Sperling v Birnbaum
2020 NY Slip Op 32267(U)
June 29, 2020
Supreme Court, New York County
Docket Number: 805166/2013
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, PART 10

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MARVIN SPERLING, As Administrator of the Estate of ANN SPINA-SPERLING **Index №.805166/2013**

Plaintiff

-against-

STANLEY BIRNBAUM, M.D.

Defendant

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HON. GEORGE J. SILVER:

With the instant application Gash & Associates, P.C., attorneys for plaintiffs, move for an order approving the settlement of this action for the sum of $950,000.00, and for other related relief. This case arises out of defendant's alleged failure to timely diagnose and treat plaintiff Ann Spina-Sperling ("decedent") for ovarian cancer. As of a result of defendant Stanley Birnbaum, M.D.'s ("defendant") purported violation of his duty of care, decedent alleges that she suffered for years, undergoing complex and painful treatment, hoping to prolong and ultimately save her life. Despite those efforts, decedent succumbed to cancer on May 7, 2014. Following decedent's death, this matter was stayed for a period of time until plaintiff Marvin Sperling ("plaintiff"), decedent's widower, was appointed administrator of decedent's estate.

Subsequent to the settlement of this matter in open court on June 25, 2019, plaintiff agreed to a resolution whereby expenses would be subtracted from plaintiff's share of the recovery. Now, however, after consultation with an attorney based in New Jersey, plaintiff insists on Gash & Associates' counsel fee and plaintiff's award being determined after the expenses are subtracted from the gross sum recovered, rather than subtracting expenses from plaintiff's share of the recovery. Gash & Associates submit that plaintiff's position is inconsistent with the state of law, and with plaintiff's own statements to the court.

Pursuant to EPTL §5-4.6, this court retains the authority to: 1) approve the settlement of this lawsuit, 2) release defendant with respect to the claims that are the subject of this lawsuit, 3) order defendant to pay the proceeds into Gash & Associates' attorney's trust account, 4) allow Gash & Associates to disburse to itself that portion of those funds which represent its fees and disbursements, and 5) allow the balance to be distributed to plaintiff pursuant to a direction from the Surrogate's Court.

In addition, this court retains the authority to follow *Matter of Kritzer*, 146 Misc.2d 1050 (Surrogates' Court, New York Cnty 1990), which holds that the limitations on attorney's fees contained in Judiciary Law §474–a(2) do not apply in wrongful death actions even though the

conduct of a defendant, which is the gravamen of the complaint, must be classified as medical malpractice.

When decedent signed a retainer agreement with Gash & Associates at the beginning of this lawsuit, the state of the law mandated that attorney's fees be calculated after the expenses of litigation were subtracted from the gross sum recovered. Under this type of calculation, even though expenses were incurred solely on behalf of a client toward the prosecution of an action, the attorney's fee effectively was reduced by whatever the attorney's *pro rata* contingency fee was of those expenses.

In 2014, the law in New York was changed to permit a client to choose whether expenses came off the top of a recovery or instead whether they would be subtracted from the client's share. In general, a client now makes such an election in the retainer agreement.

Here, after the stay was lifted and the pleadings amended, decedent was no longer the party plaintiff. Instead, plaintiff was. As a result of this change, it was necessary for a new retainer agreement to be entered into between Gash & Associates and plaintiff. Because the estate was substituted as the party plaintiff in 2016, after the law was changed, the retainer agreement sent to plaintiff reflected the change in the law, and plaintiff was asked to choose an option. Plaintiff initially did not adhere to that request. Nevertheless, by his conduct, plaintiff appeared to acquiesce to terms whereby the expenses would be subtracted from his share of the recovery since plaintiff neither advanced the expenses in connection with this lawsuit, nor reimbursed Gash & Associates for those expenses advanced.

On June 23, 2019, Gash & Associates and plaintiff appeared before this court for a settlement conference. As a result of that conference, the matter was resolved for the sum of $950,000.00. At the time of the settlement a full and complete stipulation of settlement was placed on the record, which included a *voir dire* by the court. That *voir dire* addressed plaintiff's understanding of the terms and conditions of the settlement and the manner and method by which the estate's share of the settlement and counsel's fee would be calculated. After being satisfied with plaintiff's understanding and consent to the settlement, this court accepted, on the record, the resolution of this matter.

Thereafter, plaintiff signed a retainer agreement inconsistent with his representations to this court and to Gash & Associates. "Implicit in all contracts is a covenant of good faith and fair dealing" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). This covenant "embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion."

Here, plaintiff's actions – whether those actions consist of withholding the retainer agreement absent an accounting or acting in a manner inconsistent with plaintiff's fiduciary

obligations and representations to this court – run athwart of the notion of fair dealing. To be sure, following resolution of this matter and plaintiff's representation that expenses would be deducted from plaintiff's share of the settlement, plaintiff subsequently signed a retainer agreement under which expenses were to be paid by the client and then deducted from the gross recovery. Since performance under those terms was rendered impossible by Gash & Associates assuming all financial risk by advancing all pre-litigation expenses, without a single contribution from plaintiff, plaintiff's election was inconsistent with the course of conduct of the estate and Gash & Associates.

In addition, it is fraudulent and inconsistent with the most fundamental elements of contract law for plaintiff to seek the benefits of a contractual provision that specifically contemplates performance by both parties where only one party, here Gash & Associates, actually performed (*Deerfield Communications Corp. v. Chesebrough-Pond., Inc*., 68 NY2d 954, 956 [1986]).

Moreover, the fact that plaintiff now challenges Gash & Associates' application even though plaintiff agreed in open court to have expenses deducted from his portion of the recovery, amounts to frivolous conduct. Under New York State practice, a court may impose monetary sanctions for "frivolous conduct" (*see, e.g*., 22 NYCRR § 130–1.1 [authorizing imposition of costs and attorney's fees for engaging in "frivolous conduct"]). Conduct is frivolous under 22 NYCRR section 130–1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" (22 NYCRR § 130–1.1[c][1]) or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (22 NYCRR § 130–1.1[c][2]), or "it asserts material factual statements that are false" (22 NYCRR § 130–1.1[c][3]). Here, plaintiff has managed to run afoul of the provisions within 22 NYCRR section 130–1.1. Indeed, where plaintiff previously agreed in open court to behave in a manner that he now opposes, amounts to "frivolous conduct" that taxes the court's finite resources. As such, plaintiff is put on notice that the court does not countenance such conduct, and future similar behavior may result in the court awarding costs in connection with applications such as the instant motion.

Based on the foregoing, the court approves the instant settlement, and directs that Gash & Associates disburse to itself that portion of those funds which represent its fees, expenses and disbursements, by subtracting those funds from plaintiff's share of the recovery. Accordingly, it is hereby

ORDERED that, pursuant to EPTL §5-4.6, this court approves the settlement of this lawsuit; and it is further

ORDERED that defendant is released from this lawsuit with respect to the claims that are the subject of the lawsuit; and it further

ORDERED that defendant is directed to pay the proceeds from the settlement of this action into Gash & Associates' attorney's trust account; and it is further

ORDERED that Gash & Associates is permitted to disburse to itself that portion of those funds which represent its fees, disbursements and expenses, and subtract those funds from plaintiff's share of the recovery; and it is further

ORDERED that the balance of the remaining funds shall be distributed to plaintiff pursuant to a direction from the Surrogate's Court; and it is further

ORDERED that Gash & Associates' application for sanctions is denied, with leave to renew, if necessary.

This constitutes the decision and order of the court.

Dated: June 29, 2020

GEORGE J. SILVER, J.S.C.