

Gurbuzturk v Jamrom
2018 NY Slip Op 30900(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 805284/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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SADAN GURBUZTURK, as Administrator of the
ESTATE OF SAIT KOC, Deceased, and on behalf of his
Distributees and Next of Kin,

Plaintiff,

Index No.
805284/2013

**DECISION and
ORDER**

- against -

Mot. Seq. 006,
007, & 008

LISA JAMROM, M.D., LISA JAMRON, M.D., P.C.,
JOHN SHERMAN, M.D., JOHN SHEMAN, M.D., P.C.,
RICHARD P. COHEN, M.D., and RICHARD P. COHEN,
M.D., P.C.

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Sadan Gurbuzturk (“Plaintiff”), as Administrator of the Estate of Sait Koc (“Koc”), and on behalf of Koc’s distributees and Next of Kin, commenced this action on August 13, 2013. Plaintiff alleges that on July 18, 2012, Koc underwent an elective liposuction procedure performed by defendant, John Sherman, M.D. (“Dr. Sherman”), with co-defendant Lisa Jamron, M.D. (“Dr. Jamron”) administering the anesthesia.¹ Plaintiff claims that Koc died from “Ventilatory Insufficiency” as a result of Dr. Sherman and Dr. Jamron’s negligent treatment. On March 20, 2018, the parties to this action allegedly reached a settlement.

Presently before the Court are three Orders to Show Cause: Motion Sequence 006, Motion Sequence 007 and Motion Sequence 008.

¹ Recently discontinued co-defendant, Dr. Richard Cohen, performed preoperative surgical clearance.

Motion Sequence 006

In Motion Sequence 006, Plaintiff seeks an order compromising this action in the amount of \$3,300,000.00 and approving the extraordinary fees of Plaintiff's counsel. Plaintiff entered a retainer agreement with the law firms of Ruta, Soulios & Stratis, LLP and Michael Gunzburg, P.C., on March 5, 2013. In this instant Order to Show Cause, Mr. Gunzburg submits an affirmation wherein he itemizes all of the services provided to Plaintiff. For instance,

“12) Multiple motions were made in this case including motions to compel discovery, to oppose motions where defendants sought discovery, to extend defendants' time to get discovery after the note of issue was filed . . . 15) Review and analysis of numerous bank statements spanning several years before decedent's death from several countries including Turkey . . . and all of the records from Turkey were in Turkish . . . Review and analysis of multiple corporations spanning several years before decedent's death related to the decedent in both Turkey and the United States, and many of those records were also in Turkish . . . 19) Time spent with decedent's accountant to Review and analyze his U.S. sources of income . . . 20) Time Spent with Plaintiff's economist to review all of the decedent's Individual and corporate Income, Financial records, Tax Returns Bank Statements, and Credit Card statements . . .”

(affirmation of Gunzburg at 4-5)

Also included with Motion Sequence 006 is the affidavit of Plaintiff who provides the following,

“As to the Legal Fees, Mr. Gunzburg and Mr. Ruta fully explained to me the difference between the legal fees that

that the Estate would have to pay under NYS Judiciary Law Section 474-a for the \$3,300,000 recovery in this case. The attorneys also explained to me that if the Estate were to pay the attorneys a one third (1/3) fee on the total recovery of the case . . . the total legal fees in this case are \$1,080,960,58. . . . I have received instructions directly from the decedents' Beneficiaries to ask this court to grant plaintiff's application in full for their one third (1/3) legal fees in this case based on their extraordinary services provided in this case . . . In my opinion, the attorneys in this case are entitled to extraordinary fees for their services based on the extraordinary work performed in this case, and the tremendous amount of time and efforts spent in gathering all of the evidence in this case and prosecuting the Estate's claims to a successful resolution in this matter."

(aff of Gurbuzturk at 2-3)

Dr. Sherman and John Sherman, M.D., P.C. ("Sherman P.C."), oppose. They allege that Plaintiff has provided a unilaterally-altered Settlement Agreement that includes different terms than those upon which the parties agreed. Dr. Sherman and Sherman P.C. also seek specification in the Compromise Order that the time frame for payment by them will be no later than 60 days after receipt of executed Stipulations of Discontinuance, General Release, and Hold Harmless Agreement following the entry of a compromise order. Lastly, these defendants request that the Court seal all applications and filings related to the settlement because the parties agreed in principle to include a confidentiality clause regarding the settlement terms.

In support, Dr. Sherman and Sherman P.C. submit *inter alia* a copy of the Letters of Administration issued from the Honorable Rita Mella, Judge of the New York County Surrogate's Court. The letters, issued on February 6, 2013 provide,

"These letters authorize the collection only of a total of \$20,000.00 dollars. Any collection above that amount

must be authorized by further order of the Surrogate. These letters issued with power to prosecute only and not with power to collect or compromise or exercise any other powers until the further order of this court, or the order of any court of competent jurisdiction. (EPTL 5-4.6).”

(Dr. Sherman and Sherman P.C.’s exhibit E)

Dr. Jamron and Lisa Jamron, M.D., P.C. (“Jamron P.C.”) also oppose. They request that if the Court approves the compromise order, that the Order explicitly provide the prerequisites of payment “as previously agreed upon by the parties and as required by EPTL § 5-4.6 and CPLR § 5003-a.” (affirmation of Brady at 3)

Motion Sequence 007

In Motion Sequence 007, Dr. Jamron and Jamron P.C., move for an Order directing the Clerk of the Court to seal plaintiff’s application for a compromise order and to permanently seal the plaintiff’s application for a compromise order, all documents and/or records related to the application. Dr. Jamron and Jamron P.C., assert that settlement was conditioned on the execution of a stipulation that included a confidentiality provision. Additionally, they argue that the plaintiff’s Order to Show Cause seeking a provisional compromise order directly contradicts the confidentiality provision agreed upon by the parties in that it explicitly discloses the terms of the settlement. Accordingly, Dr. Jamron and Jamron P.C. request that the Court seal plaintiff’s application and all related documents.

Plaintiff does not oppose the request that the settlements amount paid be “restricted from disclosure” but believes “that the facts surrounding this incident should be made public so that this type of medical tragedy does not repeat itself.” (affirmation of Gunzburg at 1)

Motion Sequence 008

In Motion Sequence 008, Dr. Sherman and Sherman P.C. move for an order sealing Plaintiff's application to the Court for a compromise order. They assert that as a courtesy and at plaintiff's request, they amended their customary confidentiality clause to allow Plaintiff's counsel to disseminate the following statement, "\$2.3 Million dollar settlement in medical malpractice action in New York State." Allegedly however Plaintiff executed Settlement documents with unilateral amendments especially with respect to the confidentiality clause. Dr. Sherman and Sherman P.C. allege that Plaintiff's counsel added, "the facts of the case on his website and with Jury Verdict reporter with the names and identity of all parties redacted." Upon receipt of this amended settlement, Dr. Sherman and Sherman P.C. sent Plaintiff a letter rejecting the terms. Plaintiff opposes *inter alia* for the reasons he provided in his opposition to Motion Sequence 007.

Standards

Limited Letters of Administration

SCPA § 702 provides that,

"Letters may be granted limiting and restricting the powers and rights of the holder thereof . . . [t]o the enforcement or prosecution of a cause of action in favor of the decedent or his fiduciary . . . and restraining the fiduciary from compromise of the action . . . until the further order of the court and the filing of satisfactory security if required." (SCPA § 702)

Limited letters that restrain an administrator from compromising an action are designed "to protect the persons ultimately entitled to the recovery from loss through the fraud or dishonesty of the plaintiff. To this end a bond is required before the judgment is paid to him." (*In re Atterbury*, 222 NY 355, 361-362 [1918].) Limited letters restraining an administrator from compromising an action "when read narrowly, seem[] to forbid a compromise or agreement to settle an action until the further order of the Surrogate . . . Any conclusion to be drawn from such narrow reading . . . is entirely overcome by the obvious purpose . . . which is to prevent administrators from handling funds without giving security. The purpose cannot be to enable the Surrogate's Court, in effect, to nullify the judgments and orders of the

Supreme Court . . .” (*Amo v Leonard*, 30 NYS2d 183, 186 [4th Dept 1941].) “If the administratrix desires to compromise an action . . . she should present a verified petition to the Surrogate’s Court setting forth the restriction contained in the letters, the amount which is about to come into her hands by reason of the compromise . . . and ask that an order be made, on giving additional satisfactory security, removing the restriction contained in the limited letters, so as to leave her free to accept a compromise . . .” (*id.*)

EPTL§ 5-4.6 currently governs the procedure to compromise an action. Although, “the Surrogate’s Court is the ‘preferred’ forum for determining the proper distribution of the settlement proceeds . . . the same cannot be said about the determination to approve or disapprove the terms of a wrongful death settlement. As to that determination, it is the Supreme Court, with its superior familiarity with the merits and the litigants, that is better situated to make the necessary assessment.” (*Pollicina v. Misericordia Hosp. Medical Center.*, 604 NYS2d 879, 882-883 [1993].)

Seal

The sealing of court records is governed by 22 NYCRR § 216.1, which provides as follows:

“(a) Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and opportunity to be heard.”

There is a strong public interest in the openness of court proceedings. (*Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept 2011].) Therefore, “the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.” (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].) For instance, a compelling objective is “when the need for secrecy outweighs the public’s right to access, e.g., in the case of trade secrets.” (*In re East 51st Street Crane Collapse Litigation*, 106 AD3d 473, 474 [1st Dept

2013].) “The rule also requires courts to consider the interests of the public as well as the parties in determining whether good cause has been showing.” (*id.*) “[A] finding of good cause . . . ‘boils down to . . . the prudent exercise of the court’s discretion.” (*Applehead Pictures LLC v Pereleman*, 80 AD3d 181, 192 [1st Dept 2010].) Even if the parties stipulate to sealing an action, the motion court should still make its own written finding of good cause. (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].)

Attorney’s Fees

Judiciary Law 474-a (2) establishes a mandatory fee schedule for attorneys who are retained to prosecute medical practice claims on a contingent fee basis. (*Yalango by Goldberg v Popp*, 84 NY2d 601, 606 [1994]) In 1985, the statute was amended to eliminate the one-third recovery as an option and relegated medical malpractice attorneys to the percentages contained in the fee schedule. (*id.* at 607) Judiciary Law 474-a (2) specifically provides,

“2. Notwithstanding any inconsistent judicial rule, a contingent fee in a medical . . . malpractice action shall not exceed the amount of compensation provided for in the following schedule: 30 percent of the first \$250,000 of the sum recovered; 25 percent of the next \$250,000 of the sum recovered; 20 percent of the next \$500,000 of the sum recovered; 15 percent of the next \$250,000 of the sum recovered; 10 percent of any amount over \$1,250,000 of the sum recovered.”

The statute further provides that “in the event that . . . plaintiff’s attorney believes in good faith that the fee schedule set forth in subdivision two of this section, because of extraordinary circumstances, will not give him adequate compensation, application for greater compensation may be made . . .” (Judiciary Law § 474-a [4]) “Such application shall be made to the justice of the trial part to which the action had been sent for trial . . .” (Judiciary Law § 474-a [4]) “Upon such application, the justice, in his discretion, if extraordinary circumstances are found to be present, and without regard to the . . . plaintiff’s consent, may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth in subdivision two . . .” (Judiciary Law § 474-a [4])

In applying this statute, the Court of Appeals has stated that “inadequacy of the statutory fee schedule is the touchstone of the section 474-a (4) inquiry. The analysis must begin with the recognition that the section 474-a (2) scheduled fees

are presumptively reasonable in all malpractice cases.” (*Yalango* at 607) To succeed on a request for excess compensation, then, the applicant bears the burden of rebutting that presumption by establishing that the fee schedule was inadequate to compensate counsel for the representation provided in the particular case.” (*id.*) “[B]efore departing from the statutory fee schedule, the court must make a threshold finding that a departure from the fee schedule is justified because the authorized fee did not equitably compensate counsel.” (*Yalango*, 84 NY2d at 607 – 608) The considerations that are relevant to the adequacy of the fees are “those related to the economics of the litigation and any concomitant financial hardship suffered by plaintiff’s counsel. In other words, in determining whether extraordinary circumstances caused the fee to be inadequate, governing emphasis should be placed on whether the award – viewed as a whole or broken down to its hourly equivalent – equitably compensates counsel for ‘the amount of time reasonably and necessarily spent’ in litigating the claim.” (*id.* at 608) According to the Court of Appeals, the fee may be inadequate where the case “involves an extremely complicated procedural history or where plaintiff’s counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of income or some other financial detriment.” (*id.*) “Once this threshold showing is made, counsel must justify a departure from the fee schedule by demonstrating that extraordinary circumstances caused the statutory fees to be unreasonable in the particular case.” (*id.*)

When determining if extraordinary circumstances existed in the case, “factors such as the degree of diligence or success achieved by counsel . . . do not render a case extraordinary for purposes of the section 474-a (4) application.” (*Yalango*, 84 NY2d at 609) “The adjustment provision was not designed to reward successful results, nor diligent, thorough or even exhaustive preparation on behalf of a client.” (*id.*) The percentages in the fee schedule “are set at levels intended to provide ‘ample compensation for the best efforts and services of competent counsel.’” (*id.*) Additionally, the technical complexity of the medical issues and the existence of a dispute concerning proximate cause will not render the case extraordinary. (*id.* at 610) “Medical malpractice actions are by their nature complex, warranting extensive and sophisticated preparation. In fact, it is quite routine and ordinary in a medical malpractice action for causation to be in dispute or attributable to multiple defendants. Moreover, it is customary for parties to produce the testimony of various experts and to be technically well prepared to develop that testimony or to cross-examine witnesses produced by the opposite side.” (*id.*) Lastly, costs from counsel’s extensive travel in securing expert medical consultations do not constitute extraordinary circumstances because they are reimbursable in full disbursements for expert testimony or investigation in prosecuting the action. (*id.*)

In *Yalango by Goldberg v Popp*, the Respondent law firm was awarded \$338,731.74 by application of the statutory percentages and moved to increase the compensation to \$629,105.81 or thirty percent of the total recovery. (*id.* at 605) The Respondent argued that extraordinary circumstances existed because the attorneys engaged in diligent and extensive efforts to master the complex and sophisticated medical issues involved. (*id.*) They spent hundreds of hours searching for, contacting, and meeting with numerous medical experts, both in and out of State and they conducted extensive depositions totaling over 1,100 pages of transcript. (*id.*) The Respondent supported its request by showing that it negotiated a favorable settlement despite potential questions of causation. (*id.*) The Court of Appeals analyzed the case in accordance with the standards set forth above by first relying on the respondent's estimation that it expended 620 hours in representing the plaintiff. (*id.* at 609) The Court of Appeals determined that the Respondent was compensated at a rate of almost \$550 per hour and this rate was just. (*id.*) The Court of Appeals then used the 620 hour figure to determine that the Respondent's representation of the plaintiff roughly averaged only 10 hours per month over a five-year period. (*id.*) Under the circumstances, Respondent could not reasonably argue that its representation of the Plaintiff caused it to forego other opportunities or imposed financial hardship. (*id.*) The Court of Appeals determined that Respondent failed to rebut the presumption that the fees were reasonable and Respondent's motion to increase its compensation was denied. (*id.* at 612)

Discussion

Although Plaintiff received limited letters of administration restraining him from compromising this action, the letters do not prohibit

a compromise or agreement to settle an action until the further order of the Surrogate. (*Amo v Leonard*, 30 NYS2d 183, 186 [4th Dept 1941].) The purpose is to prevent Plaintiff from handling funds without giving security. (*id.*) Accordingly, this Court may at least approve the settlement, and then transfer this matter to the Surrogate, who is in the best position to determine the proper distribution of the funds. (*Pollicina v. Misericordia Hosp. Medical Center.*, 604 NYS2d 879, 882-883 [1993].)

Attorney's Fees Analysis

In accordance with *Yalango by Goldberg v Popp*, this Court begins its analysis with the recognition that Judiciary Law 474-a's scheduled fees are presumptively reasonable in a malpractice case such as this one. Mr. Gunzburg has the burden of rebutting the reasonableness of these fees by establishing that they were inadequate to compensate him for his representation of Plaintiff. However, Mr. Gunzburg has submitted insufficient information to permit this Court to consider the economics of the litigation. Mr. Gunzburg does not allege that he suffered financial hardship or that he had to forego other opportunities because he represented Plaintiff. Perhaps most importantly, Mr. Gunzburg does not provide the Court with an estimation of the total number of hours he worked on this case.

Without some record of the hours that Mr. Gunzburg spent on this litigation over five years, the relative impact it had on his law practice, and other factors as recognized by the Court of Appeals, this Court is unable to engage in a similar analysis to the Court of Appeals' in *Yalango*. For these reasons, Mr. Gunzburg has not met his burden of rebutting the reasonableness of the 474-a scheduled fees and the Court cannot make a threshold finding that a departure from the fee schedule is justified.

This Court need not reach the question of whether extraordinary circumstances existed. However, making multiple motions, reviewing numerous bank statements in a different language, analyzing income, consulting an economist among other things do not constitute extraordinary circumstances. (affirmation of Gunzburg at 4-5) Although Plaintiff avers, "In my opinion, the attorneys in this case are entitled to extraordinary fees for their services based on the extraordinary work performed in this case", the result does not change. (aff of Gurbuzturk at 2-3) Indeed, the Court of Appeals stated that "the adjustment provision [of 474-a] was not designed to reward . . . even exhaustive preparation." (*Yalango* at 609, 610) Additionally, the fee schedules "are set at levels intended to provide 'ample compensation for the best efforts and services of competent counsel.'" (*id.* at 609) Finally, the successful outcome of a \$3,300,000 settlement does not render this case extraordinary just as the favorable settlement negotiated in *Yalango* did not render that case extraordinary either. (*Yalango* at 605)

Despite the extraordinary efforts required to analyze income in preparation for the action, the Court notes that Plaintiff's currently proposed compromise order with exhibits does not provide a calculation for attorney's fees according to the sliding scale under Judiciary Law § 474-a. Pursuant to Judiciary Law § 474-a, after deducting costs of \$57,118.23, the fee would not exceed, \$474,288.18, which is just.

Seal Analysis

There is a strong public interest in the openness of this court proceeding. (*Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 501 [1st Dept 2011].) Here, Dr. Jamron, Jamron P.C., Dr. Sherman and Sherman P.C., have “the burden to demonstrate compelling circumstances to justify restricting public access.” (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].) At best they assert that this court should seal Plaintiff’s application to compromise this action because all of the parties allegedly agreed to a confidentiality clause. However, it appears that Plaintiff disputes what information was intended to be kept confidential. Regardless, even if all of the parties completely agreed as to what materials should be sealed, this court would still need to make its own written finding of good cause. (*Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].) The defendants have not offered a compelling objective where the need for secrecy outweighs the public’s right to access. (*In re East 51st Street Crane Collapse Litigation*, 106 AD3d 473, 474 [1st Dept 2013].)

Lastly, the parties should resume settlement discussions to clarify the terms of their settlement.

Wherefore, it is hereby,

ORDERED that Motion Sequence 006 seeking an Order compromising this action is denied as premature and denied to the extent that Plaintiff Sadan Gurbuzturk’s counsel seeks extraordinary legal fees; and it is further

ORDERED that Motion Sequence 007 and Motion Sequence 008 are denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: May 10, 2018



EILEEN A. RAKOWER, J.S.C.