Simpson v Mackendrick
2022 NY Slip Op 31126(U)
April 8, 2022
Supreme Court, New York County
Docket Number: Index No. 152507/2015
Judge: Lisa S. Headley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** 28M

Justice

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VONETTA SIMPSON,

Plaintiff,

- v -

CARL MACKENDRICK,

Defendant.

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INDEX NO. 152507/2015

MOTION DATE 11/04/2021

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81

were read on this motion to/for ATTORNEY - FEES.

This motion was filed by movant-attorneys, Napoli Shkolnik, PLLC ("movant-attorney"), the former counsel for plaintiff. Plaintiff's counsel, Scott A. Wolinetz, P.C., filed opposition to the motion. A virtual conference and oral argument were held on November 4, 2021.

The movant-attorney seeks: (1) to compel current counsel for the plaintiff, Scott A. Wolinetz, P.C., to immediately forward payment of 40% of his attorneys' fee for the above referenced matter to the law firm of Napoli Shkolnik, PLLC, the former attorneys of this matter, pursuant to *Judiciary Law §475*, or in the alternative direct all parties to appear for a hearing on a date and time certain to be set by the Court to determine the apportionment of attorneys' fees in the within action; and (2) to compel the plaintiff's counsel to immediately produce and deliver to the office of Napoli Shkolnik, PLLC a full and detailed statement of all recovery, charges, fees and expenses related to this matter.

In support of the motion, the movant-attorney argues that on September 10, 2013, plaintiff Vonetta Simpson contacted their law firm seeking representation for her claims arising from a motor vehicle accident that took place on August 24, 2013. The movant-attorney was retained and contends that their firm "thoroughly investigated the incident by obtaining photographs of the vehicles, running searches of the vehicle, sending letters of representation to the defendant's carrier, and to the no-fault carrier, and obtained plaintiff's relevant medical records." The movant also contends that they contacted the workers compensation carrier to advise them of the claim and their representation of plaintiff. Subsequently, on August 21, 2014, plaintiff signed a consent to change attorney. Then, on September 17, 2014, movant contends that they wrote to the incoming counsel for plaintiff advising them of disbursements incurred and of their lien for attorney's fees and annexed the letter as Exhibit B to the motion papers. In addition, the movants sent two subsequent letters in 2017, attached as Exhibit D and E to the motion papers. The movant-attorney

further contends that they learned the matter was settled in January 2019, and their office wrote to plaintiff's counsel reminding him of the lien for attorney's fees. The movants acknowledge that they engaged in settlement discussions with plaintiff's counsel, however they could not reach a resolution.

In opposition, plaintiff's counsel, Scott A. Wolinetz, submits, *inter alia*, their retainer statement, the summons and complaint, answer, bill of particulars, the conference ordered, response to demands, the plaintiff's and defendants' EBT transcripts, the motion papers, and opposition papers filed, the Note of Issue, the consent to settle and reduction of workers' compensation lien, the plaintiff's medical records, the movant's file sent to plaintiff's office, and the release and closing statement.

Here, plaintiff's counsel argues that the motion should be denied because the movants did not submit any proof of their efforts to support their claim for a fee of 40%. Further, plaintiff's counsel contends that this action was filed because of a two-car motor vehicle accident, which involved plaintiff, who was operating an MTA vehicle during the course of her employment. As a result of the accident, plaintiff sustained injuries, and reinjured both shoulders from a prior accident. Plaintiff's counsel contends that he was retained by plaintiff on August 20, 2014, and when the movant-attorney transferred his file, it only included medical records of Dr. Huish from September 2013 and December 2013, as well as a no-fault application. Plaintiff's counsel argues that there is no proof of any work performed on this matter after December 16, 2013, and there is no proof that the movant filed a lawsuit or took any action of substance.

Plaintiff's counsel detail their work done in this case, including obtaining all medical records, drafting and serving the summons and complaint, drafting and serving bill of particulars, appearing for multiple compliance and status conferences, preparing and appearing for plaintiff's deposition, conducting defendant's deposition, opposing orders to show cause and motions, filing the Note of Issue, and negotiating settlement with defense counsel. The plaintiff's counsel contends that after filing a Note of Issue, the case was settled for $120,000.00, and their office incurred $1,432,08 in expenses and a fee of $39,522.64. Plaintiff's counsel argues that their office performed all the essential work on this case, and their work, alone, contributed to the settlement, and thus, they are entitled to the entire fee. Plaintiff's counsel also argue that prior counsel did not commence a lawsuit in this case, and only collected three months of records and preliminary investigation, which does not entitle them to any fee. In sum, plaintiff argues that they performed all the work necessary to achieve the settlement, and prior counsel filed a no-fault application, when the proper relief sought in this case was a workers' compensation claim.

DISCUSSION

Here, the movant-attorney filed the instant motion for this court to assess its charging lien, pursuant to *Judiciary Law §475*, at 40% of the attorney's fees or any just amount. It has long been recognized that courts have traditional authority to supervise the charging of fees for professional services under the court's inherent and statutory power to regulate the practice of law. *See, Greenwald v. Scheinman,* 94 A.D.2d 842, 463 N.Y.S2d 303 (3d Dep't 1983); *Hom v. Hom,* 210 A.D.2d 296, 622 N.Y.S2d 282 (2d Dep't 1994). "The determination of what constitutes

reasonable fees is a matter 'within the sound discretion of the Surrogate, who is in a superior position to judge factors such as the time, effort and skills required'." *Matter of McCann,* 236 A.D.2d 405, 654 N.Y.S2d 578 (2d Dep't 1997), *citing, Matter of Papadogiannis,* 196 A.D.2d 871, 872, 602 N.Y.S2d 68 (2d Dep't 1993).

Judiciary Law §475 provides in relevant part: "[f]rom the commencement of an action, special or other proceeding in any court . . . or the initiation of any means of alternative dispute resolution including . . . mediation . . . the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come[.]"

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 N.Y.2d 655 (1993); Lai Ling Cheng v. Modansky Leasing Co.,* 73 N.Y.2d 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 A.D.2d 656 (1st Dep't 1972); *Callaghan v. Callaghan,* 48 A.D.3d 500 (2d Dep't 2008); *see also*, *Young v. New York City Tr. Auth.,* 2020 N.Y. Slip Op. 32056[U], 4 [N.Y. Sup Ct, New York County 2020].

The court should assess the case-specific considerations at the outset and factor them into its determination of a reasonable hourly rate, which is then multiplied by a reasonable number of hours expended to reach the presumptively reasonable fee. *See, McDaniel v. City of Schenectady,* 595 F. 3d 411, 420 (2d Cir. 2010); *see also*, *In re Bracken, Margolin, Besunder, LLP v. Raymond*, 2013 N.Y. Slip Op. 31619[U] (N.Y. Sup Ct, Suffolk County 2013).

The burden is on the party seeking attorney's fees to submit sufficient evidence to support the hours worked and the rates claimed. *See, Hensley v. Eckerhart,* 461 U.S. 424, 453 (1983). Finally, as instructed by the Supreme Court in *Fox v. Vice,* - US -, 131 S. Ct 2205, 2216, 180 Led 2d 45 (2011), when trial courts examine a fee application, they "need not, and indeed should not, become green-eyeshade accountants." *Citing*, *In re Bracken, Margolin, Besunder, LLP v. Raymond*, *supra*.

Here, the movant-attorneys have failed to demonstrate work done on their part that would render a reward requested of 40% of the legal fees. First, in assessing on a *quantum meruit* basis, including the complexity of the matter and the fair and reasonable value of the work rendered, the case record is clear that the movant-attorney did not commence the lawsuit that resulted in the settlement of the plaintiff's workers' compensation award. The movant acknowledged that they completed a no-fault application and retrieved records from only one of the multiple doctors that treated plaintiff. Annexed to the movant's letter to the incoming plaintiff's counsel, is a ledger from the movants' law firm, which totals $289.57 for services rendered from October 2013 to

August 2014. The services included medical record expenses, and document management, and it should be noted that none of said services included the commencement of the underlying action.

In fact, plaintiff's counsel demonstrated in his opposition papers, that he commenced the workers' compensation action, conducted the discovery, depositions, motion practice, as well as, successfully performed settlement discussions in this case, resulting in an award for plaintiff. Here, the services rendered by the movant-attorney merely compares to the work performed by plaintiff's counsel and does not justify the movant's request of 40% of the legal fees awarded to plaintiff's counsel. Thus, this court finds that the movant failed to demonstrate that they should receive the requested 40% portion of the fees obtain by plaintiff's counsel.

However, within the court's discretion, the movant-attorney is awarded $300.00 to resolve all the claims alleged herein, as it represents the services provided based on the movant's ledger, as preliminary work performed in plaintiff's personal injury case.

Accordingly, it is hereby

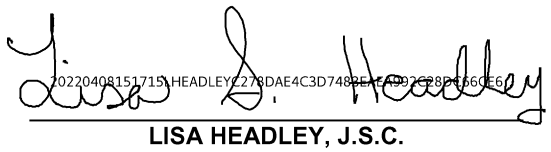
ORDERED that the movant-attorney's motion for attorneys' fees is granted, only to the extent that they should be awarded a total sum of $300.00 for legal services rendered on behalf of plaintiff, Vonetta Simpson; and it is further

ORDERED that within 60 days of the date of this decision, the law firm of Scott A. Wolinetz, P.C., shall tender to movant-defendants Napoli Shkolnik, PLLC, a certified check in the amount of $300.00, and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further;

ORDERED that within 30 days of entry, movant-attorneys shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision and Order of the Court.



4/8/2022
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED		NON-FINAL DISPOSITION			
		GRANTED	X DENIED	GRANTED IN PART		OTHER	
APPLICATION:		SETTLE ORDER		SUBMIT ORDER			
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE	