

**Young v New York City Tr. Auth.**

2020 NY Slip Op 32056(U)

June 24, 2020

Supreme Court, New York County

Docket Number: 651835/19

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 42

-----x  
CRYSTAL YOUNG

Plaintiff,

DECISION AND ORDER

-v-

Index No. 651835/19

NEW YORK CITY TRANSIT AUTHORITY,

MOT SEQ 004

Defendant.  
-----x

**NANCY M. BANNON, J. :**

I. INTRODUCTION

In this discrimination action, the plaintiff's former counsel Cary Kane LLP moves pursuant to Judiciary Law § 475 for an order, inter alia, fixing a charging lien in the amount of \$74,632.50 on plaintiff Crystal Young's claims in this action, and directing the parties in this action to apprise Cary Kane LLP of any settlement discussion and obtain its written concurrence prior to executing any settlement agreement. Both the plaintiff and the defendant oppose the motion. The motion is granted in part.

II. BACKGROUND

The plaintiff has been an employee of the defendant the New York City Transit Authority, for 18 years, with her current job title listed as conductor. Based upon complications from her

pregnancy, the plaintiff suffered from morning sickness, dizziness, and fatigue that inhibited her from performing her duties as a conductor. As a result, the plaintiff's doctor examined the plaintiff and completed a medical form indicating that her condition substantially limited one or more of her major life activities and based upon a review of her essential job functions, should be accommodated by placing the plaintiff on desk duties. The plaintiff submitted her request for a reasonable accommodation on January 10, 2019. She received no response regarding her request, ultimately leading her to use all her accrued sick leave and then to go on unpaid leave.

On March 8, 2019 the plaintiff entered into an engagement agreement with Cary Kane LLP to represent her against the defendant. The engagement agreement stated that the plaintiff agreed to compensate Cary Kane LLP on a contingency basis, but that were the plaintiff to terminate Cary Kane's services without good cause, then Cary Kane would be entitled to payment for the reasonable value of its services with specified rates of \$500.00 per hour for partners, \$375.00 for associates, and \$125.00 per hour for paralegal and law clerk work.

The plaintiff filed her complaint on March 28, 2020. In the complaint, she alleges that the defendant discriminated against her due to her pregnancy in violation of both the New York State

and New York City Human Rights Law by failing to provide her with a reasonable accommodation. The complaint also notes that, upon information and belief, a class of employees similarly situated to the plaintiff existed, and that the plaintiff intended to seek permission to represent the class.

The complaint was accompanied by a proposed order to show cause for preliminary injunctive relief which was withdrawn on April 23, 2019. Following a preliminary conference on July 18, 2019, the plaintiff moved to amend the complaint on August 13, 2019 to include an additional plaintiff. On October 3, 2019 the claims asserted by the additional plaintiff were discontinued without prejudice. Cary Kane LLP also filed a motion to compel, returnable on November 18, 2019, in advance of a scheduled compliance conference on November 21, 2019. On November 20, 2019 the plaintiff discharged Cary Kane. On December 4, 2019 Cary Kane made the instant motion for a charging lien.

### III. DISCUSSION

Judiciary Law § 475 provides that:

"From the commencement of an action... the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order

or determination. The court upon the petition of the client or attorney may determine and enforce the lien.”

A charging lien should be for the fair and reasonable value of the discharged attorney's services, determined at the time of the discharge and computed on the basis of quantum meruit, even if the attorney was originally retained on a contingency basis. See Cohen v Grainger, Tesoriero & Bell, 81 NY2d 655 (1993); Lai Ling Cheng v Modansky Leasing Co., 73 NY2d 454 (1989). In determining the reasonable value of the attorney's services, courts consider, *inter alia*, the time and skill required in the case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services. See Jordan v Freeman, 40 AD2d 656 (1<sup>st</sup> Dept. 1972); Callaghan v Callaghan, 48 AD3d 500 (2<sup>nd</sup> Dept. 2008). The trier of fact, in determining appropriate amount for an attorney's charging lien for services rendered to a client, is generally in the best position to evaluate all the relevant factors, such as the time, effort and skill that went into the attorney's work. See Haser v Haser, 271 AD2d 253 (1<sup>st</sup> Dept. 2000).

In support of its motion for a charging lien, Cary Kane LLP submits, *inter alia*, the engagement agreement detailing the hourly fees that Cary Kane LLP would be entitled to were it

terminated without cause and its billing record for this case. Cary Kane LLP further submits affirmations from Anthony Consiglio, the attorney who handled the plaintiff's case, averring to the services provided to the plaintiff in the case, and Larry Cary, a partner at Cary Kane LLP corroborating Consiglio's affirmation and detailing his belief that the plaintiff terminated Cary Kane LLP because it declined to represent her regarding an additional claim for retaliation against the defendant, which he believed was beyond the scope of the engagement agreement.

In opposition, the plaintiff argues (i) that she terminated Cary Kane LLP for cause, or, alternatively, (ii) that the \$74,632.50 sought by Cary Kane LLP is not the fair and reasonable value of the services it rendered. Additionally, both the plaintiff and the defendant claim that the portion of Cary Kane LLP's motion seeking an order directing the parties in this action to apprise Cary Kane LLP of any settlement discussion and obtain its written concurrence before executing any settlement agreement is without support under Judiciary Law § 475.

