

Matter of 91st St. Crane Collapse Litig.

2018 NY Slip Op 31956(U)

August 13, 2018

Supreme Court, New York County

Docket Number: 117294/08

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

IN RE 91ST STREET CRANE COLLAPSE LITIGATION:

MARIA LEO, ADMINISTRATRIX FORTHE ESTATE OF HER SON, DONALD CHRISTOPHER LEO, DECEASED
May 30, 2008,

INDEX NO. 117294/08
MOTION DATE 6-27-2018
MOTION SEQ. NO. 116
MOTION CAL. NO. _____

Plaintiff ,

- and -

BERNADETTE PANZELLA, P.C.,
Non-Party Inttervenor,

- against -

JAMES F. LOMMA, J.F. LOMMA, INC., and NEW YORK CRANE & EQUIPMENT CORP.,
Defendants.

The following papers, numbered 1 to 16 were read on this motion by the non-party intervenor, Bernadette Panzella, P.C., to compel plaintiff to pay invoices for legal services, reimbursement of interest, and for a sanctions and the cross-motion for a judicial declaration pursuant to CPLR §3001 that the non-party intervenor is not entitled to legl fees and to turn over any monies held related to those fees:

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 3	_____
4 - 7, 8 - 11	_____
12 - 16	_____

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that non-party intervenor, Bernadette Panzella, P.C.'s (hereinafter referred to as "Panzella") motion seeking an Order compelling the plaintiff to pay unpaid invoices for legal services rendered; directing sanctions against plaintiff, Gregory Cassamento, Esq., and Locke Lord, LLP for frivolous conduct; and directing plaintiff, Gregory Cassamento, Esq. and Locke Lord, LLP to reimburse to Panzella's charging lien the difference in interest between the New York State 9% Judgment Interest Rate and the amount of interest deferred in favor of the defendants to settle plaintiff's claim, is granted as stated herein. The remainder of the relief sought is denied. Plaintiff's cross-motion seeking to have this Court deny the underlying motion; issue a judicial declaration pursuant to CPLR §3001 that Panzella is not entitled to fees sought in the motion; and ordering Panzella to turn over any money related to these fees, is granted as stated herein. The remainder of the relief sought in the cross-motion is denied.

This case relates to the collapse of a Kodiak Tower Crane (#84-052) (the "Crane") on May 30, 2008, at East 91st Street, New York County. This action was commenced to recover damages as a result of the personal injuries and death of Donald Christopher Leo on May 30, 2008, when the Crane collapsed. Panzella was retained by the decedent's father Donald Raymond Leo, the prior Administrator of the Estate, and began representation approximately June 11, 2008. Mr. Leo, Sr. died unexpectedly on July 12, 2013 and the decedent's mother, Maria Leo, was substituted as Administratrix.

Plaintiff entered into a retainer agreement with Panzella on August 5, 2013. Approximately six months later on February 12, 2014, Panzella received an e-mail from Andrea Arrigo, Esq. advising that plaintiff had substituted lawyers. Six weeks after the substitution plaintiff "withdrew" the retainer and relationship with Andrea Arrigo Esq. , re-hiring Panzella by stipulation reinstating the August 5, 2013 retainer.

Panzella represented plaintiff in the first jury trial that was declared a mistrial within a week. Panzella also represented the plaintiff before this Court over the course of a second wrongful death jury trial that commenced on October 2, 2014 and concluded on August 3, 2015. Plaintiff obtained a verdict against the defendants after trial of \$7.5 million for preimpact terror, \$8 million for pain and suffering of the decedent, and \$24 million in punitive damages. Panzella also alleges that there were pre-verdict settlements that totaled \$1,740,000.00.

Post-verdict plaintiff advised Panzella that Locke Lord LLP had been retained to handle any anticipated appeal by the defendants. A meeting was held on September 16, 2015 between Panzella and the attorneys from Locke Lord, LLP. A confirmation of the substitution of attorneys was sent December 2, 2015 with an additional confirmation by email from Mr. Casamento of Locke Lord, LLP on December 3, 2015. On January 5, 2016, a judgment on the verdict at the jury trial prepared by Panzella was filed and entered by the Clerk of the Court. On January 5, 2016 a formal notice of appearance on behalf of the plaintiff was filed by Locke Lord, LLP.

