement to compensation, to the extent of even questioning whether he ever represented her. In a supporting affidavit submitted in opposition to the instant motion plaintiff indicates that she is “unsure how Attorney Spinac became involved [in her case]” and “as far as I know, Mitchell H. Spinac did nothing on my case at all. I cannot see how he is entitled to any fee.” Attorney Spinac has submitted copies of various papers in his file as evidence of his representation of the

plaintiff. He has also submitted a copy of a written consent to change attorneys purportedly signed by plaintiff, which authorizes Martin, Harding & Mazzotti, LLP to be substituted as attorney of record in the place and stead of “the undersigned attorneys”, one of which is Attorney Spinac. In view of the disagreement concerning whether Attorney Spinac ever represented the plaintiff, and with regard to what services were provided, the Court finds that there must be a hearing on the issue, including with regard to the nature and value of any such legal services.

Turning to the claim of L. A. Beesecker, Esq., Attorney Beesecker indicates that during a judicial settlement conference held on June 22, 2006 the plaintiff rejected a \$90,000 settlement offer. He indicates that thereafter the plaintiff decided she did not wish to continue working with him, and ceased communicating with him. It was at that point that he made a motion to be relieved as counsel, which (as noted) was granted by Supreme Court Justice Leslie E. Stein on September 7, 2006. Plaintiff (through her current attorney) points out that the order of Judge Stein (which, incidentally, includes a recital that it was issued with the plaintiff’s consent) contained the following ordering paragraph:

“Ordered that upon appropriate written notice from plaintiff or incoming counsel, and upon receipt of reimbursement for expenses and disbursements, L.A. Beesecker and Martin, Harding & Mazzotti shall transfer the file to successor counsel or to plaintiff, Pro Se, as the case may be subject to retention of their lien for fee, *if any, as may be determined by the court upon appropriate application hereafter; and it is further. . .*”
(emphasis supplied)

From the foregoing it is clear that Judge Stein left the issue with regard to the existence of a charging lien open for future judicial determination.

In opposition to the instant motion, plaintiff asserts that Attorney Beesecker was not

adequately prepared to proceed to trial at the June 2006 conference; and that Attorney Beesecker abandoned her as a client thereafter, leaving her in an untenable situation. The mere fact that both the outgoing attorney and the client consented to counsel's withdrawal as attorney of record is not determinative of the issue of whether the outgoing attorney is entitled to a charging lien (see Klein v Eubank, 87 NY2d 459, 463-464 [1996], cited with approval, Frankel v Frankel, 2 NY3d 601, 606, footnote 2). As stated in Lansky v Easow (304 AD2d 533 [2d Dept., 2003]):

“[w]here an attorney's representation terminates upon mutual consent, and there has been no misconduct, no discharge for cause, and no unjustified abandonment by the attorney, the attorney maintains his or right to enforce the statutory lien. However, where an attorney withdraws without good cause, his or her lien is automatically forfeited” (Lansky v Easow, *supra*, at 534, citing Klein v Eubank, *supra*, and Moon v City of New York, 255 AD2d 292 [1998]).

The Court finds that the plaintiff has raised an issue with regard to whether Attorney Beesecker was unprepared to proceed to trial at the June 2006 conference¹ and/or whether she was unjustifiably abandoned by Attorney Beesecker before trial. A hearing must be held with regard to the entitlement of Attorney Beesecker to a statutory charging lien, and if so, the amount thereof.

The Court concludes that a hearing must be held in keeping with this decision with regard to all of the following: Attorney Spinac's entitlement to a retaining lien in quantum meruit for the reasonable value of his pre-action services; Attorney Beesecker's entitlement to a charging lien in quantum meruit based upon the reasonable value of his services in

¹The Court is mindful of the argument advanced by Attorney Beesecker that as of the June 22, 2006 settlement conference there was still plenty of time to prepare for trial.

securing a \$90,000.00 settlement offer; and the reasonable value of the services furnished by the law firm of Basch and Keegan taking into account the \$150,000.00 final settlement.


The Court takes note that the law firm of Basch and Keegan currently holds the sum of \$47,980.14 in escrow, representing one third of the net settlement after deduction of disbursements (as set forth in the retainer agreement). The apportionment of attorneys fees to be awarded to Attorney Spinac, Attorney Beesecker and the law firm of Basch and Keegan should be confined to the foregoing amount. In the Court's view, the respective fee awards should be governed by general principles applicable in such cases. "Relevant factors to be considered include the time required, the difficulties involved, the nature of the services provided, the amount involved, the professional standing and ability of counsel, and the results obtained" (Matter of Estate of Drossos, 26 AD3d 602, at 603 [3rd Dept., 2006]; see also Matter of Estate of Middagh, 267 AD2d 593, 594 [3d Dept., 1999]).

Lastly, the Court will, by separate order, appoint Judicial Hearing Officer Patrick D. Monserrate as a referee to report (see CPLR 4320) or, if all parties consent, as referee to hear and determine (see CPLR 4317). A hearing will thereafter be scheduled.

SO ORDERED!

This shall constitute the decision and order the Court. All papers are being retained by the Court pending further proceedings.

Dated: April 6, 2010
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion of L.A. Beesecker, Esq. dated May 19, 2009, Supporting Papers and Exhibits
2. Affidavit of Irene Beede, sworn to June 11, 2009
3. Affidavit of Eli B. Basch, Esq., sworn to June 12, 2009, and Exhibits
4. Affirmation of Mitchell H. Spinac, Esq., dated June 4, 2009
5. Affirmation of Derek J. Spada, Esq. dated June 15, 2009
6. Affirmation of L.A. Beesecker, Esq., dated June 18, 2009
7. Further Affirmation of Mitchell H. Spinac, Esq., dated June 23, 2009
8. Affidavit of Eli B. Basch, Esq., sworn to June 26, 2009
9. Supplemental Notice of Motion dated October 14, 2009, Supporting Papers and Exhibits
10. Supplemental Affirmation of Mitchell H. Spinac, Esq., dated October 20, 2009 and Exhibits
11. Affirmation of Charles W. Heran, Jr., Eq., received November 13, 2009