The plaintiff fails to establish that she terminated Cary Kane LLP for cause. Where an attorney is discharged for cause, a charging lien pursuant to Judiciary Law § 475 is improper. See Klein v Eubank, 87 NY2d 459 (1996). "An attorney may be

discharged for cause where he or she has engaged in misconduct, has failed to prosecute the client's case diligently, or has otherwise improperly handled the client's case or committed malpractice." Coccia v Liotti, 70 AD3d 747, 757 (2<sup>nd</sup> Dept. 2010). The client asserting for-cause discharge must demonstrate that her attorney's conduct fell "below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." Morrison Cohen Singer & Weinstein v Zuker, 203 AD2d 119, 119 (1<sup>st</sup> Dept. 1994). "[R]easonable strategic choices regarding litigation" are insufficient to establish malpractice or for-cause discharge. Id. "[A]n honest mistake of judgment where the proper course is open to reasonable doubt" is likewise insufficient to establish for-cause discharge. Bernstein v Oppenheim & Co., P.C., 160 AD2d 428, 430 (1<sup>st</sup> Dept. 1990).

The plaintiff asserts that she discharged Cary Kane LLP for cause because it refused to pursue her claims of retaliation. However, the plaintiff includes no facts or details of her alleged retaliation claim that would allow the court to determine whether Cary Kane LLP improperly exercised its professional judgment in refusing to pursue the claim. As such, the plaintiff fails to establish that Cary Kane LLP's conduct fell "below the ordinary and reasonable skill and knowledge commonly possessed by a member of the profession." Morrison Cohen Singer & Weinstein v Zuker, supra. Moreover, Cary Kane's

proof indicates that it properly declined to pursue that claim. In his affirmation, Anthony Consiglio explains that the plaintiff's proposed retaliation claim concerned critical comments made about her by the defendant's employees in private groups on social media which the defendant did not stop or discipline, and that Cary Kane LLP, believing that it could not establish liability on those facts, declined to represent the plaintiff.

The plaintiff similarly claims that Cary Kane LLP's failure to seek class certification gave rise to a for-cause discharge. Again, the plaintiff fails to cite any facts that would allow the court to evaluate whether Cary Kane LLP improperly exercised its professional judgment. Additionally, the Consiglio affirmation explains Cary Kane's professional assessment that the class would be sufficiently served by the permanent injunctive relief sought in the plaintiff's complaint, and alleges that Consiglio discussed this strategic choice with the plaintiff and she did not express any disagreement with it. Furthermore, the plaintiff allegation that Cary Kane LLP attempted to settle the case without her consent, and that constituted the cause of Cary Kane's discharge, is belied by the communications relied upon by the plaintiff in support of her position, which state "Plaintiff declines to make a specific demand for settlement of her monetary damages."

Therefore, the plaintiff fails to establish that Cary Kane LLP was terminated for cause.

However, the plaintiff has correctly argued that Cary Kane has not established that the amount sought, \$74,632.50, is a fair and reasonable sum for the services rendered, when considering the time and skill required in the case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit from the services, and the fee usually charged by other attorneys for similar services. See Jordan v Freeman, 40 AD2d 656 (1<sup>st</sup> Dept. 1972); Callaghan v Callaghan, 48 AD3d 500 (2<sup>nd</sup> Dept. 2008). Specifically, the plaintiff claims that a charging lien of \$74,632.50 is excessive since Cary Kane LLP only (i) filed the summons and complaint and the accompanying order to show cause for preliminary injunctive relief which was withdrawn approximately a month later at the preliminary conference, (ii) amended the complaint to add an additional plaintiff, discontinued that additional plaintiff's claims with prejudice less than a month later, and (iii) filed a motion to compel discovery three days before a compliance conference was scheduled to be held. As such, a hearing shall be held to determine whether \$74,632.50 or some other sum is the fair and reasonable value of the services rendered by Cary Kane LLP.

The portion of Cary Kane LLP's motion seeking an order directing the parties in this action to apprise it of any settlement discussion and obtain its written concurrence prior to executing any settlement agreement is denied. Cary Kane LLP provides no persuasive authority in support of its position that the plaintiff should be required to obtain its written concurrence before executing any settlement agreement. Neither of the two cases cited in Cary Kane LLP's moving papers, Woodbury v Andrew Jergens Co., 69 F.2d 49, 50 (2<sup>nd</sup> Cir. 1934) and Ingold v Ingold, 30 F. Supp. 347, 349 (S.D.N.Y. 1939), require a different conclusion. However, the parties are advised to promptly notify the movant of the execution of any settlement.

Any further relief sought in the motion is denied.

Finally, the parties are advised that, while the court is directing a hearing, due to the ongoing Covid-19 health emergency and consequent limitation of in-person court appearances and proceedings, scheduling of the hearing may be delayed.

#### IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of Cary Kane LLP's motion pursuant to Judiciary Law § 475 is granted to the extent that a charging lien will be fixed in an amount to be determined at a hearing,

and upon the fixing of the charging lien Cary Kane LLP may make further applications as necessary to enforce it, and the motion is otherwise denied; and it is further,

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of whether the demanded sum of \$74,632.50 or some other amount is a fair and reasonable value of the services rendered by Cary Kane LLP to the plaintiff, for purposes of a charging lien; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel shall immediately consult one another and, within 30 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an

Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the movant shall serve a proposed accounting of the fees and disbursements sought within 45 days from the date of this order and the parties shall serve objections to the proposed accounting within 20 days from service of the movant's papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules

of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts, and it is further,

ORDERED that the movant shall serve a copy of this order upon the parties by regular mail and e-mail within 20 days of the entry of this order.

This constitutes the Decision, Order, and Judgment of the court.

Dated: June 24, 2020

ENTER:

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON