

**Hecht, Kleeger, Pintel & Demashek v Asher &
Assoc., P.C.**

2010 NY Slip Op 31300(U)

May 21, 2010

Sup Ct, Richmond County

Docket Number: 80029/10

Judge: Joseph J. Maltese

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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 80029/10
Motion No.: 001**

HECHT, KLEEGER, PINTEL & DEMASHEK,

Petitioner

DECISION & ORDER

against

HON. JOSEPH J. MALTESE

**ASHER & ASSOCIATES, P.C. and
THE CITY OF NEW YORK**

Respondent

The following items were considered in the review of the following motion by order to show cause to compel disbursement of funds.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause with Verified Petition Attached	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Petitioner Hecht, Kleeger, Pintel & Damashek moves by order to show cause to: (1) compel Respondent Asher & Associates to consent to the disbursement of settlement monies in a proportion determined by this court pursuant to Judiciary Law § 475; and (2) disburse the settlement monies to Matthew Eadicicco, while holding the disputed funds in escrow pending resolution of the fee dispute. Petitioner's motions are denied in their entirety.

FACTS

This case calls the court to resolve a fee dispute between a plaintiff's lawyers. Suzanne Eadicicco Hill ("Hill") commenced the underlying action on behalf of her son, Matthew Eadicicco ("Eadicicco"). Hill hired Asher & Associates ("Asher") to represent her son in the personal injury action. Eadicicco claimed that he was injured as a result of a slip and fall at a New York City Public School. As a result of the fall, Eadicicco sustained a fracture to his right leg. He underwent surgical reduction of the fracture with internal fixation of an intra-medullary rod. Several months after the

rod was put in place, Eadicicco underwent a second surgical procedure during which the rod was removed

Asher obtained a \$175,000 pretrial settlement offer from the City of New York (“City”), which it believed was an acceptable offer and attempted to contact Hill, but was unable to do so. In order to preserve this offer, the respondent conditionally accepted the offer subject to Hill’s approval.

Hill rejected the City’s offer and fired Asher. Hill then hired the petitioner Hecht, Kleeger, Pintel & Demashek (“HKPD”). After taking over the case, HKPD attended numerous pre-trial conferences, filed several motions, filed a note of issue and certificate of readiness, prepared Eadicicco for his trial testimony, and tried Eadicicco’s case. While the jury deliberated, Eadicicco, who was no longer an infant, personally accepted a \$200,000 offer of settlement from the City. This represented a \$25,000 increase from the original offer of settlement obtained by Asher.

HKPD alleges that Eadicicco accepted the offer because he was concerned that the jury would return an unfavorable decision. Soon after the settlement offer was accepted, the jury came back with a decision favorable to Eadicicco. HKPD argues that it is entitled to receive its fee based on one-third of the \$200,000 settlement after the deduction of its costs and disbursements because of the labor exerted in prosecuting Eadicicco’s case. To further strengthen its position, petitioner contends that, had Eadicicco not disregarded its advice and allowed the jury to issue the verdict, the recovery would have been substantially greater.

Asher opposes this argument and asserts that any recovery by the petitioner, as Eadicicco’s subsequent attorney, should be limited to the \$25,000 increase in the settlement obtained by the petitioner.

The issue before the court is whether a subsequently engaged plaintiff’s attorney may reap the benefit of the entire settlement when it is only responsible for a fractional increase obtained by

its predecessor.

DISCUSSION

Attorney Fee Earned by Each Law Firm

Clients may terminate the relationship between themselves and their attorneys at any time by discharging the attorneys and substituting other counsel. Attorneys who are discharged without fault have an immediate right to recover the fair and reasonable value of their services rendered. The fee is determined at the time of the discharge on the basis of quantum meruit.¹ The relevant factors in the determination of the value of legal services are the nature and extent of the services, the actual time spent, the necessity therefor, the nature of the issues involved, the professional standing of counsel, **and the results achieved.**² The touchstone in determining the value of the services performed by attorneys for their clients is the benefit obtained by the clients from their services.³

The petitioner, HKPD, asserts that it is entitled to calculate its fee based on the final \$200,000 settlement. Petitioner argues that the prior settlement obtained by Asher tainted any subsequent settlement discussions initiated by the petitioner. The petitioner contends that the earlier settlement created an impression that the case was settled or would be settled for a similar amount, and that those impressions diminished petitioner's ultimate fee.

