SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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JOEL GROSSBARTH, as Successor in interest to TOGNINO & GROSSBARTH, LLP,

Petitioner,

-against-

DANKNER, MILSTEIN & RUFFO, P.C.,

Respondent.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. 2571/2015
Motion Date: May 19, 2015

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The following papers numbered 1 to 7 were read on Petitioner's claim in quantum meruit for attorney's fees and Respondent's cross-motion for an award of costs:

Order to Show Cause - Verified Petition - Affirmation / Exhibit - Affidavit/Exhibit 1-4

Notice of Cross Motion - Affirmation in Opposition / Exhibits 5-6

Affirmation in Opposition to Cross Motion / Exhibit 7

Upon the foregoing papers the Petition and motion are disposed of as follows:

This proceeding arises out of a prior action entitled *Gronner v. Starvaggi,* Orange County Index No. 6218/2010. The Petitioner, a disbarred attorney, alleges that he was retained by the Gronners in 2008 to represent them in a medical malpractice action. On November 3, 2011, Petitioner was suspended from the practice of law due to professional misconduct unrelated to that action, whereupon the Respondent law firm took over the representation. Respondent settled the *Gronner* action in June 2012 for the sum of $550,000.00.

In September 2012, Petitioner moved pursuant to Judiciary Law §475 and 22 NYCRR 691.10(b) for an apportionment of the attorney's fee in quantum meruit for his role in the prosecution of the case through the date of his suspension from the practice of law. However, it was determined that Petitioner had not filed a retainer statement in the *Gronner* action in accordance with the requirements of 22 NYCRR 691.20(a)(1). By decision and order dated October 22, 2012, this court denied Petitioner's motion for an apportionment of the attorney's fee. Citing *Rabinowitz v. Cousins*, 219 AD2d 487 (1st Dept. 1995), and *Giano v. Ioannou*, 78 AD3d 768 (2nd Dept. 2010), the court held:

> [T]he rules of the First and Second Departments are identical on this issue. The *Giano* Court held "[t]his Court's [Second Department] rules require every attorney practicing law in the Second Judicial Department who is retained with respect to certain types of actions to file a retainer statement with the Office of Court Administration (hereinafter OCA) within 30 days of being retained (*see* 22 NYCRR 691.20[a] [1]). Filing a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies (*see Micro–Spy, Inc. v. Small,* 69 A.D.3d 687, 689, 893 N.Y.S.2d 187; *Rabinowitz v. Cousins,* 219 A.D.2d 487, 488, 631 N.Y.S.2d 312)." *Giano,* 78 AD3d at771. In the instant case, the evidence clearly reveals that Mr. Grossbarth failed to file the requisite retainer statement as the law in both the First and Second Departments requires. Moreover, Mr. Grossbarth was not discharged without cause. He was suspended from the practice of law and the instant file needed to be transferred to another attorney.
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> The rules pertaining to the filing of retainer statements are not mere suggestions. They were implemented for the purpose of protecting a client's interests and for proper monitoring of attorneys in certain types of cases. The case law makes clear that a condition precedent for receiving attorneys' fees is the filing of a retainer statement with OCA. Mr. Grossbarth failed to do just that and therefore is not entitled to any fee. To award a fee under these circumstances would be to suggest that the Second Department's rules are suggestions and do not need to be followed. To hold otherwise would reward an attorney for directly disobeying the very rule from which he may claim a fee in the first instance. Therefore, movant's motion is denied in its entirety and Mr. Grossbarth has forfeited his fee for his failure to file any retainer statement with OCA or seek a nunc pro tunc filing thereof through the Court prior to his suspension.

Now, by Verified Petition dated March 25, 2015, Petitioner alleges that "[t]he fair and reasonable legal services [petitioner] performed while representing the plaintiffs in the Gronner Action amount to approximately $61,500.00." He seeks from the Respondent law firm precisely the same relief that was denied in this court's October 22, 2012 decision and order, to wit, a portion of the legal fee generated in the *Gronner* case calculated on a quantum meruit basis. In support of his claim, Petitioner argues:

> When an attorney is discharged as counsel, he/she has three (3) separate and distinct remedies to recover for the value of their legal services 1) a charging lien in accordance with Judiciary Law §475, 2) a retaining lien and 3) a plenary action in quantum meruit. Butler, Fitzgerald & Potter v. Gelmin, 235 AD2d 218, 651 NYS2d 525 (1st Dept. 1997). These remedies are cumulative and not exclusive....
> ....
>
> Even if an attorney fails to file a Retainer Statement, in accordance with Judiciary Law §475, with the Office of Court Administration, he/she is entitled to be compensated for their quantum meruit work performed. [cit.om.]. By failing to file a Retainer Statement, in accordance with Judiciary Law §475, the attorney is precluded solely from asserting a cause of action for breach of contract, in accordance with Judiciary Law §475, and is limited to asserting a cause of action for quantum meruit. Micro-Spy, Inc. v. Small, 69 AD3d 687, 893 NYS2d 187 (2d Dept. 2010).

