

Su San Kwek v Lei Zhou
2015 NY Slip Op 30715(U)
April 22, 2015
Sup Ct, Queens County
Docket Number: 24939/12
Judge: Howard G. Lane
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Short Form Order

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

SU SAN KWEK and HYUNG IL CHA,

Plaintiffs,

-against-

LEI ZHOU and XUE FEI LIN,

Defendants.

Index No. 24939/12

Motion
Date November 13, 2014

Motion
Cal. No. 95

Motion
Sequence No. 4

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Upon the foregoing papers it is ordered that as the claim of plaintiff Hyung Il Cha has been settled as against defendants, and after a hearing to determine the value of the legal services rendered, if any, that the Law Office of Jerald D. Werlin, Esq. is entitled compensation, the motion by outgoing attorneys for plaintiff, the Law Office of Jerald D. Werlin, for an order directing the apportionment of attorneys fees between incoming and outgoing attorneys, is determined as follows:

I. BACKGROUND

On June 23, 2012, plaintiff Hyung Il Cha ("Cha") was injured in a motor vehicle accident. Thereafter, Cha retained the Law Office of Jerald D. Werlin ("Werlin") to represent him in an action for personal injury. Thereafter, Cha discharged Werlin and substituted the Law Offices of Andrew Park, P.C. ("Park").

The action by Cha was settled for the sum of \$75,000.00¹. The attorneys were unable to reach an agreement on legal fees, and thereafter, the instant motion ensued. Werlin now moves this

¹The court notes that the claim of plaintiff Su San Kwek remains active against defendants.

court to set the legal fees it is entitled to based upon the work Werlin performed. Werlin does not dispute that Park is entitled to some legal fees, but asserts that Park is only entitled to an amount in proportion to the total amount of legal work actually performed by the two participating law firms of the Law Office of Jerald D. Werlin and the Law Offices of Andrew Park, P.C. On the other hand, Park disputes that Werlin is entitled to any legal fees, and asserts that Werlin is not entitled to any legal fee because, Werlin engaged in misconduct and was discharged for cause in that Werlin attempted to settle plaintiff Cha's claim without his consent or approval.

By order of this court dated December 8, 2014, this matter was set down for a hearing to determine the value of the legal services rendered, if any, that the Law Office of Jerald D. Werlin and the Law Offices of Andrew Park, P.C. are entitled to as compensation (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]). A hearing was conducted on February 17, 2015 and was concluded on April 7, 2015. At the hearing, Jerald D. Werlin, Esq. testified on behalf of the Law Office of Jerald D. Werlin, and Andrew Park, Esq. and plaintiff Hyung Il Cha testified on behalf of the Law Offices of Andrew Park, P.C. 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. 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 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 (Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 AD2d 183, 187 [1st Dept 2002]).

A. Was the Law Office of Jerald D. Werlin Dismissed for Cause?

Park argues that Law Office of Jerald D. Werlin was dismissed by Cha for cause and is not entitled to any legal fee (see, Friedman v. Park Cake, Inc., 34 AD3d 286, 287 [1st Dept 2006] [stating that where an attorney is discharged for cause, she is entitled to no compensation]). In support of this argument, Park asserts that the Law Office of Jerald D. Werlin engaged in misconduct and was discharged for cause in that Werlin "attempted to settle Plaintiffs' claim without the consent/approval of Plaintiffs in this action." (¶ 13 Affirmation in Opposition of Andrew Park, Esq., dated October 2, 2014). The court finds Park's allegations without merit. The bare conclusory allegations of misconduct contained in the affirmation of the attorney are insufficient to establish a prima facie case. Thus, Park's claim of misconduct is without merit.

Moreover, at the hearing, plaintiff Hyung Il Cha testified that he understood that the offer of settlement for \$65,000 communicated to him by Werlin was not binding upon him and that he was not obligated to accept it. In fact he demonstrated his rejection of the offer by his subsequent conduct by (1) not signing the release and (2) discharging Werlin and retaining incoming attorney, Park. From the record before the court, the court finds that Cha discharged Werlin because he was dissatisfied with the services of Werlin, and because of this dissatisfaction, he elected to change attorneys. Evidence of a general dissatisfaction with an attorney's performance or a difference of opinion between attorney and client does not establish that the attorney was discharged for cause absent some evidence that the attorney failed to properly represent the client's interest (Costello v. Kiaer, 278 AD2d 50, 50 [1st Dept 2000]). Park presented no evidence that Werlin failed to properly represent Cha's interest.

Furthermore, "[a]ttorney-client relationships frequently end because of personality conflicts, misunderstandings, or differences of opinion having nothing to do with any impropriety by either the client or the lawyer" (Klein v. Eubank, 87 NY2d 459 [1996]). Something more than a personality conflict or difference of opinion is required to establish discharge for cause and "[c]ourts typically find a discharge for cause where there has been a significant breach of legal duty" (D'Jamoos v. Griffith, 2006 WL 2086033, at 5 [EDNY July 25, 2006] [quoting Allstate Ins. Co. v Nandi, 258 F Supp 2d 309, 312 [SDNY 2003])).

