Banks-Dalyymple v Chang
2018 NY Slip Op 32928(U)
February 21, 2018
Supreme Court, Bronx County
Docket Number: 308657-2011
Judge: Fernando Tapia
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C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Part 13

WANDA BANKS-DALYYMPLE,

Plaintiff, **Index:** 308657-2011

- against -

JUDY CHANG D.D.S. and WEST HILL DENTAL, LLC.

Defendants.

DECISION

This court orders defendant to pay the sum of $25,822.30 (twenty-five thousand, eight hundred and twenty-two dollars and thirty cents) to plaintiff's counsel for reasonable costs and expenses for the litigation of the case up until the granting of mistrial.

The trial of this matter involved a dental malpractice case arising out of the alleged failure to properly treat plaintiff. From the outset, this trial proved to be a contentious one, with both defendant and plaintiff counsels engaging in heated back and forth throughout the trial. The court's decisions to grant the mistrial turned on one issue, and one issue only. Whether defense counsel's attempt during cross examination, to elicit from plaintiff that the first attorney she sought to represent her in this matter did not want to take the case., was so prejudicial that a mistrial was warranted. This court ruled that it was.

First, defendant's counsel seeks to draw a distinction between the two questions that were asked leading up to the granting of the mistrial. "They didn't take the case" and "They didn't want to take the case". Referencing the trial transcript starting at pp. 65 line 20:

> **"Q: Was someone, your attorney, at that time Al Chianese?**
> **A: No, sir. They did not take --- They sent me a letter eight months later, telling me that they---**
> **MR. SCHWARTZ: Ah-ha.**
> **THE COURT: No, You can't say what they said.**
> **A: (Continuing) No, sir. They were not my attorneys. No, sir.**
> **Q: But there were looking into your case and sent records out to Dr. Chang?**
> **A: I have no idea what one sued. I have no idea whatsoever. I have no idea.**

I went to him in August, and I got a letter in January of 2010 from that attorney's office.
Q: Saying they didn't want to take the case?"

Defense counsel's distinction between the two questions is a valid one. The former is value neutral and the latter is value laden. As to the former "they didn't take your case…" nothing is understood or implied other than the fact that the attorney, for whatever reason, did not take the case. A jury would be hard pressed to draw, against the plaintiff any prejudicial inferences from this question, standing alone. However, the question, "they didn't want to take your case", communicates to the jury not only the fact that case was not accepted by the initial attorney approached by plaintiff, but that the case in the attorney's opinion, was either weak or had no merit, when considering the context in which the question was asked:

"Q: But they were looking into your case and they sent records out to Dr. Chang?

A: I have no idea what one sued…I got a letter in January 2010 form that Attorney's office.

Q: Saying they didn't want to take the case?"

This line of questioning by defense counsel was calculated to convey to the jury that the attorney, after having looked into the case, and having sent out records to Dr. Chang, did not want to take the case. The prejudicial inference that that the jury would draw is a simple one that the initial attorney after having looked into the case and sending out the records, did not want the case, because it was weak.

Defense counsel's assertion that "the extremely close nature of these two questions demonstrates the accidental nature of that statement by defense counsel that caused the mistrial…" was inadvertent and not by design. This court in not convinced that the question was inadvertent or not by design. Defense counsel was put on notice by the court pp. 65 line 25,

plaintiff's testimony., "The Court: No. You can't say what they said", referring to the letter sent by prior counsel in January 2010. Defense counsel question was eliciting, hearsay which the court ruled, barring an exception, would not permit plaintiff to answer. Defense counsel then proceeded, disregarding the court's prior ruling, to ask plaintiff to testify to hearsay from the very letter this court had ruled as hearsay two questions earlier.

It was readily apparent to this court that defense counsel' follow-up question was an attempt to back door before the jury prejudicial hearsay that was irrelevant to the issue of proving or disproving dental malpractice.

This court is mindful that in intensely contested trials, emotions can get the better of the most seasoned attorney. As here, both plaintiff and defendant counsels were vigorously putting forth their respective clients' cases. At sidebar on no less than three or four occasions emotions between counselors ran high. To say that the trial atmosphere was a charged one, is to make an understatement. Nevertheless, both plaintiff and defendant counsel are exceptionally seasoned trial attorneys highly skilled in trying personal injury cases. That is why this court is hard-pressed to believe defense counsel when he states, that his questioning of plaintiff that prompted the mistrial, was accidental.

The granting of a mistrial in any case is not of light moment. Time, resources, considerable expenses have all been invested by both defendant and plaintiff. But where a mistrial has been granted, the party culpable for causing the mistrial must be prepared to compensate the non-culpable party for the fair and reasonable cost and expenses incurred in the preparation and litigation of the case up until the granting of the mistrial.

In determining the reasonable cost and expenses that plaintiff has incurred in the litigation of this case, the court has, first calculated a "lodestar" figure "consisting of the number

hours reasonably expended on the litigation multiplied by reasonable hourly rate." Easley v. Empire Inc., 757 F.2d 923, 931(8th cir.1985). Second, this figure has been adjusted according to the following relevant factors:

a) Time and labor required; b) skill requisite to perform the legal services properly; c) preclusion of employment by the attorney due to acceptance of the case; d) whether fee is fixed or contingent; e) experience, reputation and ability of the attorney; [1] f) how far the trial proceeded before mistrial granted.

Considering the above factors, this court finds the reasonable cost expenses to be:

	Total Hours Expanded	Hourly Rate
Mr. Seth Harris	26	$500
Mr. Jason Bateman	12	$100

Trial Testimony Expert Witness

Dr. Gutstein	$5,500
Dr. Wank	$5,000

Transcript of Court Proceedings

Laura Bisignano	$1,122.30

Total $25,822.30

All other reliefs sought by plaintiff are denied. This constitutes the decision of the court.

Dated: February 21, 2018
Bronx, New York

Hon. Fernando Tapia J.S.C.

[1] Factors A-E are cited in *Johnson v, Georgia Highway Express, Inc.* 488 F.2d 714-717-19 (5th Circuit, 1974). Although F is not a factor cited in *Johnson*, it is a factor that this court deems relevant in determining reasonable cost and expenses given the fact this case ended as a mistrial.