

**Devadas v Niksarli**

2010 NY Slip Op 31982(U)

July 9, 2010

Supreme Court, New York County

Docket Number: 107637/07

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 107637/2007

DEVADAS, JOHNSON

vs.

NIKSARLI, KEVIN M.D.

SEQUENCE NUMBER : 009

COUNSEL FEES, EXPENSES

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAGES NUMBERED

1,2

5

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

3,4

Upon the foregoing papers, it is ordered that this motion *and cross motion are*  
*decided in accordance with the attached memorandum*  
*decision.*

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Dated: \_\_\_\_\_

*M/L*

*[Signature]*

JUDGE DORIS LING-COHAN J.S.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  
COUNTY OF NEW YORK : IAS PART 36

----- X  
JOHNSON DEVADAS and SARAMMA DEVADAS,

Plaintiffs,

Index No. 107637/07

- against -

Motion Seq. No. 009

KEVIN NIKSARLI, M.D. and NEWSIGHT LASER  
CENTER, PLLC,

Defendants.

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**DORIS LING-COHAN, J.:**

Plaintiffs move for an order granting: (1) plaintiffs' statutory costs and disbursements; and (2) plaintiffs' counsel's increased attorneys' fees. Defendants cross-move to (1) stay the filing of any judgment until all post-trial motions and appeals are heard; and (2) deny plaintiffs' motion for an increase in the contingent fee.

This medical malpractice action was commenced after plaintiff Johnson Devadas received LASIK surgery, performed by defendant Kevin Niksarli, M.D. Prior to that date, plaintiffs entered into a retainer agreement with the Law Office of Todd J. Krouner, to represent them in this action (*see* Todd J. Krouner Affirmation, Exh B). Plaintiffs agreed to compensate counsel pursuant to the statutory sliding scale applicable to medical malpractice actions, set forth in Judiciary Law § 474-a. The retainer agreement also provided that should plaintiffs agree that the effort and result were extraordinary, counsel could petition the court for a fee enhancement, not to exceed one-third of the recovery (*see id.* at 1).

A nine (9) day jury trial was held before this court. The jury returned a verdict in favor of plaintiffs, and awarded: Johnson Devadas damages of \$100,000 for his past pain and suffering;

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\$3,000,000 for his future pain and suffering; \$60,000 for his past loss of earnings; \$20,000 per year, for 37 years, for his future loss of earnings; \$20,000 for Saramma Devadas' past loss of her husband's services; and \$100,000 for her future loss of her husband's services.

As to plaintiffs' motion which requests that the court order statutory costs and disbursements in the amount of \$1,025, such motion is inappropriate as costs and disbursements are to be determined by the Clerk of the Court, upon a showing of an appropriate bill of costs. Pursuant to CPLR 8401, "[c]osts, disbursements and additional allowances shall be taxed by the clerk upon the application of the party entitled thereto." Thus, the branch of plaintiffs' motion which seeks an order granting costs and disbursements is granted solely to the extent that plaintiffs should submit an appropriate bill of costs to the Clerk of the Court for determination of the costs and disbursements they are entitled to.

Plaintiffs also move, pursuant to Judiciary Law § 474-a, for an increased contingent fee. Judiciary Law § 474-a(4) provides that, if "plaintiff's attorney believes in good faith that the fee schedule . . . , because of extraordinary circumstances, will not give him adequate compensation" he may make an application to the court for an increase. The court, in its discretion, then has the ability to fix "reasonable compensation for legal services rendered" once "extraordinary circumstances are found to be present" (Judiciary Law § 474-a[4]).

Preliminarily, the court notes that plaintiff's counsel supports this extraordinary request essentially by submitting a scant 4 ½ page conclusory affirmation on this issue in support.<sup>1</sup> Further, the contingent fees set forth in Judiciary Law § 474-a(2) "are presumptively reasonable in all malpractice cases" (*Yalango v. Popp*, 84 NY2d 601, 607 [1994]). Thus, in seeking an

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<sup>1</sup> While the affidavit is longer, only 4 ½ pages are devoted to this issue.

order increasing such fees, the movant “bears the burden of rebutting that presumption by establishing that the fee schedule was inadequate to compensate counsel for the representation provided in the particular case” (*id.*). The factors to be considered in assessing the adequacy of the fees “are those related to the economics of the litigation and any concomitant financial hardship suffered by plaintiff’s counsel” (*id.* at 608). More specifically, the court must analyze “whether the award – viewed as a whole or broken down to its hourly equivalent – equitably compensates counsel for ‘the amount of time reasonably and necessarily spent’ in litigating the claim” (*id.* [internal citation omitted]).

Other courts have also considered: the complexity of the case and whether any novel issues were present; the estimated hours spent on the case; the extent that the case followed a more typical pattern or whether there was excessive opposition along the way or additional steps that needed to be taken in preparation of discovery, trial, and/or appeals; the size of plaintiff’s firm and extent of involvement by other members of the firm; and whether plaintiff had to forego taking on additional legal matters or expending time on behalf of other clients in pursuit of the plaintiff’s action (*see id.* at 608; *O’Connell v. Shivaram*, 37 AD3d 435, 435–36 [2d Dep’t 2007]; *Contorino v. Florida Ob/Gyn Assoc, P.C.*, 283 AD2d 67, 70–71 [2d Dep’t 2001]; *see, e.g., Doe v. Karpf*, 23 Misc 3d 229, 231 [NY Sup Ct, Nassau County 2008]; *Reid v. County of Nassau*, 158 Misc 2d 26, 29–30 [NY Sup Ct, Nassau County 1993]). One factor not to be considered is whether the client has consented to the increase.<sup>2</sup> *See* Judiciary Law § 474-a(4).