The petitioner posits that, had Eadicicco rejected the City's settlement offer, the petitioner's fee would more accurately reflect the amount of work done due to the increased settlement value of

¹ *Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655 [1993]; *Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454 [1989]

² (Emphasis added) *In re Estate of Freeman*, 34 N.Y.2d 1 [1974]; *Matter of Morris*, 57 A.D.3d 674 [2d Dept 2008]; *Spano v. Scott*, 166 A.D.2d 917 [4th Dept 1990]; *Jordan v. Freeman*, 40 A.D.2d 656 [1st Dept 1972]

³ *Mahan v. Mahan*, 213 A.D.2d 458 [2d Dept 1995]

a favorable jury finding. The time and effort expended, coupled with the respondent's alleged "tainting" of settlement negotiations, allegedly entitles the petitioner to a significant portion of the settlement monies.

The Respondent, Asher, argues that the petitioner is entitled only to a fee for the additional settlement monies obtained over and above the settlement amount previously negotiated by the respondent. Using this standard, the respondent's fee should be calculated based upon the original \$175,000 offer of settlement, while the petitioner's fee should be calculated based upon the \$25,000 in additional benefit obtained in the final settlement.

Respondent asserts that the conditional settlement did not prejudice Eadicicco or taint any subsequent settlement discussions. Eadicicco retained the ability to accept or reject the offer. Had the respondent not entered into the conditional settlement, Eadicicco would have lost the ability to make such a decision. Prior to obtaining the original settlement offer, the respondent handled Eadicicco's case for nearly five years. In those five years, the respondent performed extensive work essential to reaching the point where settlement negotiations could take place.

The present case is distinguishable from *Lai Ling Cheng v. Modansky Leasing Co.*⁴ where the plaintiff had discharged the predecessor attorney prior to the commencement of the action. Though the attorney had instituted conservatorship proceedings, investigated and gathered evidence and performed several additional preliminary services, the court agreed with the trial court's ruling that the attorney was entitled to only 20% of the legal fee based on the court's valuation of the services provided under quantum meruit.

In *Lai Ling Cheng*, the calculation of the fee was difficult because the exact amount of benefit flowing to the client from the discharged attorney's services was unclear. As a result, the court was forced to approximate the value of the services. However, in this case, the respondent

⁴ *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454 [1989]

obtained a definitive offer of settlement from which the value of his services could be readily obtained without this court having to approximate their value.

This case is more analogous to the situation in *Matter of Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Assoc.*⁵ There, the Appellate Division concluded that the predecessor attorney had entered into a contingent settlement that required the client's approval before it would be binding. The court found that the client was in no way prejudiced by the predecessor attorney's acts, which, in the circumstances, secured what then appeared to be an offer advantageous to the client. The court then found that the predecessor attorney was entitled to the fee agreed upon in the retainer as applied to the firm offer to settle that it had negotiated for its client.

Here, the respondent negotiated a contingent settlement that in no way prejudiced Eadicicco. Indeed, a conditional settlement prejudices no one. The respondent's actions maintained the validity of an offer that would have otherwise been rescinded before Eadicicco was even aware of it. Furthermore, no evidence has been presented to indicate that the respondent's prior settlement negotiations "tainted" any subsequent negotiations. Respondent merely obtained an advantageous offer from the City that provided Eadicicco with the option to either accept the offer or proceed with the prosecution of the case. As there was no evidence of misconduct on the part of the respondent in this matter, they should not be required to forfeit their agreed upon fee.⁶

The court's rationale in *Potts v. Hines*⁷ is also insightful. There, the Appellate Division found that the discharged attorney was required to return the retainer because of his failure to present sufficient evidence to demonstrate the value of his services to the plaintiff and the difficulty in determining the value of the attorney's services. The attorney did not present any time sheets or

⁵ *Matter of Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Assoc.*, 41 A.D.3d 367 [1st Dept 2007]

⁶ *Matter of Wingate*, supra

⁷ *Potts v. Hines*, 144 A.D.2d 189 [3d Dept 1988]

work product, elicit any testimony regarding his experience or reputation, or demonstrate any results achieved.