In sum, Petitioner claims that despite this court's prior denial of his motion pursuant to Judiciary Law §475 and 22 NYCRR 691.10(b) for an apportionment of the attorney's fee in quantum meruit, he is now entitled to bring a plenary action, sounding in quantum meruit, against the Respondent law firm to obtain a portion of the attorney's fee .

For multiple reasons, the Petition fails as a matter of law and must be dismissed:

(1) By decision and order dated October 22, 2012, this court held *inter alia* that "[f]iling a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies", that "the evidence clearly reveals that Mr. Grossbarth failed to file the

requisite retainer statement as the law in both the First and Second Departments requires," and that "Mr. Grossbarth has forfeited his fee for his failure to file any retainer statement with OCA or seek a nunc pro tunc filing thereof through the Court prior to his suspension." *See, Giano v. Ioannou, supra,* 78 AD3d 768, 771 (2nd Dept. 2010) ("[f]iling a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies"); *Fishkin v. Taras,* 54 AD3d 260 (1st Dept. 2008) (filing retainer statement is "a prerequisite to receipt of compensation for legal services"); *Rabinowitz v. Cousins*, 219 AD2d 487, 488 (1st Dept. 1995) (same). The October 22, 2012 decision and order, which has not been vacated or appealed, precludes the relief Petitioner seeks herein.

(2) Assuming *arguendo* that Petitioner would despite the loss of his Judiciary Law §475 remedy retain the right to commence a plenary action in quantum meruit, no such action would lie against the Respondent law firm, but only against the persons for whom his services were rendered, i.e., the *Gronner* plaintiffs. *See, Lai Ling Cheng v. Modansky Leasing Co., Inc.,* 73 NY2d 454, 457-458 (1989); *Micro-Spy, Inc. v. Small,* 69 AD3d 687, 689 (2d Dept. 2010); *Butler, Fitzgerald & Potter v. Gelmin, supra,* 235 AD2d 218, 218-219 (1st Dept. 1997).

(3) However, this court's October 22, 2012 decision and order also held that Petitioner, in the *Gronner* action, was discharged for cause. An attorney discharged for cause forfeits all right to compensation. *See, Campagnola v. Mulholland, Minion & Roe,* 76 NY2d 38, 44 (1990); *Doviak v. Finkelstein & Partners, LLP,* 90 AD3d 696, 699 (2d Dept. 2011). Once again, then, the October 22, 2012 decision and order, which has not been vacated or appealed, precludes the relief Petitioner seeks herein.

The October 22, 2012 decision and order is consistent with applicable appellate authority, and was eminently correct. The suggestion by Justice Loehr in *Grossbarth v. Danker, Milstein and Ruffo, P.C.*, Rockland County Index No. 31526/15, that this court's decision is "inconsistent with established Appellate Division precedent" is, with all due respect, based on a misreading of the pertinent appellate authority.

In *Giano v. Ioannou*, 78 AD3d 768 (2nd Dept. 2010), the Second Department held:

> This Court's rules require every attorney practicing law in the Second Judicial Department who is retained with respect to certain types of actions to file a retainer statement with the Office of Court Administration (hereinafter OCA) within 30 days of being retained (*see* 22 NYCRR 691.20[a][1]). **Filing a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies (*see Micro-Spy, Inc. v. Small*, 69 AD3d 687, 689...; *Rabinowitz v. Cousins*, 219 AD2d 487, 488...).** Although nunc pro tunc filing of retainer statements may be sufficient to preserve an attorney's right to recover fees [cit.om.], where the attorney fails to seek leave of court to file the statements nunc pro tunc, that late filing will not be sufficient [cit.om.]. Here, the defendant did not obtain leave of court to file the statements nunc pro tunc, and, indeed, filed the statements only after the judgment against him had been entered. Moreover, the defendant failed to present any evidence justifying his failure to comply with these regulations. Under these circumstances, the defendant's belated filing of retainer statements was insufficient to preserve his right to recover a fee [cit.om.]. Accordingly, the Supreme Court properly awarded the plaintiff 100% of the fees despite the parties 50%-50% fee-sharing agreement.

Giano v. Ioannou, supra, 78 AD3d at 771 (boldface emphasis added).