Plaintiffs’ counsel contends that increased attorneys’ fees are warranted in this case. Mr.

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<sup>2</sup> Although a client’s consent is irrelevant to the determination of whether to increase attorneys’ fees, other courts have noted when the clients have supported their counsel’s motion (*see, e.g., O’Connell*, 37 AD3d at 435; *Contorino*, 283 AD2d at 71).

Krouner, plaintiffs' attorney, outlined in his affirmation in support of his motion the reasons behind his belief that his fees should be increased, including: (1) that he has considerable expertise in the field of LASIK malpractice and was able to win "the second largest verdict for LASIK malpractice in history"; (2) that he "went to great lengths to locate and retain an expert ophthalmologist" and successfully sought a protective order to protect the identity of the expert; (3) that he "litigated against a considerably skilled and capable adversary"; (4) that this matter involved significant motion practice and trial preparation; (5) that the trial was postponed numerous times at defendants' request; (6) and that his boutique firm had limited resources (Krouner Affirmation ¶¶ 14-19, 23-24).

However, given the limited details provided in the short affirmation in support, the motion for increased fees is denied. Although plaintiffs' counsel has certainly zealously represented his clients, based on the record, such efforts cannot be deemed "extraordinary circumstances" sufficient to increase attorneys' fees that were contracted for between plaintiffs and their counsel (Judiciary Law § 474-a[4]). While plaintiffs' attorney does set forth the efforts he undertook during the discovery phase of this case and in preparation of trial, albeit in a conclusory manner, nowhere has he identified how many hours were spent by him in doing so and what those efforts were in detail. Counsel failed to show what his attorneys' fees amount to, nor has he broken down his recovery for attorneys' fees into an hourly equivalent (*see Yalango v. Popp*, 84 NY2d 601, 608 [1994]). In cases where the court granted an increase in attorneys' fees, counsel had adequately provided evidence of the number of hours spent on the case, and, in looking at an hourly figure, the court determined that the fees should be increased to provide reasonable compensation for the attorney (*see O'Connell*, 37 AD3d at 435; *Contorino*, 283 AD2d

at 69). Here, however, as previously explained, plaintiffs' counsel has failed to do so.

Moreover, while the court notes that plaintiffs' counsel was opposed by a "considerably skilled and capable adversary," plaintiffs' counsel was not faced with many complex or novel issues, beyond those normally present in a medical malpractice case, especially in light of his expertise in LASIK malpractice cases (*see* Krouner Affirmation ¶¶ 15, 17). "Medical malpractice actions are by their nature complex, warranting extensive and sophisticated preparation" (*Yalango*, 84 NY2d at 610).

Additionally, many of the arguments used by plaintiffs' counsel in support of his application for increased fees are not factors generally considered by the courts. The size of the award recovered for plaintiffs, the expertise of himself or the skill of his adversary are not determining factors. The motion applications made by the parties throughout the case, along with the retention of expert witnesses, are typical issues that arise throughout the life of a lawsuit, and are not considered "extraordinary circumstances" (Judiciary Law § 474-a[4]). "[I]t is customary for parties to 'produce the testimony of various experts and to be technically well prepared to develop that testimony or to cross-examine witnesses produced by the opposite side'" (*id.* [internal citations omitted]). The fact that plaintiff's injuries were serious and

"were successfully (and quite ably) pursued by movant does not render it extraordinary. To the contrary, movant is already being compensated more because of the extent of the injuries and his success than he would have been had the . . . plaintiff's injuries been less and/or had the case not been as successful even with the same expenditure of time and effort"

(*Reid v. County of Nassau*, 158 Misc 2d 26, 30-31 [Sup Ct Nassau Co 1993]). Nor has there been an allegation or a showing of "economic detriment . . . [or] loss of income or practice or

devotion of an inordinate amount of time, that would render application of the fee schedule here unjust” (*Yalango*, 84 NY2d at 610). Further, while the court notes that plaintiffs have submitted affidavits in support of plaintiffs’ counsel’s application for increased fees, such affidavits are irrelevant as the statute is clear that the clients’ consent is not a factor to be considered.

Lastly, with regard to the part of defendants’ cross motion which seeks to stay the entry of a judgment until all post-trial motions and appeals have been determined, it is denied. At this juncture, all post-trial motions made returnable to this court have been addressed and determined, and, thus, plaintiffs are entitled to entry of judgment in this action. Further, defendants have not adequately demonstrated that this court should stay the entry of a judgment pending any appeals.

Accordingly, it is

ORDERED that plaintiffs’ motion is granted solely to the extent that plaintiffs shall submit an appropriate bill of costs to the Clerk of the Court for determination of the costs and disbursements they are entitled to, and denied in all other respects; and it is further

ORDERED that defendants’ cross motion to stay the entry of judgment is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy of this order with notice of entry upon defendants.

Date: \_\_\_\_\_

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Doris Ling-Cohan, J.S.C.