On January 5, 2016 defendants filed an appeal of the verdict. Panzella sought to intervene by motion before the Appellate Division First Department. Panzella alleges that the motion to intervene was to protect financial interests to the extent of filing a brief and arguing (Mot. Exh. 5A - 5D). On July 21, 2016 the Appellate Division, First Department granted Panzella's motion only to the extent of permitting counsel to intervene (Mot. Exh. 5E). On January 6, 2016 the day after filing the appeal, defendants filed for bankruptcy in the United States Bankruptcy Court for the Eastern District of New York (EDNY).

On February 23, 2016 plaintiff filed a motion in the Bankruptcy Court seeking relief from the automatic stay to permit the amendment of the judgment entered on January 5, 2016, to strike the portion applying to Panzella's legal fees in Supreme Court, New York County and before the Appellate Division, First Department. Plaintiff's motion to amend the judgment to strike the portion applying to Panzella's legal fees, filed with this Court under Motion Sequence 115, was withdrawn without prejudice by letter dated June 30, 2016 (NYSCEF Doc. No. 4482). On October 11, 2016 the Appellate Division, First Department denied plaintiff's motion filed before that Court to amend the January 5, 2016 judgment to strike the portion applying to Panzella's legal fees (Mot. Exh. 6D).

On September 12, 2017 the Appellate Division, First Department modified the verdict by reducing the plaintiff's award for pre-impact terror to \$2.5 million, pain and suffering to \$5.5 million, and the award of punitive damages to \$8 million, conditioned on plaintiff entering into a stipulation with the defendants agreeing to the modified verdict within 30 days (In re 91st Street Crane Collapse Litigation, 154 A.D. 3d 139, 62 N.Y.S. 3d 11 [1st Dept., 2017]). Plaintiff entered into a stipulation of settlement with the defendants for the amount determined by the Appellate Division First Department. The agreement with the defendants also incorporated a lower interest rate of 6.75% instead of the standard New York Judgment 9% interest rate. Panzella was not a party to the settlement negotiations between plaintiff and defendants.

United States Bankruptcy Judge Carla E. Craig of the EDNY on January 16, 2018 Ordered that to the extent there was a Judiciary Law §475 charging lien on any distribution to the Leo Estate, Panzella's claims were contingent and were otherwise disallowed. Judge Craig's January 16, 2018 Order retained jurisdiction "with respect to all matters arising from or related to the interpretation, implementation and enforcement of [the] Order."

Plaintiff's settlement agreement with the defendants was entered into over Panzella's objection. Funds were disbursed and a Satisfaction of Judgment was filed on July 26, 2018 (NYSCEF Docket # 4572), indicating that Panzella's lien was paid in the sum of \$5,898,532.35.

Panzella's motion seeks an Order: (1) compelling the plaintiff to pay two invoices that remain unpaid for legal services rendered by a date certain; (2) directing plaintiff, Gregory Cassamento, Esq., and Locke Lord, LLP to pay such reasonable attorney fees as

this Court finds reasonable as sanctions for frivolous conduct resulting from the intervenor having to oppose five motions seeking to remove the intervenor “from the Leo judgment” entered after verdict in Supreme Court New York County; (3) directing plaintiff, Gregory Cassamento, Esq., and Locke Lord, LLP to reimburse Panzella the difference between the New York State 9% Judgment Interest Rate as modified by the Appellate Division First Department and the reduced amount deferred in favor of the Defendants resulting in an approximate loss of \$350,000.00 to the intervenor’s charging lien filed under Judiciary Law §475 and (4) additional sanctions, costs and attorney fees against Gregory Cassamento, Esq., individually for false statements made in pleadings and open court.

Plaintiff opposes the motion and cross-moves: (1) to have this Court deny the relief requested in Panzella’s motion; (2) issuing a judicial declaration, pursuant to CPLR §3001, that Panzella is not entitled to fees sought in the underlying motion; and (3) ordering Panzella to turn over any money held in escrow related to fees.

Panzella argues that there are two invoices that remain unpaid: (1) dated January 5, 2016 for review and correction of trial transcripts (40 Volumes/21,328 pages) for 72.5 hours, totaling \$36, 250.00, that was requested by plaintiff’s attorney related to the appeal and charged at a lower appeal rate of \$500.00 per hour (Mot. Exh. 1); and (2) a fee of \$49,605.00 for representation of the plaintiff before the Workman’s Compensation Board (Mot. Exh. 2).

Plaintiff’s argument that Panzella is not entitled to legal fees for review and correction of trial transcripts is unpersuasive. Panzella has provided proof in the form of a letter dated December 10, 2015 sent by Mr. Cassamento of Locke Lord LLP to Panzella’s attorney Richard Godosky, Esq., confirming that a review of the transcript and corrections on behalf of the plaintiff would be performed by Panzella, stating:

“...she continues to represent the Estate, is reviewing and will finish making all corrections to the record, and will continue to participate in all post judgment proceedings until such time as she withdraws. If as you suggested, your client will seek to withdraw as counsel for the Estate upon her completing the task of correcting the record, and entry of judgment, the Estate will need to retain appropriate counsel to replace Ms. Panzella in order to avoid any potentially adverse consequences.” (Aff. in Opp. to Cross-Mot. Exh. 7)

The “record” referred to in the December 10, 2015 letter is the trial transcript. Panzella claims that pursuant to the August 5, 2013 retainer agreement with Mrs. Leo, review and correction of the trial transcript constitutes preparation of the record on appeal and is separate appellate work. To the extent plaintiff alleges that she sought substitution for the appeal Panzella claims Locke Lord LLP was required to perform this work, but did not seek to pick up copies of the transcripts until January 29, 2016 (Aff. in Opp. to Cross-Mot. Exh. 11). Panzella’s review and correction of the transcript was not otherwise objected to by the plaintiff.

Panzella alleges that the August 5, 2013 retainer agreement with plaintiff states in relevant part:

“In consideration for attorney services now and as this matter proceeds, the undersigned client agrees to pay attorney’s fees of one-third (33 ⅓%) of all sums recovered whether by suit, settlement, Alternative Dispute Resolution (ADR) that is, arbitration/ mediation, or otherwise.”

“While the above fee does not include appeals or re-trials, no legal appeal fee has been charged for any interim appeal to date and, further no legal appeal fee shall be charged for any additional interim appeals in this matter. *The sole legal appeal fee in this matter will be limited to any post-trial appeal concerning the Verdict. The hourly rate for that appeal will be set at the courtesy rate of \$500.00 per hour reduced from \$750.00 per hour, which will be carried as a case disbursement. The actual payment of court fees, transcript fees and printing fees for all appeals will be charged as a*

disbursement.” (Emphasis added) (Bernadette Panzella, Esq. Aff. in Support of Mot., pg. 2)

Plaintiff’s claim that the appellate services provided by Panzella were self-serving and only related to the charging lien, is unavailing. Although a client may terminate the relationship with an attorney at any time, with or without cause, the provisions of a retainer agreement identifying a particular lien resulting in fees is not circumvented because the attorney did not specifically identify them in relation to the lawsuit (See Friedman v. Park Cake, Inc., 34 A.D. 3d 286, 825 N.Y.S. 2d 1 [1st Dept., 2006]). The parties agree that no appeal work was performed for plaintiff by Panzella after the judgment was filed. Panzella only billed plaintiff for review and correction of the trial transcript, services that were sought on plaintiff’s behalf by Locke Lord LLP, the appellate attorneys retained by plaintiff, without objection, before the judgment was filed on January 5, 2016. The retainer agreement identified specific fees for appellate work, and plaintiff does not identify any other provisions in the retainer agreement in support of her position that the review and correction of trial transcripts is part of the representation through trial, or subject to the contingency fee provisions in the retainer agreement. Panzella is entitled to the \$36, 250.00 sought as separate fees for appellate work in the January 5, 2016 invoice.

Pursuant to Workers’ Compensation Law § 24 the WCB has broad discretion in approving a counsel fee award for services under Worker’s Compensation. An attorney seeking an award in excess of \$450.00 is required to submit an OC-400.1 form specifying the dates and times spent on each service provided, so that the WCB can fulfill the obligation to “approve a fee in an amount commensurate with the services rendered” (Jackson v. New York City Dept., 149 A.D. 3d 1334, 52 N.Y.S. 3d 168 [3rd Dept., 2017]). The Supreme Court retains jurisdiction under Workers’ Compensation Law § 24 where the attorney is seeking fees for legal services rendered incidently to and to preserve the viability of a personal injury action (Krug v. Offerman, Fallon, Mahoney & Cassano, 214 A.D. 2d 889, 624 N.Y.S. 2d 683 [3rd Dept., 1995]).

The alleged invoice provided by Panzella is a WCB Form OC-400.1 titled “Application for Fee by Claimant’s Attorney or Representative,” after The WCB’s “Notice of Decision” dated 08/30/16 sought to have Panzella submit a fee application for prior services (Mot. Exh. 2). The form states that plaintiff failed to appear at two prior scheduled hearings and provides notice that fees of \$49,605.00 are being sought and “will be deducted from your award and paid directly to me by the insurance company or employer.” Objection to the fee request were to be made at the Board proceeding (Mot. Exh. 2).

