

**Hamilton v EOP World Plaza, LLC**

2014 NY Slip Op 3131 Ì (U)

April 24, 2014

Supreme Court, Bronx County

Docket Number: 303153/2007

Judge: Alison Y. Tuitt

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NEW YORK SUPREME COURT ----- COUNTY OF BRONX

PART IA-5

CARLOS HAMILTON,

Plaintiff,

-against-

INDEX NUMBER: 303153/2007

Present:

ALISON Y. TUITT

*Justice*

EOP WORLD PLAZA, LLC, EQUITY OFFICE  
PROPERTIES, LLC, OGILVY AND MATHER  
WORLDWIDE, INC., D.P. CONSULTING CORP.,  
BRUCE LILKER d/b/a HOK ARCHITECTURE,  
GIRDHARI CHHABRA d/b/a DESMEN  
ASSOCIATES, JASBIR BHATIA d/b/a SYSKA &  
HENNESSEY, HEREMY LANG d/b/a BUTLER  
ROGERS, BASKETT, KEITH D. STRAND d/b/a  
STRUCTURE J. TONE, STRUCTURE TONE, INC.,  
ABCO PEERLESS SPRINKLER CORP., JEFF  
SHARP d/b/a BRISK WATERPROOFING and  
GC CONTRACTORS, INC.,

Defendants.

OGILVY AND MATHER WORLDWIDE, INC.,

Third-Party Plaintiff,

-against-

VARICK DRYWALL, INC.,

Third-Party Defendant.

EOP WORLDWIDE PLAZA, LLC and EQUITY  
OFFICE PROPERTIES MANAGEMENT CORP.,

Second Third-Party Plaintiff,

-against-

VARICK DRYWALL, INC.,

Second Third-Party Defendant.

The following papers numbered 1 to 3

Read on this Order to Show Cause for a Hearing to Determine Attorney's Fees

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On Calendar of 11/13/13

Order to Show Cause-Exhibits, Affirmation 1

Affirmation in Support 2

Reply Affirmation 3

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Upon the foregoing papers, the Law Office of Raymond B. Schwartzberg & Associates , PLLC's (hereinafter "Schwartzberg") Order to Show Cause to Vacate and Reject the decision of Hon. George A. Salerno, JHO and ordering a new hearing and Menagh & Associates, PLLC's (hereinafter "Menagh") Cross-Motion to confirm the report of Hon. George A. Salerno, JHO are consolidated for purposes of this decision. For the reasons set forth herein, the Order to Show Cause is denied and the Cross-Motion is granted.

The within action involves a personal injury claim brought by plaintiff for injuries he sustained in an accident that occurred on November 11, 2005. Plaintiff claims that he fell off a ladder during the course of his employment as a construction laborer and sustained serious injuries to his neck and back. Plaintiff retained Schwartzberg to represent him in this matter. Schwartzberg commenced the action on behalf of plaintiff on or about November 28, 2007, alleging violations of the Labor Law. On or about September 7, 2011, Menagh sent Schwartzberg a letter advising that plaintiff had retained his office to represent plaintiff on the matter and was discharging Schwartzberg as his attorney. Menagh annexed a "Stop Work" letter from the plaintiff directed to Schwartzberg. Subsequently, the attorneys agreed by Stipulation dated November 28, 2011 that Schwartzberg had a lien for attorney's fees which would be resolved at the close of the case by agreement or by Court Order. Menagh's office settled the case in or around December 2012 for \$500,000.00. Pursuant to the retainer statement, attorneys' fees were 33 1/3 percent of any settlement or verdict. The attorneys could not reach an agreement on the distribution of attorneys' fees. As a result of the dispute between the attorneys, by decision

and Order dated March 19, 2013, Hon. Douglas E. McKeon ordered that a conference be held before “Judicial Hearing Officer Hon. George Salerno on April 15, 2013... in an effort to resolve the attorneys’ fee dispute, failing which a hearing will be conducted to allocate the fee between the disputing firms.”

JHO Salerno held the conference on April 15, 2013 with attorneys from both offices, Barry Driesman, Esq. from Schwartzberg’s office and Joseph Hubicki, Esq. from Menagh’s office. The attorneys were unable to reach an agreement at the conference and JHO Salerno scheduled a hearing to take place on June 4, 2013, at Schwartzberg’s request for a six week adjournment. JHO Salerno advised the parties that in granting such a long adjournment, there would be no further adjournments of the June 4, 2013 date. JHO advised that he would not be taking sworn testimony at the hearing and that he would not be conducting a trial. However, he advised that the attorneys could make submissions. On the eve of the hearing, Schwartzberg brought an Order to Show Cause before this Court seeking an adjournment of the hearing. The motion was taken on submission and no adjournment was granted. Mr. Schwartzberg appeared at the hearing on June 4, 2013 and, once again, sought an adjournment on the purported grounds that he had been unable to review Menagh’s files, notwithstanding that Menagh repeatedly asked Schwartzberg to schedule his examination of the files. JHO Salerno denied Schwartzberg’s application and Mr. Hubicki made an oral presentation and a written submission detailing the work done by Menagh including detailed time sheets. Mr. Schwartzberg also made an oral presentation at the hearing but did not submit any written submissions, despite JHO Salerno’s clear directive on April 15, 2013 that he would be accepting written submissions.

By decision dated July 19, 2013, JHO Salerno determined, in relevant part, that Schwartzberg’s office named numerous defendants, approximately 13, which caused a “considerable delay in moving this case since motions were made” by defendants not involved in the accident”. Moreover,

When this case was taken over by the Menagh firm, approximately six years after the accident occurred, discovery had not been completed by the Schwartzberg firm. Consequently, upon receipt of the file, the Menagh firm spent a considerable amount of time preparing this case for trial which included preparing and submitting a supplemental bill of particulars, completing discovery, communicating with the client and defense counsel, the State Insurance Fund as well as court appearances made by Menagh.

It is clear that the services performed by the Menagh firm resulted in a settlement of \$500,000. Although plaintiff's injuries are significant, given the manner in which this accident occurred and the delay in prosecuting plaintiff's claim warrants a settlement of this action.

Consequently, the court approves the settlement of this case in the amount of \$500,000 and it is clear that the efforts made by the Menagh firm lead (sic) to a fair settlement... Therefore, the court finds that the Menagh firm is entitled to receive 60% of the attorney's fee and the balance of the fee or 40% of the fee shall be paid to Raymond Schwartzberg regarding the service he performed during his representation of plaintiff.

Schwartzberg moves by Order to Show Cause to vacate the decision of JHO Salerno and seeks a new hearing arguing that he did not have an opportunity to review Menagh's files to determine what work had been performed by Menagh. Schwartzberg argues that he was not provided with an opportunity to review Menagh's files as a result of Mr. Hubicki's lack of cooperation. Mr. Hubicki made the entire file available to Schwartzberg to review, however, Schwartzberg had demanded that Menagh segregate the work Menagh had performed from the work Schwartzberg had done which Mr. Hubicki declined to do. On that basis, Schwartzberg refused to look at the files and on the eve of the hearing with JHO Salerno, brought an Order to Show Cause seeking to adjourn the hearing. That Order to Show Cause was brought before this Court. A decision was not rendered on the return date of the application and the motion was taken on submission. Schwartzberg argues that JHO Salerno's decision should be vacated because he did not have an opportunity to review the files prior to the hearing and that JHO Salerno failed to conduct the hearing as required by law in that he did not take testimony and there was no Court Reporter present. Menagh cross-moves to confirm JHO Salerno's decision and argues that the hearing was proper, and the findings of JHO Salerno are supported by the record.

It is well-settled that a client may discharge an attorney at any time, with or without cause. Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 457 (1989). The discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case. Cohen v. Grainger, Tesoriero & Bell, et. al., 81 N.Y.2d 655 (1993). If the discharged attorney does not at the time of the discharge elect the method of payment, it is presumed that a contingent fee has been chosen rather than a quantum meruit recovery. Id. Although a client may discharge his attorney at any time, either with or without cause, the outgoing attorney is entitled to recover a fair and reasonable fee as compensation for services rendered. Pearl v. Metropolitan

Transportation Authority, 548 N.Y.S.2d 669 (1<sup>st</sup> Dept.1989).

Here, plaintiff discharged Schwartzberg with good cause. Following his discharge of Schwartzberg, on or about January 18, 2012, plaintiff filed a complaint with the Appellate Division, First Department against Schwartzberg stating that:

I retained Raymond Schwartzberg for my accident case. I was injured in November 2005 and retained him right after. Attorney started a lawsuit naming 11 defendants. Most of the defendants have been dismissed from the case because they were wrong defendants. While he was representing me for 6 years, he would not return my phone calls and would not keep me informed of the progress of the case. As of September 2011 the case was still not complete for discovery. Finally, I hired a new lawyer and sent Schwartzberg a letter in September 2011. He refused to turn over my file and my new lawyers had to make a motion. On the day of the motion he lied to the Judge and told her I had "changed my mind". This caused a one month further delay and required that I go to Court and keep him from lying. On November 28, 2011, the Court ordered him to turn over the file. My lawyers paid the expenses but he refuses still to turn over the file. I believe his years of not calling me, the years of delay in the case, and his continued delay in turning over my file is unfair and not proper conduct for a lawyer.

It is true that Schwartzberg did not turn over the file after receiving Menagh's letter of representation dated September 7, 2011 together with plaintiff's Stop Work letter, and Menagh's office had to move by Order to Show Cause to obtain the transfer of the file. It is also true that although plaintiff retained Schwartzberg a few days after his accident in November 2005, Schwartzberg did not commence the action for two years after being retained and when the action was finally commenced, Schwartzberg named numerous defendants that were not involved in the case, resulting in serious delay of the prosecution of the case as eight motions to dismiss were made by defendants who should not have been named in the action. When Menagh's office took over the case, after six years of representation by Schwartzberg, discovery was not yet complete in the action, and only plaintiff and one defendant had been deposed. Upon receipt of the file, Menagh spent a substantial amount of time preparing the case for the trial calendar, including the preparation of a supplemental bill of particulars; conducting and completing discovery; maintaining frequent contact with plaintiff and defense counsel; settlement discussions with the liability carrier; compromise discussions with the State Insurance Fund; research and communications regarding Medicare set aside; Court appearances at discovery status conferences; and, arranging for litigation funding for plaintiff. After much negotiation, Menagh was able to settle the case for \$500,000.

Based on the record herein, the decision of JHO Salerno must be confirmed and Schwartzberg's

application for a vacatur of the decision and for a new hearing is denied. Justice McKeon appointed JHO Salerno to attempt a settlement of the attorneys' fee dispute and if a settlement could not be reached, directed that JHO Salerno conduct a hearing "to allocate the fee between the disputing firms." Pursuant to C.P.L.R. §4001, "[a] court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law." C.P.L.R. 4311 provides that "[a]n order of reference shall direct the referee to determine the entire action or specific issues, to report issues, to perform particular acts, or to receive and report evidence only. It may specify or limit the powers of the referee and the time for the filing of his report and may fix a time and place for the hearing." C.P.L.R. §4318 provides that "[u]nless otherwise specified in the order of reference, the referee shall conduct the trial in the same manner as a court trying an issue without a jury."

Since determinations of a Judicial Hearing Officer are equivalent to those of justice of Supreme Court, Supreme Court cannot interfere with his substantive decisions concerning issues referred to him, but may make determination considering jurisdiction or authority of the Judicial Hearing Officer. Lipton v. Lipton, 489 N.Y.S.2d 994 (Sup. Ct. Nassau Cty., 1985). In Lipton, the Court noted that the authority of a Judicial Hearing Officer is derived from an order of reference and is limited by its terms as well as by statutes and rules authorizing the particular reference. When particular powers or jurisdiction of the Judicial Hearing Officer have been circumscribed by an order of reference, there should be no departure from the terms of the order without Court approval. Id. A Judicial Hearing Officer who attempts to determine matters not referred to him by the order of reference acts beyond and in excess of his jurisdiction. Id.

In the instant matter, JHO Salerno did not act beyond and in excess of his jurisdiction. The Order of Justice McKeon referring the dispute to him clearly set forth that JHO Salerno was to conduct a hearing "to allocate the fee between the disputing firms" and he complied with the Order. Justice McKeon's Order directed JHO to perform a particular act, but did not require that the hearing was subject to sworn testimony with a Court Reporter present. JHO Salerno gave the attorneys time to prepare written submissions and accepted oral submissions from the attorneys on the date of the hearing. While Menagh's office provided written submissions, including a detailed accounting of all of the work performed by his firm, Schwartzberg failed to do so and instead relied only on an oral submission. The attorneys were on notice well before the hearing date that JHO Salerno would not be taking testimony and each firm was afforded an ample amount of

time to prepare written and oral arguments prior to the hearing. Schwartzberg did not object to the manner JHO Salerno would conduct the hearing, either on the conference date or at the hearing. Moreover, Schwartzberg's contention that he was not adequately prepared for the hearing because he had not been permitted to review Menagh's files is belied by the fact that Schwartzberg was provided access to Menagh's files prior to the hearing but he refused to go over the files because Menagh had not segregated the files. That the files were not separated the way Schwartzberg demanded did not prevent him from reviewing the files. The entire file was made available to Schwartzberg well in advance of the hearing. Thus, JHO Salerno's decision to not grant the adjournment was proper, especially in light of the fact that he had advised the attorneys at the April 15, 2013 conference that he would not grant further adjournments. See, Alario v. DeMarco, 540 N.Y.S.2d 270 (2d Dept. 1989)(With regard to the petitioner's contention that the Judicial Hearing Officer abused his discretion in ordering that the hearing commence without a 13 to 15 day adjournment, it must first be observed that requests for adjournments are addressed to the sound discretion of the court. Moreover, as a general rule the granting or denying of a postponement or continuance will be upheld on appellate review in the absence of an abuse of discretion).

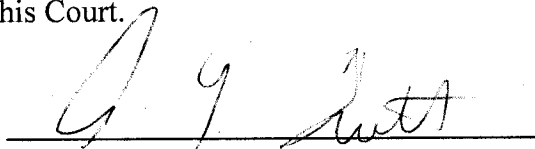
This Court confirm's JHO Salerno's findings as supported by the evidence presented, given the proportional share of work performed by on the case by each office. See, Rouen v. Chrysler Credit Corp., 565 N.Y.S.2d 35 (1<sup>st</sup> Dept. 1991). According to Mr. Schwartzberg himself, his firm represented plaintiff within a few days of the November 2005 accident. (See Schwartzberg Affirmation dated 10/21/11 "we have represented the client since a few days after the date of the accident on November 11, 2005.") Schwartzberg, however, did not commence the action until on or about November 28, 2007, over two years after the accident. In commencing the action against defendants who were not involved in the accident, Schwartzberg's office caused extensive delays in prosecuting the action. It is interesting that Schwartzberg had two years to fully investigate the case, yet managed to name numerous defendants who were not at all involved in the matter. In the four years after commencing the action, Schwartzberg had only conducted the deposition of plaintiff and one defendant. Menagh's office had to supplement the pleadings because Schwartzberg's bill of particulars was inadequate. Plaintiff himself complained to the Appellate Division that Schwartzberg would not communicate with him regarding the status of the case nor would he return plaintiff's calls. It is clear to this Court that the work performed by Menagh is what allowed Menagh's office to obtain a fair settlement in this action.

Accordingly, Schwartzberg's Order to Show Cause to vacate JHO Salerno's decision and for a new hearing is denied. The previous Order to Show Cause by Schwartzberg seeking an adjournment of the hearing on June 4, 2013 is also denied. Menagh's Cross-Motion to confirm JHO's Salerno's findings is granted.

This constitutes the decision and order of this Court.

Dated:

4/24/2014

A handwritten signature in black ink, appearing to read "A. Y. Tuitt", is written over a horizontal line.

**Hon. Alison Y. Tuitt**