

Yuan Ming Zhang v Hicham

2020 NY Slip Op 32969(U)

September 4, 2020

Supreme Court, Kings County

Docket Number: 505583/15

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of September, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
YUAN MING ZHANG, YOU QIN LI, XU CAN CHEN,
CHUN LEUNG LI AND YIM KUEN CHAN,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 505583/15
Mot. Seq Nos. 11-12

ZIANI HICHAM AND GARA CL ATLANTIC, INC.,

Defendants.

-----X
The following e-filed papers read herein:

NYSCEF Doc. Nos.¹

Notice of Motion and Affidavits (Affirmations) Annexed

209-210, 220-221

Opposing Affidavits (Affirmations) _____

221, 226

Reply Affidavits (Affirmations/Affidavits)

226, 231

Upon the foregoing papers in this mostly settled automobile accident case with a lingering dispute between attorneys, the Law Offices of Gary S. Park (Park), outgoing attorneys for plaintiff Yim Kuen Chan (plaintiff Kuen Chan) move, in motion (mot.)

New York State Electronically Filed Document Numbers

sequence (seq.) 11, for an order, pursuant to CPLR 4403, rejecting a January 21, 2020 report of the Special Referee herein (the report). Instead, Park seeks a finding, contrary to the report, of no conflict of interest while representing all plaintiffs, and a directive that the Law Offices of David M. Peterson, P.C. (Peterson) fully disclose the exact settlement amount with a full accounting of all funds received and attorney's fees earned. Park also seeks a 75% award all attorney's fees earned in this action, or alternatively, a hearing date to apportion legal fees with Peterson.

Peterson, acting as counselor for plaintiff Kuen Chan, cross-moves, in mot. seq. 12, for an order, pursuant to CPLR 2004, extending the time to move, pursuant to CPLR 4403 and 22 NYCRR 202.44 (a), to confirm the report in its entirety.

Background

This case stems from a February 2, 2015 rear-end collision allegedly caused by defendants' negligence that resulted in plaintiffs allegedly suffering injuries (*see* NYSCEF Doc. No. 1, plaintiffs' verified complaint). Park, at the time of the underlying action's commencement on May 6, 2015, represented all plaintiffs, namely driver (plaintiff Zheng) and passengers (plaintiffs Qin Li, Can Chen, Leung Li, and Kuen Chan).

Defendants answered after service of the summons and complaint and asserted the affirmative defense that "recovery [was] barred in this action as to [these] defendant[s] in whole or in part by plaintiffs' culpable conduct" (*see* NYSCEF Doc. No. 2, defendants' answer at 4, ¶ 25). Thereafter, various discovery and motion practice ensued. Defendants, in December 2016, moved, in mot. seq. two, to amend their answer to assert

a counterclaim against plaintiff Zheng, the driver, which alleged that plaintiff passengers' injuries were caused by plaintiff Zheng's negligence (*see* NYSCEF Doc. No. 24, defendants' proposed amended answer, at 7, unnumbered paragraph after ¶ 38, annexed as exhibit C to defendants' mot. seq. 2 papers). Park cross-moved on January 20, 2017 in mot. seq. three, for an order granting summary judgment to all defendants (*see* NYSCEF Doc. No. 27). While the motion to amend the answer and summary judgment cross motion were pending, plaintiff Kuen Chan, Park, and Peterson executed a March 10, 2017 consent to change attorney, resulting in Peterson being the attorney of record representing plaintiff Kuen Chan (*see* NYSCEF Doc. No. 61).

The Hon. Wavny Toussaint, also while the motion to amend defendants' answer and the summary judgment cross motion were pending, issued a May 24, 2017 order directing that Park, as counsel for all other plaintiffs, must resolve any potential conflicts that may exist in the action (*see* NYSCEF Doc. No. 66). Subsequently, Justice Toussaint issued a June 21, 2017 order directing plaintiffs Zhang, Qin Li, Can Chen, and Leung Li to retain new counsel and further specifying that plaintiff Zhang "cannot be represented by the same counsel [i.e., Park] as any of the other co-plaintiffs" (*see* NYSCEF Doc. No. 70). October 25, 2017 and October 27, 2017 orders from Justice Toussaint granted the motion to amend the answer and denied plaintiff Zhang's summary judgment cross motion as there were factual issues of fact "whether Zhang bears any liability for the happening of the accident" (NYSCEF Doc. No. 105, order dated October 25, 2017 and NYSCEF Doc. 106, order, as amended, dated October 27, 2017). The amended answer was filed on November 22, 2017 (*see* NYSCEF Doc. No. 108). Thereafter, the action,

except for the counterclaim against plaintiff Zhang, settled for an undisclosed amount, and a stipulation of discontinuance, except, as stated in its heading, for the counterclaim against plaintiff Zhang, was filed (*see* NYSCEF Doc. No. 170 dated March 28, 2019).

Park moved after the settlement, by a May 7, 2019 order to show cause, in mot. seq. ten, for an order (a) directing Peterson to fully disclose the exact settlement amount, a full accounting of all funds received and attorney's fees earned, and (b) awarding Park 75% of all attorney's fees earned in Peterson's representation of plaintiff Kuen Chan, or alternatively, setting a hearing date to apportion the legal fees between Park and Peterson. That motion resulted in a July 25, 2019 order by the Hon. Donald Scott Kurtz (*see* NYSCEF Doc. No. 203) referring the matter to the Special Referee herein to determine a) whether a conflict of interest existed in Park's simultaneous representation of plaintiff Zhang and plaintiff Kuen Chan before the substitution of counsel; b) if such conflict existed, whether the conflict was waived; and c) whether Park is entitled to attorney's fees for representing plaintiff Kuen Chan and the apportionment of such fees.

The Special Referee then conducted a hearing and issued a January 21, 2020 report which determined:

"1. There was an existence of a conflict in Park's simultaneous representation of [plaintiff] Zhang and [plaintiff] Chan prior to Peterson's March 10, 2017 substitution as the conflict arose when defendants submitted their answer alleging plaintiff, Zhang's culpable conduct on June 4, 2015, almost two years prior.

"2. The conflict was not waived as written waivers in English were submitted by Park in June 2017, and again submitted in November 9, 2018 with certification that the documents w[ere] translated, after the action was settled in mediation.

“3. Parks [sic] is disqualified from receiving any portion of the attorneys’ fees” (see NYSCEF Doc. No. 207).

Park now moves for an order rejecting the report, and Peterson cross-moves for an order confirming the report.

The Parties’ Positions

Park’s core position is that the report must be rejected as the Special Referee erroneously found a) that a conflict of interest existed and b) that it is not entitled to attorney’s fees. Park maintains that this finding is unsupported by both applicable case law and the record. Park asserts, contrary to the findings of the report, that its representation of plaintiff Kuen Chan and the other plaintiffs did not constitute a conflict of interest. Critically it notes that during its tenure as plaintiff Kuen Chan’s counsel, defendants asserted no counterclaims against any of the plaintiffs. It maintains that it was not until after its representation ceased and Peterson was substituted as counsel did a potential conflict of interest arise, when defendants filed an amended answer asserting a counterclaim against plaintiff Zhang.

Park contends that the report incorrectly concludes that defendants’ affirmative defenses, raised in its initial answer, created a conflict of interest. Further it asserts that joint representation of plaintiffs, drivers and passengers, are routine in the practice of law and are not per se against any statutory authority. Park also presents signed waivers by plaintiffs, including plaintiff Kuen Chan, purportedly affirmatively waiving any potential conflicts of interest in Park’s representation of all plaintiffs. Thus, Park argues the report must be rejected and Peterson directed (a) to fully disclose the exact settlement amount

with a full accounting of all funds received and attorney's fees earned and (b) to award Park 75% of all attorney's fees earned in this action for Peterson's representation of plaintiff Kuen Chan. Alternatively, Park seeks setting a hearing date to apportion legal fees.

Peterson principally posits that the report must be confirmed as the Special Referee properly found that a conflict of interest existed in Park's representation of all the plaintiffs. Such a finding, Peterson contends, necessitates denial of Park's demand for attorney's fees. In addition, Peterson challenges Park's position that the nonexistence of a counterclaim de facto means no conflict of interest. No authority supports this conclusion, Peterson claims, and he thus views Park's position as specious. Addressing the purported waivers, Peterson contends that the report properly concluded the waivers were unpersuasive as they were dated after settlement. Accordingly, Peterson maintains that a conflict of interest always existed in Park representing all the plaintiffs which therefore barred Park from recovering attorney's fees for representing plaintiff Kuen Chan. Thus, Peterson insists that the report must be confirmed.

Both Peterson and Park submit reply affirmations, which, in essence, reassert the initial contentions raised in the moving and cross-moving papers. To the extent the replies present new arguments, Park maintains that the instant matter is distinguishable from Peterson's cited case law as defendants here did not assert a counterclaim at any point during his representation of plaintiff Kuen Chan. Peterson's reply itemizes various assertions Park's reply presented, and raises issues about the veracity of certain statements Park made.

Discussion

The court is vested with authority to either reject or confirm a referee's report, either upon its own initiative or upon motion from any party (*see* CPLR 4403; *JNG Constr., Ltd. v Roussopoulos*, 170 AD3d 1136, 1141 [2d Dept 2019]; *Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897, 898 [2d Dept 2011]). Generally, “[t]he report of a Referee should be confirmed whenever the findings are substantially supported by the record, and the Referee has clearly defined the issues and resolved matters of credibility” (*Thomas v Thomas*, 21 AD3d 949, 949 [2d Dept 2005]; *see also Minelli Constr. Co., Inc. v New York City School Constr. Auth.*, 167 AD3d 593, 593 [2d Dept 2018]). A special referee's determinations on credibility are traditionally afforded great deference (*see Galasso, Langione & Botter, LLP*, 89 AD3d at 898). However, “[t]he referee's findings and recommendations are advisory only and have no binding effect on the court, which remains the ultimate arbiter of the dispute” (*HSBC Bank USA, N.A. v Cherestal*, 178 AD3d 680, 683-683 [2d Dept 2019], quoting *Flagstar Bank, F.S.B. v Konig*, 153 AD3d 790, 790-791 [2d Dept 2017]; *see also Bank of New York Mellon v Gitit Graffi*, 172 AD3d 1148 [2d Dept. 2019]).

“The relationship of client and attorney is one of unique fiduciary reliance which imposes on the attorney the duty to deal fairly, honestly and with undivided loyalty including maintaining confidentiality, *avoiding conflicts of interest*, operating competently, safeguarding client property and *honoring the clients' interests over the lawyer's*” (*Saint Annes Dev. Co. v Batista*, 165 AD3d 997, 997-998 [2d Dept 2018] [internal quotation marks and citations omitted] [emphasis added]). An attorney engaging

in misconduct, i.e. violating the rules of professional conduct, is not entitled to legal fees for any services rendered (*see id.* at 998; *Jay Deitz & Assoc. of Nassau County, Ltd. v Breslow & Walker, LLP*, 153 AD3d 503, 506 [2d Dept 2017]; *Matter of Sacco and Fillas, LLP v Broderick*, 133 AD3d 862, 863 [2d Dept 2015]). “Even misconduct that occurs before an attorney's discharge but is not discovered until after the discharge may serve as a basis for a fee forfeiture” (*see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011] [internal quotation marks and citations omitted]). Where an attorney maintains a conflict of interest in representing parties, a violation of the professional rules of conduct has occurred (*see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [a]*). Further, the mere appearance of impropriety places an attorney in a precarious position regarding conflicts of interest. “[T]he lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship” (*Saint Annes Dev. Co.*, 165 AD3d at 998; *see also Edelman v Levy*, 42 AD2d 758 [2d Dept 1973]). While conflicts may be waived, such waiver must be based upon, among other criteria, informed consent and confirmed in writing (*see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [b] [4]*).

A conflict of interest exists where an attorney represents both a passenger and driver in an action (*see Matter of Sacco & Fillas, LLP v David J. Broderick, P.C.*, 133 AD3d 862, 863 [2d Dept 2015]; *Shelby v Blakes*, 129 AD3d 823, 825 [2015]; *Matter of Birman*, 34 AD3d 16, 21 [2d Dept 2006]). Traditionally the issue of a conflict of interest arises where a defendant asserts a counterclaim, but the general principle is based upon

the inherent conflict between passenger and driver - a passenger in a vehicle “could assert [cross claims] against [the driver] for negligence” (*Alcantara v Mendez*, 303 AD2d 337, 338 [2d Dept 2003]; *Sidor v Zuhoski*, 261 AD2d 529, 530 [2d Dept 1999] [as “a child may properly bring an action against his or her parents, it is improper for an attorney to represent both the parents and the child in an automobile accident action brought against the owner and driver of the other vehicle] [emphasis added]; *Pessoni v Rabkin*, 220 AD2d 732, 732 [2d Dept 1995]). “The general rule is that an attorney is not entitled to a fee in a personal injury action if the attorney violated the Rules of Professional Conduct (12 NYCRR 1200.0) by representing both the driver of an automobile involved in a collision and a passenger in that vehicle” (*Matter of Sacco & Fillas, LLP*, 133 AD3d at 863, quoting *Shelby*, 129 AD3d at 825; see also *Matter of Birman*, 34 AD3d 16, 21 [2d Dept 2006]; *Quinn v Walsh*, 18 AD3d 638, 638 [2d Dept 2005]).

Here, as in every instance of an attorney representing both a driver and passenger in an automobile accident, an inherent conflict of interest existed (*Matter of Sacco & Fillas, LLP*, 133 AD3d at 863; *Shelby*, 129 AD3d at 825; *Matter of Birman*, 34 AD3d at 21). The conflict of interest began at the moment of representation, not merely upon the court’s discovery of it or defendants’ interposing counterclaims (see *Doviak*, 90 AD3d at 699).² Thus, a conflict of interest existed when Park agreed to represent both plaintiff Zhang and plaintiff Kuen Chan (see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [a]).

²

It is of no consequence that the attorney substitution occurred before the court’s awareness of the potential conflict or imposition of the defendants’ counterclaim.

Thus, moving forward, Park must demonstrate that plaintiff Kuen Chan waived the conflict of interest (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7 [b] [4]) for Park's representation of plaintiff Kuen Chan not to be in violation of the professional rules of conduct and to be entitled to a fee for representing plaintiff Kuen Chan. The waiver must embody that:

"(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

"(2) the representation is not prohibited by law;

"(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

"(4) each affected client gives informed consent, confirmed in writing" (*id.*).

Park fails to proffer waivers which permit its representation of plaintiff Kuen Park, thus it is not entitled to attorney's fees. Critically, the record lacks any waiver signed by plaintiff Zhang. Hence, Professional Conduct (22 NYCRR 1200.0) rule 1.7 (b) (4) is not satisfied as *each* affected client did not give informed consent (see generally NYSCEF Doc No. 196). Further, plaintiff Kuen Chan's waiver, proffered by Park, failed to satisfy the requirement imposed by Professional Conduct (22 NYCRR 1200.0) rule 1.7 (b) (4). Plaintiff Kuen Chan's waiver avers, among other information, "I hereby certify I will not sue my driver [plaintiff Zhang] and my driver's insurance company for this accident on February 2, 2015, because it was not the driver's fault" (NYSCEF Doc No. 197). There is no talismanic language or form which satisfies Professional Conduct (22 NYCRR

1200.0) rule 1.7 (b) (4), but plaintiff Kuen Chan's statement clearly does not constitute informed consent. The other waivers proffered by Park highlight this deficiency as those waivers satisfy Professional Conduct (22 NYCRR 1200.0) rule 1.7 (b) (4) to the extent each clearly demonstrates informed consent waiving the conflict of interest (*see generally* (NYSCEF Doc No. 196).³ Therefore, Park's representation of plaintiff Kuen Chan violated the rules of professional conduct, thereby barring him and his firm from recovering attorney's fees for the legal services rendered.

Park and Peterson's remaining contentions, to the extent not specifically addressed herein, have been considered and found either without merit and/or moot. Accordingly, it is

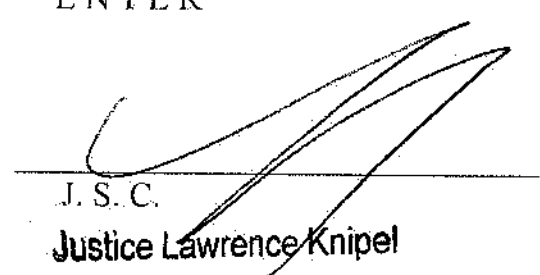
ORDERED that Park's motion, mot. seq. 11, is denied in its entirety, and it is further

ORDERED that Peterson's cross motion, mot. seq. 12, is granted in its entirety; and it is further

ORDERED that the report is confirmed in its entirety.

This constitutes the decision and order of the court.

ENTER



J. S. C.

Justice Lawrence Knipel

³

The waivers, though, as mentioned, fail to satisfy Professional Conduct (22 NYCRR 1200.0) rule 1.7 (b) (4) to the extent that not all plaintiffs represented by Park present a waiver.