

Ponzo v Landskowsky
2019 NY Slip Op 33006(U)
October 4, 2019
Supreme Court, Kings County
Docket Number: 507342/14
Judge: Michelle Weston
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At an I.A.S. Trial Term, Part 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 320 Adams Street, Borough of Brooklyn, City and State of New York, on the 4 of October 2019.

P R E S E N T:

Hon. MICHELLE WESTON
Justice

MARIE PONZO, Individually, and as the Administrator of the Estate of ANTHONY PONZO, deceased,

Plaintiffs,

- against -

ADAM LANDSKOWSKY, JUSTIN LOONA, and BAY RIDGE MEDICAL IMAGING, P.C.

Defendants.

**DECISION &
O R D E R**

Index # 507342/14

The following paper numbered 1 read on this application	Papers Numbered
<i>Proposed Order of Compromise Pursuant to EPTL §5-4.6 and Accompanying Affirmation/Affidavit</i>	1

Upon the foregoing papers, plaintiff's counsel seeks approval of a proposed order of compromise pursuant to EPTL §5-4.6. As part of that application, plaintiff's counsel also asks this Court to depart from the mandatory fee schedule set forth in Judiciary Law § 474-a(2) and award counsel an enhanced fee. While the Court approves the proposed

settlement and commends plaintiff's counsel in securing a favorable result for their client, the Court nevertheless must deny counsel's request for an enhanced fee.

To prevail on such a request, a plaintiff's attorney bears the burden of showing that the fee schedule contained in Judiciary Law § 474-a(2) is inadequate to compensate counsel (*Yalango v Popp*, 84 NY2d 601, 607-608 [1994]). In assessing the adequacy of the fee schedule, courts should consider "the economics of the litigation and any concomitant financial hardship suffered by plaintiff's counsel," that would render the hourly rate "exceptionally low" or cause "some other financial detriment" (*id.* at 608). Once this threshold burden has been met, the court must then determine "whether extraordinary circumstances caused the fee to be inadequate" (*id.*). If such circumstances exist and the amount sought is not greater than that agreed upon in the retainer agreement, then the court may fix as reasonable compensation an amount greater than that in the schedule under Judiciary Law § 474-a. In doing so, the court "shall make a written order accordingly, briefly stating the reasons for granting the greater compensation and a copy of such order shall be served on all persons entitled to receive notice" (Judiciary Law § 474-a[4]). Among those entitled to notice are any "persons holding liens or assignments on the recovery" (Judiciary Law § 474-a[4]).¹

Here, plaintiff's counsel is seeking 25% of the net recovery after the claimed

¹ Since plaintiff's counsel is seeking more than the statutory sliding scale, counsel is required to give notice to all lienholders (*see* Judiciary Law § 474-a[4]).

disbursements are deducted, or \$672,996.82, based on the “numerous obstacles” presented by the case and the “extraordinary efforts” on behalf of their client. While the court does not dispute those efforts, the court must nonetheless deny counsel’s application since the record does not demonstrate that “the amount of time spent on the representation of plaintiffs resulted in an exceptionally low hourly rate of compensation, or that it caused the law firm any financial detriment” (*Siu Kiu Lam v Loo*, 155 AD3d 660 [2d Dept. 2017]). Plaintiff’s counsel does not indicate whether the time devoted to plaintiff’s case detracted from the firm’s work on other cases, imposed a hardship on the firm, or otherwise rendered the statutory fee exceptionally low (*see Yalango v Popp*, 84 NY2d at 605, 608-609 [although respondent law firm spent over 600 hours over a five-year period on plaintiff’s medical malpractice case, including meeting with experts both in and out of state, conducting extensive depositions covering over 1,000 pages of transcript, and negotiating a favorable medical malpractice settlement despite causation issues, respondent nevertheless failed to demonstrate that the statutory compensation was inadequate, where respondent worked on the case an average of ten hours per month, the case was settled before trial and “counsel was not required to suspend its practice to attend a protracted or all-consuming trial”]; *Siu Kiu Lam v Loo*, 155 AD3d at 660 [although law firm spent approximately 970 hours over a 7 ½-year period on plaintiff’s medical malpractice case, including a nine-day trial, law firm failed to demonstrate that its statutory compensation of \$376,198.50 was inadequate]). Without such proof, the statutory amount is presumptively reasonable and the

court need not consider a request for relief based on extraordinary circumstances (*see Yalango v Popp*, 84 NY2d at 607-608).

Even if the threshold of inadequacy had been met, extraordinary circumstances do not exist in this case to warrant an enhanced fee. “[F]actors 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” (*id.* at 609) The efforts and obstacles described by counsel are generally customary in prosecuting a medical malpractice action. “Medical malpractice actions are by their nature complex, warranting extensive and sophisticated preparation” (*id.* at 610). The complexity of a medical issue or problems with proximate cause will not render a case “extraordinary” (*id.*). In this case, plaintiff’s decedent’s death did not create any unusual or exceptional circumstances that would not ordinarily be present in any other medical malpractice action involving a terminally ill patient. Conducting a deposition at home, retaining an expert to opine on the cause of death, petitioning for letters of administration and amending the complaint are all expected consequences of representing a plaintiff who is terminally ill. Similarly, spending considerable time searching and consulting with different experts, digesting voluminous depositions and medical records, and learning about a plaintiff’s illness are all within the usual scope of representing a medical malpractice plaintiff. Unlike the “rare cases” involving “extraordinary circumstances,” this case did not present any novel, difficult issues that would require extensive research, it did not have a particularly complicated procedural history, and the

case never went to trial (*compare O'Connell v Shivaram*, 37 AD3d 435 [2d Dept. 2007] [Supreme Court improvidently exercised its discretion in denying plaintiff's counsel's unopposed application for an increased fee where plaintiff's medical malpractice case was "complicated" and involved "a rare and difficult-to-diagnose lung disease," counsel worked an estimated 3,700 hours on the case, which was tried over a three-week period, and counsel's firm "declined to represent numerous other clients because of its representation of plaintiffs"])). Thus, despite plaintiff's counsel's considerable efforts and skill and the much deserved praise from their client, the Court must deny their request for an enhanced fee.

Accordingly, plaintiff's counsel's application for an enhanced fee is denied.

Plaintiff's counsel is granted the mandatory fee set forth in Judiciary Law § 474-a, as well as disbursements in the amount of \$32,446.58.² Plaintiff's counsel is directed to submit a revised compromise order consistent with the terms of this decision and order.

This constitutes the decision and order of the Court.

ENTER:



HON. MICHELLE WESTON

2019 OCT 11 AM 8:30
 FILED
 KINGSCOUNTY CLERK
RJ

² The Court denies counsel's request for reimbursement of \$566.15 in legal storage fees.