Louissaint v DePaolo

2010 NY Slip Op 33138(U)

October 27, 2010

Supreme Court, Queens County

Docket Number: 18997/07

Judge: Howard G. Lane

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.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **Justice** **IAS PART 6**

MARY LOUISSAINT and DOLORES SHARPE, Plaintiffs,	Index No. 18997/07
-against-	Motion Date November 17, 2009
MARY DEPAOLO, et al., Defendants.	Motion Cal. Nos. 12 and 13
	Motion Sequence Nos. 5 and 6

	PAPERS NUMBERED
Order to Show Cause #12- Affidavits........	1-3
Order to Show Cause #13- Affidavits........	4-7
Supplemental Affirmations.................	8-11
Opposition..................................	12-13
Reply.......................................	14-16

Upon the foregoing papers and after a hearing held on June 15, 2010, the motions of Jack L. Glasser, Esq. for an order directing a hearing to determine the amount of attorney's fees entitled to the Law Office of Jack L. Glasser, P.C., regarding the case of Mary Louissaint and Dolores Sharpe v. Mary DePaolo, NYC Premiere Properties Inc., Carissa Cali, Marie Riveccio, Countrywide Home Loans, Inc., John Costagliolo, Dennis Vourderis, and the City Register of the City of the County of Queens (Index No. 18997/07), and granting leave to withdraw from representation of co-defendants Mary DePaolo ("DePaolo"), Carissa Cali ("Cali"), Marie Riveccio ("Riveccio"), and NYC Premiere Properties Inc. and directing a charging lien on certain checks payable to Carissa Cali, is decided as follows:

I. BACKGROUND

On September 17, 2007, an action was brought against defendants DePaolo, Cali, Riveccio and NYC Premier Properties, Inc. (hereinafter "co-defendants") regarding allegations of their

involvement in an alleged predatory lending scheme. On October 2, 2007, defendant DePaolo entered into a retainer agreement with movant, Jack L. Glasser, Esq. (hereinafter "Glasser") in which the parties agreed that Glasser would provide legal representation to DePaolo "in connection with various litigation in the Supreme Court, respecting a claim of predatory lending by various parties", (Civil Case Retainer, Movant's Exhibit 1), for an hourly rate of $250.00 and reimbursement of out-of-pocket/disbursement expenses. In addition, under this retainer agreement, Glasser represented DePaolo in five (5) other separate lawsuits with similar allegations, three (3) of which were dismissed in DePaolo's favor. In a prior order plaintiffs were ordered to continue payments for use and occupancy to co-defendant Cali, and to send the checks directly to Glasser. Glasser was directed to maintain accurate records, and to forward the checks to Cali only.

On November 16, 2009, in one of the other separate lawsuits in the Supreme Court, Kings County, Glasser moved to withdraw from legal representation of DePaolo and NYC Premier Properties Inc., due to their failure to communicate with him, their attorney. The court granted Glasser's motion to withdraw from representation without opposition (Pl.'s Supplemental Affirmation 2, Ex. A). Glasser now moves this court for an order setting the legal fees he is entitled to based upon quantum meruit, and to allow him to withdraw from representation of DePaolo, NYC Premiere Properties Inc., Cali and Riveccio on the grounds of lack of communication with his clients since August 11, 2009, and for non-payment of attorneys fees. Additionally, Glasser seeks a charging lien on the checks payable to Cali. NYC Premiere Properties Inc., Riveccio and Cali do not oppose the motion, as they failed to appear or submit any opposition. On the other hand, DePaolo does not oppose withdrawal or dispute that Glasser is entitled to attorney's fees, but asserts that the attorney's fees requested by Glasser are unreasonable, and further demands that Glasser provide her with an itemized bill to determine the work performed on the instant case, and for him to turnover her court file and documents.

By order of this court (Lawrence V. Cullen, J.) dated January 6, 2010, this matter was set down for a hearing to determine the value of the legal services rendered that Glasser is entitled as compensation, if any, (see, Andreiev v. Keller, 168 AD2d 528 [2d Dept 1990]; Katsaros v. Katsaros, 152 AD2d 539 [2d Dept 1989]; Williams v. Hertz Corp., 75 AD2d 766 [1st Dept 1980]; Marscchke v. Cross, 82 AD2d 944 [3d Dept 1981]). On June 15, 2010, a hearing was conducted. At the hearing, Glasser and DePaolo were the sole witnesses who testified. At the

conclusion of the hearing, the court reserved decision.

II. DISCUSSION

Under New York Law, attorneys can assert two types of liens to secure the payment of fees from their clients (see, Butler, Fitzgerald & Potter v. Gelmin, 235 AD2d 218 [1st Dept 1997]). First, under New York common law, an attorney may obtain a retaining lien on a client's files, papers, and property in the attorney's possession (see, In re Heinsheimer, 214 NY 361, 364 [1915]; Goldstein, Goldman, Kessler & Underberg v. 4000 E. River Road Associs., 64 AD2d 484, 487 [4th Dept 1978]). Absent exigent circumstances, an attorney may withhold turning over a client's files to a successor attorney until a court determines that the amount of the lien and whether turnover of the files should be conditioned on payment or the posting of security (see, Renner v. Chase Manhattan Bank, No. 98-926 [CSH], 2000 U.S. LEXIS 16150, at 2-3 [SDNY Nov. 8, 2000]).

The second way an attorney can secure a lien is under Judiciary Law § 475. This statute provides the basis upon which an attorney may assert a charging lien against the proceeds resulting from the attorney's assertion of an affirmative claim on the client's behalf. The rationale behind the charging lien under this provision is that the attorney is entitled to a lien against a fund created through the attorney's own efforts (Greenberg v. State, 128 AD2d 939, 940 [3d Dept 1987]). The charging lien may also attach to a fund created to settle a client's claim (Squitieri v. Squitieri, 2010 NY Slip Op 07125 [1st Dept 2010]; Schneider, Kleinick, Weitz, Damachek & Shoot v. City of New York, 302 AD2d 183, 187 [1st Dept 2002]).

Furthermore, it should be noted that attorneys must comply with Part 137 of the Rules of the Chief Administrator of the Courts to determine an issue involving a fee dispute, pursuant to the Code of Professional Responsibility DR 2-106(E); 22 NYCRR 1200.11 (see, Hobson-Williams v. Jackson, 10 Misc 3d 58 [App Term, 2d Dept 2005]; Omansky v. Gest, 2007 NY Slip Op 32168(U) [Sup Ct, NY County 2007]). These rules are applicable to representation that began on or after January 1, 2002, and involve a fee dispute under $50,000. The client may voluntarily bring arbitration under this section, however if an attorney initiates the arbitration the attorney must have informed consent from their client or, provide the client with the appropriate written notice as set forth in Part 137.6, allowing the client thirty (30) days to respond (22 NYCRR 137.6 [a][1]-[2], [b], [c]). The rationale for the notice requirement is if the client has not disputed the reasonableness of the fees charged then the attorney is not required to send the notice of arbitration pursuant to Part 137.6

(see, Scordio v. Scordio, 270 AD2d 328, 329 [2d Dept 2000]). The Appellate Division, Second Department held in a fee dispute proceeding for a charging lien, as the client never disputed the reasonableness of the fees charged, the attorney was not required to send the client a notice informing her of her right to elect arbitration of any fee (Scordio v. Scordio, supra). The court declined to follow the rule adopted by the Appellate Division, First Department, which obligates an attorney to send such notice even in the absence of any fee disagreement with a client (Paikin v. Tsirelman, 266 AD2d 136 [1st Dept 1999]).

A. Procedure - Part 137 of the Rules of the Chief Administrator of the Courts

As DePaolo asserts that she disputes the reasonableness of the amount of fees she is being charged, because in part she is unclear as to the charges and how they pertain to the instant lawsuit, pursuant to Part 137 of the Rules of the Chief Administrator of the Courts, Glasser was required to send notice of arbitration allowing DePaolo the required thirty (30) days to respond. The court notes that it appears that Glasser did not comply with the required notice procedure, nor did he receive prior knowledge and informed consent from DePaolo to bring this proceeding for arbitration of attorney's fees. Although in the interest of justice and judicial economy, this court will not at this stage of this proceeding deny Glasser's motion on these grounds and require Glasser to re-file after compliance with the notice provision, the court notes that some courts have found where it is found that notice is required and not served, the attorney may not recover a fee (see, Scordio v. Scordio, supra; Paiken v. Tsirelman, supra; Rotker v. Rotker, 195 Misc 2d 768, 772 [Sup Ct, Westchester County 2003]; citing Julien v. Machson, 245 AD2d 122 [1st Dept 1997]; L.H. v. V.W., 171 Misc 2d 120 [Civ Ct, Bronx County 1996]).

B. Glasser's entitlement to a charging lien

Glasser argues that he is entitled to a charging lien on the checks payable to Cali. The court finds that Glasser is not entitled to a charging lien since a charging lien for representation of defense is only granted on account of whether defense brought a counterclaim. Without such action, defense is not entitled to any proceeds that their client may obtain during representation (see, Krauss v. New Era Cab Corp., 259 AD 341 [1st Dept 1940] [court held that a charging lien may attach to a judgment attained in the course of an attorney's efforts, an attorney for a defendant cannot, without the presence of a counterclaim, have a charging lien]; U.S. v. Clinton, 260 F Supp

84 [1966] [court held that an attorney representing the defendant is not entitled to a charging lien without bringing a counterclaim]). Glasser has presented no evidence that a counterclaim was made on behalf of DePaolo or Cali, nor do the checks constitute an award since Cali was entitled to the monies prior to the commencement of the suit. Therefore, under these circumstances, the checks cannot be considered an award, nor was it a judgment in DePaolo's or Cali's favor as it was not from the result of a counterclaim brought by Glasser on behalf of his alleged clients (see, Petition of Rosenman & Colin, 850 F2d 57, 61 [2d Cir 1988]).

Glasser further asserts that there exists an attorney-client relationship between Cali and him, which therefore entitles him to a charging lien pursuant to Judiciary Law § 457, as the checks were awarded due to his efforts as her alleged legal counsel. Glasser has not presented evidence to show that there existed any attorney-client relationship between Cali and him. Cali did not sign the written retainer agreement, and there is no testimonial or documentary evidence to establish that Cali retained Glasser to provide her legal representation. The only task that Glasser has been able to establish to have undertaken was the representation of DePaolo in the actions brought against her. The court finds that Glasser is not entitled to a charging lien on the checks payable to Cali.

Furthermore, it has been established that merely because another person, other than the client, has benefitted from the services provided by an attorney, the attorney may not recover legal fees from that person (see, Gottlieb v. Fuller, 2010 NY Slip Op 51037(U) [Sup Ct, NY County 2010], citing Builders Affiliates v. North Riv. Ins. Co., 91 AD2d 360, 366-67 [2d Dept 1983]; Matter of Linder, 17 AD2d 949, 950 [2d Dept 1962]; Armstrong v. I.T.T.S. Corp., 10 AD2d 711 [2d Dept 1960]). Therefore, by law, an attorney is not entitled to a charging lien on funds awarded to a party that has, by default, financially benefitted from the attorney's representation.

C. Calculation of the Fee

At the hearing, Glasser elicited undisputed evidence of the work performed by the Law Office of Jack L. Glasser, P.C. and expenses incurred and payments made by DePaolo. He established, and it was undisputed, that he engaged in: drafting, serving, and filing motions and complaints, conducting and responding to discovery, appearing in court, preparing for trial and client preparation. In light of the foregoing, the court finds the sum of $11,148.32, as reasonable for Glasser's legal work on the case

inclusive of disbursements.

IV. CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that Jack L. Glasser's request to withdraw from representation is granted.

ORDERED, that pursuant to a prior court order Jack L. Glasser release the checks in his possession payable to Ms. Carissa Cali.

ORDERED, that attorney's fees and disbursements in the amount of $11,148.32 be paid by Mary DePaolo to the Law Office of Jack L. Glasser within twenty (20) days after a copy of this decision and order is served on Mary DePaolo, with notice of entry. In addition, the request by Ms. DePaolo for the surrendering of all court filings and her file is denied, based on the retaining lien, until the above fee is satisfied.

The parties are directed to immediately contact the clerk of IAS Part 6 at (718) 298-1210 to make arrangements to pick up any exhibits admitted into evidence and left with the court at the conclusion of the hearing. If the exhibits are not retrieved before November 26, 2010, they will be destroyed without further notice to the parties.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to the respective parties.

Dated: October 27, 2010

....
Howard G. Lane, J.S.C.