

Mihalik v Serour
2015 NY Slip Op 32350(U)
December 10, 2015
Supreme Court, New York County
Docket Number: 161689/14
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22**

Index No.: 161689/14

Motion Seq. 002

Dylan Mihalik, in infant, et. al.,

Plaintiffs,

-against-

Sameh S. Serour et. al.,

Defendant.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

This is plaintiff's outgoing attorney's motion for a charging lien. For the following reasons, the motion is granted to the following extent.

Dylan Mihalik's parents are divorced and, pursuant to a family court decree, they have joint legal custody, with physical custody being with his father. On February 8, 2013 Dylan was walking with his father and was hit by a car. Dylan's mother hired a lawyer (outgoing attorney) and signed a retainer agreement on February 18, 2013. Outgoing attorneys never claim that, at the time they were retained, they were unaware that (a) the parents were divorced and (b) the parents had joint legal custody and (c) the father had physical custody. The retainer agreement - signed only by the mother - clearly anticipates litigation; that is, it is not limited to pre-litigation matters.

After allegedly trying to resolve the matter without litigation, the outgoing attorney commenced this personal injury action in November 2014, naming Dylan

by his mother and his mother individually. Although the mother did not verify the complaint, there is proof that she knew litigation was pending in January 2015; the outgoing attorney shows text messages where she asks him for an update and he advises her that the case is in litigation.

In or about April, 2015, Dylan's father and mother decided to retain incoming attorneys. Incoming attorneys sought the file and outgoing attorneys sought an acknowledgment of lien. Incoming attorneys refused to acknowledge the lien and this motion ensued.

The first issue is whether the mother had the capacity to unilaterally choose an attorney to pursue a lawsuit for her son's personal injuries without the father's consent. Outgoing attorneys claim that because the mother has legal custody, CPLR Sec. 1201 allows it. But CPLR 1201 must be read for intact families; things change when there is a judicial decree governing the family relationships.

The judicial decree granting physical custody to the father and joint legal custody to the parents is silent about decision making authority on the "big" decisions such as religion, education, health/medical decisions and the like. As Dylan was injured and the personal injury action is brought to get compensation for Dylan for his injuries, this Court finds that the choice of attorney, like the choice of a doctor or school, is one of the "big" decisions made on behalf of the

child and therefore could not be made without the consent of both parents.

Therefore, because the mother lacked the sole authority to authorize outgoing attorney to commence a lawsuit, outgoing attorney is not entitled to any fees relating to the commencement of the action.

That is not to say, however, that the outgoing attorney worked for free. After the father understood that his ex-wife hired an attorney to work out the bills and try to settle the case, he did have communications with the outgoing attorney and cooperated with him, including appearing in his office for a meeting. What the father now objects to is the commencement of the action without his authority, not all the pre-litigation work.

According to the father, he told the outgoing attorney to stop work in early November 2014 and the outgoing attorney does not deny this. While the outgoing attorney states that "it defies logic that I would agree to, in essence, babysit a legal file until [the parents] find substitute counsel" the attorney never denies that he was instructed to stop work and that he filed the complaint anyway.

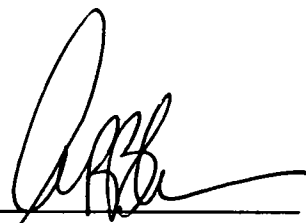
However, because the mother retained the outgoing attorney and the father cooperated with pre-litigation matters, the Court finds that the father ratified the contract to the extent of all pre-litigation work. Therefore, the Court finds that outgoing attorney is entitled to compensation for his time and expenses for all pre-

litigation work - that is, up to but not including drafting the complaint. As no hourly rate was agreed upon, outgoing attorney will be compensated on a quantum meruit basis. See *Sharbat v Law Offices of Michael B. Wolk*, 121 AD3d 426 (1st Dept. 2014).

The matter is referred to a referee to hear and report on the value of outgoing attorney's services. Outgoing attorney to serve this decision and order upon the appropriate clerk to schedule a hearing. If the parties consent, then the referee is authorized to hear and determine.

This is the decision and order of the Court,

Dated: December 10, 2015
New York, New York



HON. ARLENE P. BLUTH, JSC