Conversely, the respondent in this case presented ample evidence of the value of his services on behalf of Eadicicco. The \$175,000 settlement offer is a firm benchmark from which the value of respondent's services can be determined since \$175,000 is undoubtedly a measurable "result achieved".⁸

Respondent should not be penalized in the form of a decreased fee simply because the petitioner expended allegedly vast amounts of time and effort to obtain a reward that was smaller than they had anticipated. This court cannot speculate as to ultimate value of a favorable jury verdict compared to the actual settlement. Though petitioner and Eadicicco diverged in their opinion on whether to accept the City's offer of settlement, the ultimate decision to settle was Eadicicco's alone and petitioner was bound by it. That the settlement may not have been in petitioner's best interests, or that petitioner may have been proven correct in their advisement that Eadicicco decline the settlement offer is irrelevant.

Application of Judicial Law § 475

Petitioner seeks to compel the release of settlement monies held by the City, in a proportion determined by this court, to the petitioner pursuant to Judiciary Law § 475 so that the share of the settlement proceeds owed to Eadicicco may be distributed.

Section 475 states in part:

From the commencement of an action...the attorney who appears for a party has a lien upon his client's cause of action...which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor...and the lien cannot be affected

⁸ *In re Estate of Freeman*, supra

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.

An attorney need not be counsel of record at the time the judgment or settlement fund is created in order to be entitled to the lien afforded by Judiciary Law § 475.⁹

This court finds that the respondent is entitled to receive the fee negotiated in the retainer agreement, that is, one-third of the results directly attributable to their prosecution of the case. Since the respondent obtained a \$175,000 settlement offer, they are entitled to receive one-third of the remaining proceeds once their respective costs and disbursements are deducted from \$175,000.¹⁰ Petitioner is entitled to one-third of the remaining proceeds once their respective costs and disbursements are deducted from the additional \$25,000.

Disbursal of Settlement Funds

Neither party has presented this court with any documentation to evidence their respective expenses and disbursements. As such, disbursement of any settlement monies to Eadicicco, petitioner or respondent would be premature. In addition, Hill had a cause of action for medical expenses in the original action.¹¹ No evidence has been presented to show Hill has discontinued her cause of action or that she is waiving her share of the proceeds in favor of Eadicicco. Therefore, this court cannot order the disbursement of any settlement monies to the parties at this time.

Accordingly, it is hereby:

ORDERED, that Hecht, Kleeger, Pintel & Demashek's petition is denied; and it is further

⁹ *Klein v. Eubank*, 87 N.Y.2d 459, 462 [1996]

¹⁰ *In re Estate of Freeman*, supra; *Matter of Wingate*, supra

¹¹ Exhibit F, Respondent's Affirmation in Opposition

ORDERED, that Hecht, Kleeger, Pintel & Demashek is entitled to one-third of \$25,000 less reasonable costs and disbursements; and it is further

ORDERED, that Asher & Associates is entitled to one-third of \$175,000 less reasonable costs and disbursements; and it is further

ORDERED, that Hecht, Kleeger, Pintel & Demashek and Asher & Associates shall submit reports detailing their respective costs and disbursements by June 30, 2010; and it is further

ORDERED, that an affidavit from Suzanne Eadicicco Hill shall be submitted delineating whether she has settled or withdrawn her cause of action; and it is further

ORDERED, that the City of New York shall continue to hold the settlement monies in escrow, pending final order of this court.

ENTER,

DATED: May 21, 2010

Joseph J. Maltese
Justice of the Supreme Court