Despite the Second Department's citation of *Micro-Spy, Inc. v. Small, supra*, for the proposition that "[f]iling a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies" (*Giano, supra*), both Petitioner and Justice Loehr mistakenly interpret *Micro-Spy, Inc.* as holding directly to the contrary that an attorney who has unjustifiably violated the Second Department's rule mandating the filing of contingency fee retainer statements may nevertheless recover from the prevailing attorney a portion of the

attorney's fee under the rubric of quantum meruit. As witness the Second Department's own decision in *Giano v. Ioannou*, *Micro-Spy, Inc. v. Small* holds no such thing.

The case at bar, like *Giano, supra,* concerns an attorney precluded by virtue of his unjustifiable violation of 22 NYCRR 691.20(a)(1) from recovering a portion of the attorney's fee in a case to which Section 691.20(a)(1) indisputably applied. In *Micro-Spy, Inc.*, by contrast, there was no determination that the attorney had violated Section 691.20(a)(1).

The requirement that a retainer statement be filed is triggered only if:

(1) the action or claim is one "for damages for personal injury or for property damages, or for death or loss of services resulting from personal injuries, due to negligence or any type of malpractice or in connection with any claim in condemnation or change of grade proceedings"; AND

(2) the attorney's compensation is to be "dependent or contingent in whole or in part upon the successful prosecution or settlement thereof."

See, 22 NYCRR 691.20(a)(1). The attorney in *Micro-Spy, Inc.* sought to recover a contingency fee from clients who retained him in a case where there was no written retainer agreement, nor any indication in the record as to the substance of the fee agreement (if any) between lawyer and clients. *Id.*, 69 AD3d at 688. The Second Department did not hold that the attorney violated Section 691.20(a)(1), for the evidence did not establish the existence of a contingency fee agreement in an action to which that regulation applies. Instead, the Court held that (1) the attorney, having failed to file a contingency fee retainer statement in accordance with Section 691.20(a)(1), could not obtain a contingency fee, but (2) he might be entitled be entitled to recover from his clients in quantum meruit for the reasonable value of his services. The Court wrote:

> As it is undisputed that the appellant did not comply with 22 NYCRR 691.20(a)(1), pursuant to which attorneys must file retainer agreements with the OCA in, inter alia, actions to recover damages for personal injuries and property damage, he is not entitled to a contingency fee [cit.om.].
>
> However, under the circumstances, the appellant may be entitled, in a separate plenary action, to recover, in quantum meruit, for the reasonable value of his services (*see Law Off. of Howard M. File, Esq., P.C. v. Ostashko,* 60 AD3d 643...; *Haser v. Haser,* 271 AD2d 253, 255 ...; *Butler, Fitzgerald & Potter v. Gelmin,* 235 AD2d 218, 218-219 ...). We take no position on the merits of such an action.

Micro-Spy, Inc., supra, 69 AD3d at 689.

The common denominator of the three cases cited in *Micro-Spy, Inc.* as involving circumstances wherein an attorney – despite his failure to file a retainer statement – "may be entitled, in a separate plenary action, to recover, in quantum meruit, for the reasonable value of his services" is the inapplicability in the first instance of the Section 691.20(a)(1) requirement that a retainer statement be filed with OCA. The filing requirement was inapplicable in *Butler, Fitzgerald & Potter v. Gelmin, supra,* because the action or claim therein was not one covered by Section 691.20(a)(1), but rather "a commercial dispute involving defendants' interest in the residual value of certain equipment owned by Sequa Capital Corporation and leased to third parties." *Id.,* 235 AD2d at 218. The filing requirement was inapplicable in *Ostashko* and *Haser, supra,* because they involved domestic relations matters, wherein contingent fees are prohibited by law. *See, Law Off. of Howard M. File, Esq., P.C. v. Ostashko, supra,* 60 AD3d at 644.

In view of the foregoing, the suggestion by Petitioner herein, and by Justice Loehr in Rockland County Index No. 31526/15, that *Micro-Spy, Inc.* permits an attorney who has unjustifiably violated 22 NYCRR 691.20(a)(1) to recover from the prevailing attorney a portion

of the attorney's fee under the rubric of quantum meruit is plainly in error. The law in the Second Department is that "[f]iling a retainer statement with OCA is a prerequisite to receiving a fee for any case to which the regulation applies." *Giano v. Ioannou, supra,* 78 AD3d 768, 771 (2nd Dept. 2010). *See also, Fishkin v. Taras, supra; Rabinowitz v. Cousins, supra.* Petitioner having failed to satisfy that prerequisite is barred from obtaining any portion of the attorney's fee in the underlying action from the Respondent law firm.

It is therefore

ORDERED, ADJUDGED AND DECREED, that the Petition is dismissed, and it is further

ORDERED, that Respondent's cross-motion is denied.

The foregoing constitutes the decision, order and judgment of the Court.

Dated: June 4, 2015
Goshen, New York

ENTER

HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE