

Dondero v Sylvester

2022 NY Slip Op 34144(U)

November 25, 2022

Supreme Court, New York County

Docket Number: Index No. 805349/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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INDEX NO. 805349/2018

DONNA DONDERO, as guardian of the property of PETER DONDERO, and DONNA DONDERO, individually,

MOTION DATE 11/14/2022

Plaintiffs,

MOTION SEQ. NO. 005

- v -

ANDREW SYLVESTER M.D., INTERNATIONAL MULTI SCLEROSIS, and JOHN DOS 1-10

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for APPROVE/SETTLE ACCOUNTING.

In this action to recover damages for medical malpractice, the plaintiff's counsel, Nagel Rice, LLP, moves pursuant to CPLR 1207 for approval of a proposed order of settlement and compromise of all claims against the defendant International Multi Sclerosis (IMS), and seeks an upward departure from the otherwise mandatory attorney's fee schedule applicable to medical malpractice actions that is set forth in Judiciary Law § 474-a(2). Neither IMS nor the plaintiff opposes the motion. The motion nonetheless is granted only to the extent that the court approves the settlement and awards the plaintiff's law firm the sum of \$323,721.06, in accordance with the prescribed statutory fee, plus costs and disbursements in the sum of \$12,789.37, for a total of \$336,510.43. The motion is otherwise denied.

In August 2016, then 50-year-old Peter Dondero (Dondero), a resident of New Jersey, underwent a magnetic resonance imaging (MRI) scan at the Hackensack Neurology Group in Hackensack, New Jersey. He was diagnosed with multiple sclerosis (MS). With the worsening of his symptoms, Dondero sought additional care, and presented to IMS in New York, whereupon he informed medical staff there that he had declining cognitive function,

uncontrollable laughter and crying, progressively altered and slurred speech, and weak extremities. IMS diagnosed Dondero with “probable MS-aggressive,” and started a course of intravenous steroids, repeated the MRI, and tested for human polyomavirus 2, commonly known as John Cunningham (JC) virus. While the JC virus test was positive, the previous treatment was continued, notwithstanding the fact that Dondero’s neurological conditions were not improving. In late October 2016, Dondero was admitted to another facility, whereupon he was diagnosed with progressive multifocal leukoencephalopathy (PML), which is an infection of the central nervous system caused by the JC virus. That facility also confirmed that Dondero, in fact, did not have MS.

Dondero now has a permanent and irreversible cognitive and neurological disability resulting from a brain injury caused by PML. Dondero’s wife, Donna Dondero (Mrs. Dondero), has been his primary caregiver since the onset of symptoms in 2016. On July 30, 2019, Mrs. Dondero was appointed as guardian of the person and the property of Dondero pursuant to New Jersey law. In May 2022, Mrs. Dondero settled, for the sum of \$1,100,000.00, an action that Dondero had commenced in 2017 against his original neurologist in Hackensack, New Jersey. The settlement order in the New Jersey action, inter alia, awarded the sums of \$353,466.35 to be placed in a Trust for the benefit of Dondero and \$289,199.75 directly to Mrs. Dondero herself. The order awarded the additional sum of \$368,122.61 to Nagel Rice, LLP, who served as the plaintiffs’ attorney in the New Jersey action, comprising the sums of \$252,292.48 for attorneys’ fees and \$115,830.13 for costs and disbursements (\$90,830.00 for actual disbursements, costs, and expenses, plus \$25,000.00 as and for an escrow for costs anticipated to be necessary to complete discovery and conduct the trial in the instant New York action). As noted above, Nagel Rice, LLP, also is the plaintiff’s attorney in the present case.

The plaintiff and IMS agreed to settle the instant action against IMS for the gross sum of \$1,750,000.00, and the plaintiff now seeks court approval of that settlement, as set forth in a proposed guardianship compromise order. The proposed compromise order provided that the

settlement proceeds would be apportioned by awarding \$539,086.45 to Mrs. Dondero and \$808,629.68 payable to the Trust for the benefit of Dondero. As further memorialized in the proposed compromise order, the plaintiff's attorney also seeks an enhanced attorneys' fee that generally applied the statutory sliding scale set forth in Judiciary Law § 474-a(2), but permitted it to recover a fee award in the sum of 23.5% of any amount over \$1.25 million of the net sum recovered, rather than the 10% otherwise fixed by the statute, for a fee of \$389,494.50, plus an award of disbursements in the amount of \$12,789.37, for a total of \$402,283.87. The plaintiff's attorney contended that it is entitled to this enhanced fee based on a retainer agreement setting forth the plaintiff's consent to that increased percentage recovery for allegedly extraordinary services, and asserted that it did, in fact, provide such extraordinary services.

Judiciary Law § 474-a(2) provides that,

“Notwithstanding any inconsistent judicial rule, a contingent fee in a medical, dental or podiatric malpractice action shall not exceed the amount of compensation provided for in the following schedule:

“30 percent of the first \$250,000 of the sum recovered;
25 percent of the next \$250,000 of the sum recovered;
20 percent of the next \$500,000 of the sum recovered;
15 percent of the next \$250,000 of the sum recovered;
10 percent of any amount over \$1,250,000 of the sum recovered.”

Those percentages must be calculated on the net sum recovered after deducting from the gross amount recovered those expenses and disbursements that are chargeable to the enforcement of the claim or prosecution of the action (*see* Judiciary Law § 474-a[3]). Where an attorney shows that the statutory compensation is inadequate due to extraordinary circumstances, the court may “fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule,” provided that the enhanced compensation does not exceed the fee fixed by the retainer agreement (Judiciary Law § 474-a[4]). In other words, a retainer agreement in a medical malpractice action that includes a provision for the recovery or award of enhanced fees, payable from the settlement proceeds, is not per se enforceable. Rather, regardless of the terms of the agreement, an attorney must always make the necessary

showing of extraordinary work and insufficient compensation in order to obtain enhanced compensation. As made clear by the statute, however, while the court “may fix as reasonable compensation for legal services rendered an amount greater than that specified in the schedule set forth” in Judiciary Law § 474-a(2), “such greater amount shall not exceed the fee fixed pursuant to the contractual arrangement, if any, between the claimant or plaintiff and the attorney (Judiciary Law § 474-a[4]). Hence, the retainer agreement in the instant matter serves as a ceiling or cap on any enhanced fees that the plaintiff’s attorney seeks to recover here.

“[I]n determining whether extraordinary circumstances caused the fee to be inadequate, governing emphasis should be placed on whether the award--viewed as a whole or broken down to its hourly equivalent--equitably compensates counsel for ‘the amount of time reasonably and necessarily spent’ in litigating the claim (*People v Perry*, 27 AD2d 154, 161). Under this formulation, the statutory fee may be inadequate, for example, where the case involves an extremely complicated procedural history or where plaintiff’s counsel is required to expend an inordinate amount of time in pursuing the medical malpractice claim, thereby rendering the hourly rate of compensation exceptionally low or causing a loss of other income or some other financial detriment. Once that threshold showing is made, counsel must then justify a departure from the fee schedule by demonstrating that extraordinary circumstances caused the statutory fees to be unreasonable in the particular case.”

(*Yalango by Goldberg v Popp*, 84 NY2d 601, 608 [1994]).

In *Yalango*, medical practitioners failed timely and properly to diagnose the plaintiff’s condition, which ultimately left him in need of lifelong, continuous skilled nursing for his severe and permanent injuries, including brain damage, spastic quadriplegia, and cortical blindness (see *id.* at 604). The parties settled the claims prior to trial and the plaintiff’s attorney simultaneously moved to increase its compensation, beyond that otherwise prescribed in Judiciary Law § 474-a(2), from \$338,731.74 to \$629,105.81, equaling one third of the total recovery, on the ground that extraordinary circumstances were present in prosecuting that action (see *id.* at 605). The Supreme Court granted the application, and the Appellate Division affirmed, both courts finding that extraordinary circumstances did indeed exist due to the number of defendants and witnesses, the nature of the case, and the length of time taken to litigate it (see *id.*). The Court of Appeals, however, reversed the Appellate Division and

thereupon denied the application, concluding that the law firm was adequately compensated under the statutory fee schedule (*see id.* at 606). In particular, the Court of Appeals concluded that the law firm did not and could not establish that it was somehow unjust that the statutory scale would have yielded a fee award of almost \$550 per hour to compensate it for the approximately 620 hours of time that it incurred (*see id.* at 609). The firm's average time invested on the action, amounting to 10 hours per month over a five-year period, was not sufficient to demonstrate that the firm, by litigating the subject medical malpractice action, had to forego other legal business or ignore other clients, or otherwise incurred financial hardship (*see id.*). Finally, the case did not progress beyond pretrial settlement negotiations and, thus, did not require a prolonged or all-consuming trial (*see id.*).

Likewise, in the case at bar, counsel has failed to demonstrate that the compensation provided for by the statutory fee schedule is inadequate, let alone establish that extraordinary circumstances existed. The plaintiff's counsel claimed that it was required to invest an extensive amount of time and labor over a four-year period to litigate this action. While the court does not deny such efforts, it cannot deem them extraordinary or excessive for purposes of interpreting the relevant statute. Moreover, although counsel asserted that his firm spent hundreds of hours on this case, he failed to provide documented expenditure of that time (*see Perchuk v Health Ins. Plan*, 308 AD2d 386, 386 [1st Dept 2003]). Consequently, the evidence failed to show that the time spent representing the plaintiff resulted in an exceptionally low hourly rate of compensation or that it caused any financial detriment to counsel (*see Ponzo v Landskowsky*, 2019 NY Slip Op 33006[U], *3, 2019 NY Misc LEXIS 5447, *2-3 [Sup Ct, Kings County, Oct. 4, 2019], citing *Siu Kiu Lam v Loo*, 155 AD3d 660, 660 [2d Dept 2017]; *cf. Flanagan v Mack*, 2018 NY Slip Op 31766[U], 2018 NY Misc LEXIS 3220 [Sup Ct, Suffolk County 2018, Jul. 17, 2018] [granting counsel's application for an increase beyond the statutory fee schedule where it expended in excess of 2,887 hours over 7½ years in litigating a medical malpractice action against multiple defendants in multiple practice areas and specialties, and

the matter was settled during trial]). In fact, counsel here only stated in conclusory fashion that “our time was shifted away from many other trial-ready cases” and that representing the plaintiff required the “setting aside of many other matters.”

It should be noted that factors such as the degree of diligence or success achieved by an attorney do not make the services rendered “extraordinary” under Judiciary Law § 474-a(4), as that provision “was not designed to reward successful results, nor diligent, thorough or even exhaustive preparation on behalf of a client” (*Yalango by Goldberg v Popp*, 84 NY2d at 609). In fact, “the percentages contained in the fee schedule are set at levels intended to provide ample compensation for the *best efforts* and services of competent counsel” (*id.* [emphasis in original] [internal quotation marks omitted]).

Moreover, counsel in the present case asserted that this matter “required special skills beyond those normally encountered in routine personal injury litigation.” The courts notes that, while such “special skills” may not be required in other subsets of personal injury litigation, medical malpractice actions are complex by nature and warrant extensive and erudite preparation (*see Yalango by Goldberg v Popp*, 84 NY2d at 610). Thus, the technical complexity of the medical issues does not, in and of itself, render a medical malpractice case extraordinary (*see id.*; *cf. O’Connell v Shivaram*, 37 AD3d 435 [2d Dept 2007] [awarding an increased fee in rare case concerning unusual and difficult-to-diagnose lung disease, where joint counsel spent an estimated 3,700 hours on pre-trial issues and three weeks on trial prior to settlement]). The services rendered in this case---researching and preparing for commencement of the lawsuit, retaining medical experts, participating in discovery proceedings including the taking multiple depositions, drafting and filing motions, appearing for mediation, and participating in settlement negotiations---are routine in the area of medical malpractice.

Additionally, the court notes that counsel represented the plaintiff in the aforementioned New Jersey action that was commenced in October 2017 and settled in May 2022, while this

case was commenced in October 2018. Similar pretrial services are likely to have been rendered in the New Jersey action that may have eased or expedited the litigation of this action.

Finally, the court notes that, although the retainer agreement otherwise provided for the applicability of the statutory sliding fee schedule, the plaintiff's consent to an enhanced fee in the retainer agreement provided only that, "[i]f the case is settled *before trial*, I agree that Nagel Rice is entitled to a fee of 23.5% of any amount recovered over \$1,250,000 and I consent to Nagel Rice filing an application to the Court seeking such a fee" (emphasis added). Accordingly, had a pre-trial settlement with IMS not occurred, and the parties proceeded to trial, in light of that contractual limitation, counsel's claim of extraordinary circumstances would not be triggered if the action were settled *during* trial or the trial resulted in a plaintiff's verdict. This contractual restriction provides further support for the court's finding that the statutory fee schedule does not yield inadequate compensation, as counsel agreed to adhere to that schedule even if it performed the significant additional work that would have been required had the action not settled against IMS prior to trial.

Consequently, the court denies counsel's application for an enhanced fee of 23.5% of any amount recovered over \$1.25 million of the net sum, rather than the statutory 10%, and awards counsel the sum of \$323,721.06 in attorneys' fees pursuant to the schedule set forth in Judiciary Law § 474-a(2), along with the sum of \$12,789.37 for costs and disbursements, for a total of \$336,510.43. Inasmuch as the fee sought by the plaintiff's counsel was \$65,773.44 greater than the fee that the court is approving, that amount must instead be allocated to the Trust held for the benefit of Dondero. Thus, from the settlement proceeds, the Trust is entitled to recover the sum of \$874,403.12 rather than the \$808,629.68 set forth in the proposed compromise order, and the court amends the compromise order accordingly.

In light of the foregoing, it is

ORDERED that the motion is granted to the extent that the proposed compromise order and settlement, as modified and attached, is approved, and Nagel, Rice, LLP, is awarded the

sums of \$323,721.06 in attorneys' fees and \$12,789.37 for costs and disbursements, for a total of \$336,510.43, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

11/25/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: