

**Komlosi v Cuomo**

2012 NY Slip Op 30804(U)

March 28, 2012

Supreme Court, New York County

Docket Number: 115207/2009

Judge: Cynthia S. Kern

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

\_\_\_\_\_ Index Number : 115207/2009  
KOMLOSI, MARK  
vs.  
CUOMO, ANDREW M.  
SEQUENCE NUMBER : 003  
OTHER RELIEFS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

## FILED

MAR 30 2012

COURT CLERK  
CLERK OF THE COURT

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

Dated: 3/28/12

pgc, J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
MARK KOMLOSI,

Petitioner-Plaintiff,

Index No. 115207/2009

For a Judgment Pursuant to Articles 78 and 30 of the  
Civil Practice Law and Rules,

-against-

Andrew M. Cuomo, as Attorney General of the State  
of New York, NEW YORK STATE OFFICE OF MENTAL  
RETARDATION AND DEVELOPMENTAL DISABILITIES  
and Commissioner DIANA JONES RITTER.

Respondents-Defendants.

-----X  
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	4

The law firm of Emery Celli Brinckerhoff & Abady LLP ("ECBA") brought the instant motion for an order fixing a charging lien pursuant to Judiciary Law § 475 against petitioner Mark Komlosi. As will be explained more fully below, the court grants ECBA's motion to the extent that it finds that ECBA is entitled to a charging lien but reserves the determination of the amount of attorneys fees owed to it until appeal of the action is resolved.

The relevant facts are as follows. Komlosi retained ECBA to represent him in connection

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NEW YORK  
COUNTY CLERK'S OFFICE

[\* 3]

with an Article 78 petition seeking a declaratory judgment finding that the State of New York was obligated to indemnify Melanie Fundenberg, a New York State employee on a judgment Komlosi received against Fundenberg. The retainer limited the scope of ECBA's representation to an application for an Article 78 judgment, any appeal from the outcome of such application, and any request under FOIL that ECBA deemed to be supportive of Komlosi's efforts. The retainer also provided that ECBA was to receive 30% of the gross amount of any recovery, settlement or judgment obtained on Komlosi's behalf if the litigation concluded in either the Supreme Court or the Appellate Division and 33% of the gross amount of any recovery, settlement or judgment if there was an appeal to the New York Court of Appeals. On November 13, 2009, ECBA filed an Article 78 petition on Komlosi's behalf seeking an order annulling the State of New York's decision denying indemnification to Melanie Fudenberg on the judgment Komlosi received against her. On April 26, 2010, Justice Solomon granted Komlosi's petition and declared that Fudenberg was entitled to indemnification from the State and thus Komlosi was entitled to payment. Judgment was entered in favor of Komlosi on May 25, 2010. The State filed a notice of appeal on August 11, 2010. Komlosi's opposition brief was due on August 10, 2011. During the time leading up to the due date of the opposition brief, Komlosi and ECBA had some disagreements in opinion about case strategy as well as the most effective method of communication for the parties. By letter dated June 30, 2011, Komlosi terminated ECBA's services. On July 28, 2011, petitioner filed a motion to withdraw as counsel in the First Department. That motion was granted by the First Department on October 13, 2011. ECBA brought the instant motion seeking to fix a charging lien pursuant to Judiciary Law § 475 against Komlosi for the services it performed under its agreement with Komlosi.

Judiciary Law § 475 provides:

From the commencement of an action, special or other proceeding in any court ... 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 clients 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.

However, a client has an absolute right to discharge an attorney at any time. If the discharge is with cause, the attorney has no right to compensation or to a retaining lien. If the discharge is without cause before the completion of services, then the amount of the attorney's compensation must be determined on a *quantum meruit* basis." *Telchner v W & J Holsteins*, 65 N.Y.2d 977, 979 (1985). "Cause requires a showing of impropriety or misconduct on the part of the attorney." *See Simon v Unum Gr.*, No. 7 Civ. 11426, 2010 WL 2541145 at \*1 (S.D.N.Y. June 23, 2010)(internal quotations omitted). In this regard, "poor client relations, differences of opinion, or personality conflicts do not amount to cause." *Id.*; *see Callaghan v Callaghan*, 48 A.D.3d 500 (2d Dept 2008)(stating that as a matter of law, dissatisfaction with reasonable strategic choices regarding litigation do not constitute cause for the discharge of an attorney).

As a general matter, "a hearing is required to determine if an attorney is discharged for cause or without cause before completion of his services. *See Hawkins v Lenox Hill Hosp.*, 138 A.D.2d 572 (2d Dept 1988). Although a hearing is generally held to determine whether the discharge was for cause, "it is fundamental that a motion may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue." *Hawkins*, 138 A.D.2d at 572. Therefore, in cases

where the determination can be made based upon the papers, a hearing is not necessary to making a determination of whether the attorney was discharged with or without cause. *See Braider v 194 Riverside Owners Corp.*, 237 A.D.2d 147 (1<sup>st</sup> Dept 1997); *Hawkins*, 138 A.D.2d at 572.

In *Braider*, the First Department overturned the lower court's ruling that a hearing was required to determine whether the outgoing counsel was discharged for cause and found that the outgoing counsel was entitled to a charging lien based on the records. In coming to this conclusion, the First Department relied on the fact that the outgoing counsel provided a detailed accounting of his representation of plaintiffs while the "plaintiff's allegations attempting to justify counsel's discharge [were] largely conclusory and bereft of detail." *See Braider*, 237 A.D.2d at 147.

The court finds that ECBA was discharged without cause and is therefore entitled to a charging lien. A hearing is not required in the present case to determine whether ECBA was terminated for cause because the papers submitted do not raise a factual dispute on a material point which must be resolved before the court can decide the legal issue of whether ECBA was terminated for cause. As in *Braider*, ECBA, the discharged counsel in the present action, has provided a detailed accounting of its representation of Komlosi. In this regard, ECBA has provided evidence of numerous email exchanges between ECBA and Komlosi discussing and explaining its legal strategy as well as addressing Komlosi's questions about ECBA's strategy for his case. The emails also provided evidence of a difference in opinion regarding case strategy between ECBA and Komlosi regarding whether Komlosi was entitled to prejudgment interest and whether and how to pursue such interest. However, when there was evidence of a difference in opinion, ECBA provided a reasonable explanation of its position as well as advising Komlosi

to come into ECBA's office in person to discuss any differences in opinion.

Komlosi, on the other hand, has failed to provide any evidence of ECBA's misconduct or impropriety. Komlosi's two main arguments in support of its position that ECBA was discharged for cause are that ECBA did not work on the papers in opposition to the State's appeal of the Article 78 determination to Komlosi's satisfaction and that ECBA was incorrect in its analysis of prejudgment interest owed to Komlosi. However, apart from making conclusory assertions, Komlosi has failed to provide any evidence that ECBA's position regarding the prejudgment interest was incorrect or that the working draft of ECBA's opposition brief was inadequate or that ECBA was untimely in the manner in which it completed the work. Further, as evidenced in the email correspondence between ECBA and Komlosi, the time extensions requested to file the opposition papers were made at Komlosi's direction. In any event, even if Komlosi's assertions were true -- which for the reasons discussed above are not -- these assertions do not rise to the level of misconduct or impropriety. Moreover, it remains undisputed that ECBA was successful in obtaining a favorable judgment for Komlosi with regard to his Article 78 petition, preserved his rights to collect interest on the judgment and was discharged before it submitted any papers on behalf of Komlosi in opposition to the State's appeal. For all of these reasons discussed above, the court finds that ECBA was discharged without cause and entitled to a charging lien on the proceeds of the lawsuit. However, the court finds that the determination of ECBA's fee which is to be recovered in *quantum meruit* shall be reserved until the final outcome of this action is determined at which time a more accurate assessment can be made as to the value of the services provided by ECBA.

Finally, Komlosi's request that the entirety of the motion practice be reviewed *in camera*