Here, there is no evidence that the conduct of Werlin breached any trust and confidence with Cha. Moreover, no evidence was submitted from Cha by affidavit or testimony to show that the reason he discharged Werlin was because Werlin failed to properly represent his interest. Rather, the record shows that Cha discharged Werlin because he disagreed with Werlin's recommendation of settling the case for \$65,000.00 and Cha wanted a greater amount. Therefore, the court finds that Werlin was not discharged for cause and maintains a charging lien for its fee (see, Calabro v. Bd of Educ of City of New York, 39 AD3d 680, 681 [2d Dept 2007]).

B. Calculation of the Fee

A discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based upon his or her proportionate share of the work performed (Fernandez v New York City Health and Hospitals Corp., 238 AD2d 544, 545 [2d Dept 1997]). In determining a discharged attorney's proportionate share of the work, the court considers the time and labor involved, the difficulty of the case, the skill required to handle the matter, the results achieved, the amount of money involved, and the fee customarily charged for similar services (see, Buchta v. Union-Endicott Central School Dist., 296 AD2d 688, 689-90 [3d Dept 2002]). Here, Werlin requests that this court award it attorney fees upon a proportionate share of the total amount of the work performed by both attorneys to achieve a settlement for the amount of \$65,000.00 which was the amount that Werlin had successfully achieved before Park had performed any work and before Werlin was discharged. On the other hand, Park argues that if this court should find that attorney's fees are warranted, it should limit Werlin's proportionate share to a significantly lower amount based upon the fewer hours it spent on the case in proportion to the vastly extensive time expended by Park to achieve the successful result of a settlement of \$75,000.00. Park asserts that Park is entitled to the majority of attorney's fees because Park performed the majority of the work which led to a successful final settlement in Cha's favor. Park further argues that if this court should find that attorney's fees are warranted, it should limit Werlin's attorney's fees based upon the fewer hours Werlin spent on the case in proportion to the time expended by Park and the successful result of settlement in the client's favor.

Werlin elicited evidence to show the work performed by the Law Office of Jerald D. Werlin. It was established and it was undisputed that Werlin, among other things, performed an investigation of the motor vehicle accident, filed a claim for no fault benefits, obtained medical reports and records from

medical providers, exchanged same with defendants' attorneys and insurance carrier, filed a summons and complaint, prepared and served a bill of particulars, prepared and served discovery demands, appeared at preliminary conference, and attempted settlement negotiations. (¶¶ 3-7 Attorney Affirmation of Jerald D. Werlin, Esq. in Support of Motion).

However, this court finds that the Law Offices of Andrew Park, P.C.'s share of the total work performed in this case was far more extensive and disproportionately greater than the amount of work performed by the Law Office of Jerald D. Werlin. Park, among other things, performed preliminary interviews and fact gathering, conducted and responded to discovery, conducted depositions, successfully opposed a summary judgment motion, appeared in court for a compliance conference, and most importantly, conducted successful settlement negotiations. Because of the successful result achieved, which the court accords significant weight, the court determines that Park is entitled to a significantly greater portion of the total fee. Notwithstanding the successful settlement achieved by Park, the Court must accord some weight to the relative success that Werlin achieved by obtaining a settlement offer of \$65,000.00, although \$10,000.00 less than the \$75,000.00 final settlement achieved by Park. In light of the foregoing, the court finds that a fee of one-third (1/3) or 33 1/3 % of the gross attorney's fees of \$25,000.00, namely the gross sum of \$8,332.50, is reasonable for Werlin's legal work on the case inclusive of any disbursements (see, Brown v. Governale, 28 AD3d 617 [2d Dept 2006] [holding that outgoing counsel, who merely commenced an action, was entitled to 5% of the legal fee where incoming counsel filed an amended summons and complaint, conducted discovery, successfully opposed a motion for summary judgment, and represented the plaintiff at a mediation which resulted in a settlement]; Podbielski v. KMO 361 Realty Assocs., 6 AD3d 597, 597 [2d Dept 2004] [granting counsel five percent of the net contingency fee for providing advise to appellate counsel and arranging for the collection of judgment]; Poulas v James Lenox House, Inc., 11 AD3d 332 [1st Dept 2004] [holding that outgoing counsel was entitled to 3% of the legal fee where outgoing counsel "merely filed and served a three-page summons and complaint in the action and obtained some medical records during the 11 months it served as plaintiff's attorney ...[while] the incoming firm...., by contrast, inter alia, responded to defendants' discovery requests, conducted approximately 10 depositions, retained experts on liability and damages, conducted voir dire, engaged in settlement negotiations and secured a highly favorable settlement for plaintiff, whose injuries, although serious, were difficult to establish clinically"]; Greenberg v Cross Island Industries, Inc., 522 F Supp 2d 463, 2007 WL 3285810 [EDNY 2007] [granting attorney's fees of five percent of the net attorney's fee to originating attorney who performed preliminary fact gathering and

drafted and filed the complaint]).

III. CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that attorney's fees in the amount of \$8,332.50 be paid to the Law Office of Jerald D. Werlin by the Law Offices of Andrew Park, P.C., either: (1) within twenty (20) days after receipt of the settlement amount, or (2) if the settlement amount has already been paid, within twenty (20) days after a copy of this decision and order is served on the Law Offices of Andrew Park, P.C. with notice of entry.

A courtesy copy of this order is also being mailed to the Law Offices of Andrew Park, P.C. and the Law Office of Jerald D. Werlin.

This constitutes the decision and order of the court.

Dated: April 22, 2015

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Howard G. Lane, J.S.C.