Plaintiff correctly argues that Panzella has not shown that the WCB rendered any determination of fees or that a fee hearing was even conducted. The WCB Form OC-400.1 specifically states that the “insurance company or (decendent’s) employer” will pay the fees (Mot. Exh. 2). Alternatively, Panzella has not shown entitlement to fees for services provided before the Worker’s Compensation Board (WCB), there is no proof that the services provided before the WCB were to be separately billed pursuant to the retainer agreement.

The resolution of an issue by the Appellate Court is “law of the case” and is binding on the Supreme Court as well as the Appellate Court. No further examination of the issues can be made without a showing of subsequent evidence or a change in the law. Under the “law of the case” doctrine parties are precluded from relitigating issues that were decided or “where there previously was a full and fair opportunity to address the issue” (See Carmona v. Mathisson, 92 A.D. 3d 492, 938 N.Y.S. 2d 300 [1st Dept., 2012] and Jacoby & Meyers, LLP v. Flomenhaft, 137 A.D. 3d 547, 26 N.Y.S. 3d 848 [1st Dept., 2016] citing to Board of Managers of the 25 Charles Street Condominium v. Seligson, 106 A.D. 3d 130, 961 N.Y.S. 2d 152 [1st Dept., 2013]).

Plaintiff’s argument that the judgment entered on January 5, 2016, should be amended by this Court to strike the portion applying to Panzella’s legal fees, was made before the Appellate Division First Department and that relief was denied. The October 11, 2016 determination of the Appellate Division, First Department filed under M-3238 (Mot.

Exh. 6D) is “law of the case.” Plaintiff has not provided new evidence or shown there is a change in the law, warranting denial of the relief seeking amendment of the judgment in the cross-motion. Plaintiff’s argument that the Appellate Division First Department’s decision is “cursory” and does not specifically identify Panzella’s fees, ignores the relief sought in the underlying motion and is unpersuasive. Plaintiff fails to establish that the September 12, 2017 Appellate Division, First Department decision modifying the verdict, which did not address Panzella’s charging lien, vacated the October 11, 2016 determination or obviated the provisions in the judgment applying to Panzella’s charging lien (see *In re 91st Street Crane Collapse Litigation*, 154 A.D. 3d 139, *supra*). Plaintiff’s arguments about the potential viability of the judgment and inability to determine whether the fees are reasonable are unpersuasive. Plaintiff entered into a stipulation of settlement with the defendants and a satisfaction of judgment was filed, there is no need for this Court to address the issues, which should have been raised with the Appellate Court.

Panzella has not established that this Court should direct plaintiff, Gregory Cassamento, Esq., and Locke Lord, LLP to reimburse Panzella the difference between the New York State 9% Judgment Interest Rate as modified by the Appellate Division First Department and the reduced amount of 6.75% interest deferred in favor of defendants.

Plaintiff correctly argues that U.S. Bankruptcy Judge Carla E. Craig of the EDNY in her January 16, 2018 decision on the Third Omnibus Objection to Proofs of Claim filed by Panzella, determined that Panzella’s claims related to the charging lien under Judiciary Law §475 are contingent to those of the Leo Estate on any distribution, and that Panzella does not have an undivided interest in the settlement. Panzella’s claims were otherwise disallowed, with a reservation of jurisdiction “with respect to all matters arising from or related to the interpretation and enforcement of [the] Order.” (Cassamento Aff. in Further Support of Cross-Mot. Exh. A). Even if this Court were to retain jurisdiction, Panzella has not established that the claim related to the charging lien takes precedence or is greater than that of the Estate, the lien is only a security interest against the judgment or settlement made by the former client, there is no basis for a higher rate of interest, warranting denial of this relief (*Jaffe v. Brown-Jaffe*, 98 A.D. 3d 898, 951 N.Y.S. 2d 142 [1st Dept., 2012]).

22 NYCRR §130-1.1 allows the Court in its discretion to award to any party or their attorneys, costs in the form of reimbursement for reasonably incurred actual expenses and reasonable attorney fees resulting from frivolous conduct by another party or their attorneys. There is no limit on the amount to be awarded. Frivolous conduct is defined in 22 NYCRR §130-1.1 [c] as, “(1) [conduct] completely without merit and [which] cannot be supported by reasonable argument...(2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) [that] asserts material factual statements that are false.” The determination of whether conduct is frivolous, requires the Court to consider factors such as, the circumstances under which the conduct took place, and the time for investigation of the legal or factual basis for the conduct (*Llantin v. Doe*, 30 A.D. 3d 292, 817 N.Y.S. 2d 57 [1st Dept., 2006]). The making of a somewhat colorable argument is sufficient to avoid sanctions (*Kremen v. Benedict P. Morelli & Associates, P.C.*, 80 A.D. 3d 521, 916 N.Y.S. 2d 44 [1st Dept., 2011]). The imposition of sanctions requires a pattern of frivolous behavior (*Sarkar v. Pathak*, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [1st Dept. 2009]).

Plaintiff, Locke Lord LLP and Mr. Cassamento have established that the multiple applications seeking to have Panzella removed from the judgment was not done maliciously, or as part of a pattern designed to harass Panzella, and has not delayed this litigation. Sanctions for frivolous practice are not warranted. Their efforts in seeking the same relief before multiple Courts, were made in an attempt to bring a final resolution of the case without further litigation, while protecting the interests of the decedent’s estate. The settlement has benefitted all parties since Panzella has been paid \$5,898,532.35 and the estate has resolved the claims pending against the remaining defendants without the need for further litigation. Panzella has conceded that legal filings related to the settlement, appeal and in the Bankruptcy Court were solely related to legal fees and the charging lien. Panzella has not shown entitlement to an additional \$200,000.00 in sanctions for the cost of defending the motions.

Panzella has not established that additional sanctions, costs and attorney fees against Gregory Cassamento, Esq., individually, for false statements made in pleadings and open court are warranted . Panzella claims that the alleged false statements were made in pleadings and open Court in the Bankruptcy Court and were not before this Court, and Panzella is required to raise this issue before Federal Judge Carla Craig. There is no basis for this Court to have jurisdiction over that claim. To the extent Panzella seeks sanctions for statements made in the cross-motion by Mr. Cassamento referring to Panzella’s potential removal of funds from the escrow account, he relied on statements made on Panzella’s own invoice, therefore sanctions are not warranted.

Plaintiff is entitled to the declaratory relief, pursuant to CPLR §3001, sought in the cross-motion that Bernadette Panzella, P.C., is not entitled to fees on the second invoice for representation before the Worker’s Compensation Board. The remainder of the relief sought is denied.

Accordingly, it is ORDERED that non-party intervenor, Bernadette Panzella, P.C.’s motion, is granted as stated herein, and it is further,

ORDERED that plaintiff, Maria Leo, Administratrix for the Estate of her son, Donald Christopher Leo, Deceased, May 8, 2008, shall pay the balance remaining on Bernadette Panzella, P.C.’s January 5, 2016 invoice totaling \$36,250.00 for review and correction of trial transcripts for the appeal, and it is further,

ORDERED that Bernadette Panzella, P.C. shall retain the \$30,131.10 remaining in the escrow account as partial payment of the January 5, 2016 invoice, and it is further,

ORDERED that within thirty days (30) of service of a copy of this Order with Notice of Entry, plaintiff, Maria Leo, Administratrix for the Estate of her son, Donald Christopher Leo, Deceased, May 8, 2008, shall pay to Bernadette Panzella, P.C. the remaining \$6,118.90 balance on Bernadette Panzella, P.C.’s January 5, 2016 invoice for review and correction of trial transcripts for the appeal, and it further,

ORDERED that the remainder of the relief sought in Bernadette Panzella, P.C.’s motion is denied, and it is further,

ORDERED that plaintiff’s cross-motion (1) to have this Court deny the relief requested in Bernadette Panzella, P.C.’s motion; (2) issuing a judicial declaration pursuant to CPLR §3001, that Bernadette Panzella, P.C. is not entitled to fees sought in the underlying motion; and (3) ordering Bernadette Panzella, P.C. to turn over any money held in escrow related to fees, is granted to the extent that Bernadette Panzella, P.C. is not entitled to fees for representation of the plaintiff before the Workman’s Compensation Board, and it is further,

ADJUDGED and DECLARED that Bernadette Panzella, P.C. is not entitled to fees of \$49,605.00 for representation of the plaintiff before the Workman’s Compensation Board, and it is further,

ORDERED that the remainder of the relief sought in plaintiff’s cross-motion, is denied.

ENTER :

MANUEL J. MENDEZ
J.S.C.

Dated: August 13, 2018



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE