

Schwarz v Schwarz

2014 NY Slip Op 33888(U)

November 3, 2014

Supreme Court, Kings County

Docket Number: 10942/2012

Judge: Kathy J. King

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At an IAS Term, Part ~~20K~~ of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of November, 2014.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X

SAMUEL SCHWARZ AND
SIMON SCHWARZ,

Plaintiffs,

- against -

Index No. 10942/2012

HELENE SCHWARZ AND
JACK KARTAGINER,

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

Transcripts of hearing on December 19, 2013 and January 22, 2014__

September 20, 2013 Decision and Order_____

Affirmation of Legal Services_____

Papers Numbered

_____ 1, 2

_____ 3

_____ 4

Upon the foregoing papers, the issue presented for disposition by the court in this action brought by Simon Schwarz (Simon), on behalf of himself and purportedly on behalf of Samuel Schwarz (Samuel), against defendants, Helene Schwarz and Jack Kartaginer is the determination of the amount of reasonable attorney's fees and disbursements to be awarded to Anthony J. Lamberti, Esq. (Mr. Lamberti), the attorney for defendants, which are to be

paid by Simon, as a sanction, pursuant to 22 NYCRR 130.1.1, based upon his frivolous conduct.

BACKGROUND

On May 24, 2012, Simon filed this action against defendants, seeking to cancel and set aside deeds to certain real properties, to compel reconveyance of these real properties, and to compel an accounting as to the net rental income generated from such real properties. On October 24, 2012, defendants moved to dismiss this action, contending that Simon lacked standing to bring it on behalf of Samuel, an incapacitated person, and that, pursuant to a decision and order of the court dated September 23, 2011 in a Mental Hygiene Law article 81 guardianship proceeding brought by Simon (the guardianship proceeding), which was affirmed by the Appellate Division, Second Department on June 20, 2012, this action was barred by the doctrines of res judicata and collateral estoppel. Defendants, in their motion, also sought the imposition of costs and sanctions on Simon based upon his frivolous conduct in bringing this action. Simon vehemently opposed defendants' motion.

Following oral argument held by the court on May 6, 2013, the court rendered a decision and order dated September 20, 2013, in which it held that the doctrines of res judicata and collateral estoppel barred this action, and that Simon also lacked standing to bring the claims asserted by him in this action. It, therefore, dismissed this action pursuant to CPLR 3211. As to defendants' request, in their motion, for costs and sanctions, pursuant to 22 NYCRR 130-1.1, the court found that Simon had engaged in frivolous conduct because he knew or should have known, based upon the prior litigation, that his claim was completely

without merit in law since the court, in the September 23, 2011 decision and order, had already addressed the claims raised by Simon in this action and determined them to be wholly without merit. Said decision and order was affirmed by the Appellate Division, Second Department (*Matter of Damuel S.[Helen S.]*, 96 AD3d 954 [2d Dept 2012, *lv dismissed* 19 NY3d 1065[2012]). It specifically determined that Simon had frivolously continued to pursue his claims that defendants had engaged in financial improprieties and fraudulent transactions with respect to Samuel's assets well after it became apparent or should have been apparent that these claims by him lacked merit, and that his continued course of conduct appeared to have been undertaken in bad faith, primarily to harass defendants and to continue to prolong litigation which had already been resolved.

Based upon Simon's frivolous and egregious conduct, the court, pursuant to 22 NYCRR 130-1.1, imposed a sanction upon him in the sum of \$5,000, and awarded defendants their reasonable attorney's fees and costs. It further directed that a hearing be held on the issue of the reasonable amount of these fees and costs to be awarded to defendants' attorney, Mr. Lamberti. A lengthy and detailed hearing was held by the court on this issue, which began on December 19, 2013, and was continued on January 22, 2014.

At the hearing, Mr. Lamberti requested the total sum of \$20,800 for his legal services, which was calculated at an hourly rate of \$400 for 52 hours of legal work performed by him, and further requested the sum of \$45 in disbursements for court filing fees. These requested sums were set forth by Mr. Lamberti in an affirmation of legal services dated October 10, 2013. Mr. Lamberti also gave direct testimony as to his qualifications and experience as an

attorney, his billing practices, the specific legal services performed by him, the amount of time it took him to perform these legal services, the reasons such legal services were necessary, and how he arrived at his fees for these legal services. Simon fully and extensively cross-examined Mr. Lamberti with respect to his affirmation of legal services and his testimony regarding his fee request.

DISCUSSION

In determining a reasonable attorney's fee, which represents the reasonable value of the legal services rendered, the following factors must be considered: (1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved" (*Diaz v Audi of Am., Inc.*, 57 AD3d 828, 830 [2d Dept 2008]; see also *Matter of Freeman*, 34 NY2d 1, 9 [1974]; *47 Thames Realty, LLC v Robinson*, 120 AD3d 1183, 1184-1185 [2d Dept 2014]; *Green v Silver*, 79 AD3d 1097, 1098 [2d Dept 2010]; *Matter of Gaffney v Village of Mamaroneck*, 21 AD3d 1032, 1032 [2d Dept 2005]).

As to the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented, Mr. Lamberti testified, in detail, as to the specific legal services performed by him and the amount of time spent on each of these services. These legal services, as set forth in his affirmation of legal services, included: (1) his receipt

and review of the summons and complaint regarding the real property – 2 hours, (2) extensive file review for preparation of the motion to dismiss (including all prior filings by Simon in the various proceedings, including exhibits) – 25 hours, (3) preparation of affidavit in support of the motion to dismiss the summons and complaint – 3 hours, (4) preparation of an attorney's affirmation in support of the motion to dismiss – 3 hours, (5) preparation of the notice of motion to dismiss and service and filing with the court – 2 hours, (6) court appearances for oral argument in various parts – 5 hours, (7) receipt and review of the court's decision and order – 1 hour, (8) service of the order with notice of entry – 1 hour, and (9) preparation of this affirmation of legal services rendered – 1 hour. In addition, Mr. Lamberti, in his affirmation of legal services, set forth the additional time which he projected that he would spend on this matter. These services included: (1) meeting with the client to discuss the decision – 2 hours, (2) preparation for the court appearance – 1 hour, (3) court appearance – 2 hours, (4) receipt and review of the court's decision – 1 hour, and (5) enforcement of the court's determination – 3 hours. Mr. Lamberti testified that these services had now been or were to actually be performed by him.

Mr. Lamberti explained, at the hearing, that the number of hours listed in his affirmation of legal services were conservative and rounded down, and that he likely underestimated the amount of time spent in performing these tasks. Specifically, he noted that the meeting with his client to discuss the decision was held and it exceeded the two hours that he set forth in the affirmation, and that the court appearance by him at the two-day

hearing on attorney's fees was projected to be two hours, but that it well exceeded that estimate by several hours.

At the hearing, Simon subjected Mr. Lamberti to a rigorous and intensive line by line review of the legal services listed in his affirmation of legal services. Mr. Lamberti testified that he, in fact, spent the amounts of time stated in his affirmation of legal services performing each item of work listed. He adequately explained the work involved in performing these legal services and the time expended on them. Based upon Mr. Lamberti's testimony, the court finds that the number of hours billed by Mr. Lamberti is reasonable.

Simon, at the hearing, particularly opposed Mr. Lamberti's charge for 25 hours spent on his extensive file review for preparation of the motion to dismiss, contending that Mr. Lamberti could not have spent 25 hours in performing this work. Mr. Lamberti, however, set forth that it was necessary for him to review all of the papers that comprised this action and the prior guardianship proceeding to discern the information pertinent to the motion. He explained that he had at least three file boxes in his office relating to this matter that he had to review in order to prepare the motion to dismiss. He pointed to the fact that Simon had filed extensive voluminous papers in the prior guardianship proceeding with literally "books" or volumes of bound exhibits, and that he had to go through this voluminous amount of motion papers and supporting exhibits in order to ascertain if there were grounds to make the motion to dismiss. He testified that all of this work took him a total of 25 hours. The court finds that contrary to Simon's contention, given the extensive history of the prior litigation brought by Simon and the need to examine how the issues in this action related to such prior

litigation in the guardianship proceeding, which required the review of voluminous papers, the amount of time spent by Mr. Lamberti on this review was entirely reasonable under the circumstances.

Simon, at the hearing, also criticized the fact that Mr. Lamberti's affirmation of legal services did not list the dates upon which each of these services were performed. The time frame in which the services were performed, however, are apparent from the nature of these services since they would have to have been performed at the time that the documents referred to therein were prepared and when Mr. Lamberti's court appearances took place.

Simon further criticized the fact that Mr. Lamberti did not bring in separate contemporaneous time records for the work reflected in his affirmation of legal services to support his stated number of hours for the legal services rendered. Mr. Lamberti, however, testified that he had yellow pieces of legal papers on which he had contemporaneously recorded the amount of time that he spent on each of the legal services performed by him. While Mr. Lamberti did not retain these yellow papers, he testified that the amounts of time set forth in his affirmation of legal services accurately reflected the times previously recorded by him, and, as noted above, he specifically provided testimony setting forth how his time was expended and justifying the number of hours spent. Thus, there was adequate evidence of the work performed by Mr. Lamberti (*see Matter of Schwartz*, 235 AD2d 482, 482 [2d Dept 1997]).

Simon additionally argued that the questions involved were not difficult. However, Simon had opposed the motion made by Mr. Lamberti on behalf of defendants, indicating

the contested nature of the questions involved. Simon's attack on and disagreement with Mr. Lamberti's legal strategy in this action, which resulted in an unfavorable result for Simon, i.e., the dismissal of Simon's action against Mr. Lamberti's clients, is irrelevant to the issue of Mr. Lamberti's entitlement to the legal fees earned by him.

Simon, in cross-examining Mr. Lamberti, pointed to the factor of the skill required to handle the problems presented, criticizing the skill employed by Mr. Lamberti in making the motion to dismiss. Mr. Lamberti, however, was possessed of, and exercised the required skill and legal capability to effectively identify the issues involved and to raise the arguments which resulted in the granting of the motion to dismiss.

As to the factor of Mr. Lamberti's experience, ability and reputation, Mr. Lamberti was admitted to practice law in January 1991, and, at the time of his fee request on October 10, 2013, he possessed over 22 years of experience as an attorney. Furthermore, Mr. Lamberti testified that he is currently the chair of the Brooklyn Bar Association Elder Law Committee and has been so since 1996, and that he is also presently the vice chair of the Guardianship Subcommittee of the New York State Bar Elder Law Executive Committee and that he has had this position since 2012. He further testified that prior to that, he was the district delegate to the Elder Law Committee from the Second District, and has been chair of the Guardianship Subcommittee at various times in the past 15 years. In addition, he set forth that he has handled numerous proceedings in this court and other courts with regard to Mental Hygiene Law article 81 matters.

Simon, during his cross-examination at the hearing, criticized and attacked Mr. Lamberti's reputation on the basis that his experience was mainly in the area of guardianship. He asserted that, although this dismissed action involved Samuel, an incapacitated person, and was related to the guardianship proceeding involving Samuel, it raised issues of alleged fraudulent conveyances, which were held to be barred by the doctrines of res judicata and collateral estoppel based upon the court's prior ruling in the guardianship proceeding. He argued that these issues were, therefore, general litigation issues, rather than guardianship issues, and purported to assert that Mr. Lamberti did not have expertise in this area.

This attack on Mr. Lamberti's reputation is entirely unfounded. While Mr. Lamberti has particular expertise in the area of guardianship, his background and outstanding credentials demonstrate that he was also well qualified to handle the issues presented in this action. Indeed, Mr. Lamberti testified that he actually had previously worked on a case to set aside fraudulent deeds as part of an Mental Hygiene Law article 81 case. Furthermore, Mr. Lamberti has demonstrated that he possessed the competence, experience, and ability to address the legal issues of res judicata, collateral estoppel, and standing raised in this action.

As to the factor of the customary fee charged for similar services, Mr. Lamberti testified that his normal hourly fee for legal services is \$400 per hour. "In most communities, the marketplace has set a value for the services of attorneys, and the hourly rate charged by an attorney for his or her services will normally reflect the training, background, experience and skill of the individual attorney" (*Getty Petroleum Corp. v G.M. Triple S. Corp.*, 187

AD2d 483, 484 [2d Dept 1992] [internal quotation marks omitted]). Here, the court finds that Mr. Lamberti's hourly rates for his services are reasonable and in line with fees customarily charged by other attorneys in this locality.

As to the factor of the amount involved and benefit resulting to the client from the services, Simon had sought, in this action, to declare deeds to certain real properties void, as well as damages against defendants in the amount of at least \$700,000. As noted above, Mr. Lamberti was successful in his motion to dismiss this action, and, consequently, this resulted in a benefit to defendants.

As to the factor of the contingency or certainty of compensation, Mr. Lamberti testified that he had a continuing retainer with defendants, which was rolled over from the guardianship proceeding. He stated that his retainer was based upon an hourly billing at the rate of \$400 per hour. He testified that since he billed defendants at the rate of \$400 per hour, if Simon had not been required, by the court's September 20, 2013 order, to pay his attorney's fees, defendants would have been required to pay him the total sum of \$20,800 for the 52 hours of legal services performed by him, plus the \$45 in disbursements.

With respect to the factor of the results obtained, as noted above, the motion to dismiss brought by Mr. Lamberti, on behalf of defendants, was successful. As to the factor of the responsibility involved, this was a contentious matter that required intensive review.

Thus, after considering all of the relevant factors, the court finds that Mr. Lamberti is entitled to the full amount of \$20,800 requested by him as the reasonable value of the legal services rendered by him (*see Freeman*, 34 NY2d at 947; *Thames Realty, LLC*, 120 AD3d

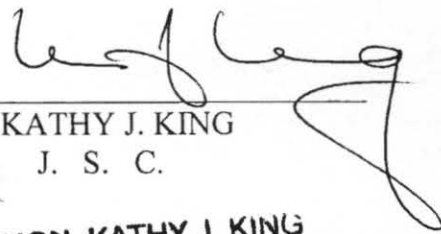
at 1184-1185). Simon has not opposed Mr. Lamberti's request for \$45 in disbursements, and the payment of this sum is warranted (*see Diaz*, 57 AD3d at 832).

CONCLUSION

Accordingly, Mr. Lamberti is awarded the sum of \$20,800 as reasonable attorney's fees and \$45 in disbursements. Simon is directed to pay the full amount of this sum to Mr. Lamberti within 30 days of service upon him of a copy of this decision and order with notice of entry thereon.

This constitutes the decision, order, and judgment of the court.

E N T E R,



HON. KATHY J. KING
J. S. C.

HON. KATHY J. KING
JSC

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

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KINGS COUNTY CLERK

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