

Newark Rehabilitation Ctr., PA v Simela

2023 NY Slip Op 33838(U)

October 26, 2023

Supreme Court, New York County

Docket Number: Index No. 651425/2022

Judge: Melissa A. Crane

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
NEW YORK COUNTY**

PRESENT: HON. MELISSA A. CRANE PART **60M**

Justice

-----X

NEWARK REHABILITATION CENTER, PA,
REHABILITATION MEDICINE PRACTICE OF N.Y., P.L.L.C.

INDEX NO. 651425/2022

Plaintiff,

- v -

ASHLEY SIMELA, YACIRIS GONZALEZ,

**DECISION AFTER
INQUEST**

Defendant.

-----X

The court presumes familiarity with the facts underlying this case but provides the following background as relevant to this inquest on attorneys’ fees.

In Motion Sequence No. 04, plaintiffs Newark Rehabilitation Center, PA (“Newark Rehab”), Rehabilitation Medicine Practice of N.Y., P.L.L.C. (“Rehab Medicine”), and Jose Colon, M.D. (“Colon”) (collectively, “Plaintiffs”) moved to strike both defendants’ answers and affirmative defenses, as well as defendant Simela’s counterclaims, due to the spoliation of their cellphones, electronic information and thousands of text messages (Doc 126 [Sussman Affirmation] ¶ 2).

On July 25, 2023, the court granted the motion for discovery sanctions (Doc 227 [MS 04 Decision]). Specifically, the court issued two adverse inferences: 1) an adverse inference that the missing text messages tend to show that defendants Simela and Gonzalez conspired to steal patients away from plaintiffs; and 2) another adverse inference that “Angela Polonio” and Gonzalez are one and the same (*id.*). Additionally, the court found that defendants behaved in a contumacious, willful and dilatory fashion, such that monetary sanctions in the form of attorneys’ fees were appropriate (*id.* at 4). The court awarded plaintiffs their reasonable attorneys’ fees spent

OTHER ORDER – NON-MOTION

uncovering defendant's misrepresentations and for the time plaintiffs spent on the underlying motion (MS 04) (*id.*).

Plaintiffs now seek a total of \$127,564.45 in attorneys' fees, comprised of \$113,376.25 for work they did to uncover defendants' misrepresentations and omissions, as well as for the time they spent drafting the sanctions motion. Plaintiffs also seek \$14,188.20 representing plaintiffs' counsels' work on this fee application.

As discussed further below, the court declines to award the full amount plaintiffs seek.

Discussion

An award of reasonable attorneys' fees is within the sound discretion of the court (*see Diakrousis v Malanga*, 61 AD3d 469 [1st Dept 2009]). When evaluating the reasonableness of attorneys' fees, the court examines several factors, "including the time and labor required, the difficulty of the issues involved, and the skill and effectiveness of counsel...reduc[ing] the amount requested to eliminate work that was duplicative or was unnecessarily performed by an attorney, rather than a secretary or paralegal" (*JK Two LLC v Garber*, 171 AD3d 496, 496 [1st Dept 2019]; *S.T.A. Parking Corp. v Lancer Ins. Co.*, 128 AD3d 479, 480 [1st Dept 2015]). The burden of proving the reasonableness of the requested fees is on the requesting party (*EVUNP Holdings LLC v Frydman*, 154 AD3d 558, 559 [1st Dept 2017]).

The court may reduce fees that are excessive (*see Solow Management Corp. v Tanger*, 43 AD3d 691 [1st Dept 2007]). The court may also reduce fees where the amount requested lacks proof (*Josefsson v Keller*, 141 AD2d 700 [1st Dept 1988]). Additionally, a fee award may be reduced where there is block billing – the practice of lumping multiple charges together in a single billing entry (*see Matter of Silverstein v Goodman*, 113 AD3d 539, 540 [1st Dept 2014]; *RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 840 [2d Dept 2016] [25% reduction of fee award

“due to the use of block billing, including vague and nonspecific billing entries, and the nature of th[e] lawsuit”). Specifically, courts may reduce requested fees when the use of block billing makes it “makes it exceedingly difficult for the court to identify whether the amount of time spent on a particular task is reasonable” (*546-552 W. 146th St. LLC v Arfa*, 99 AD3d 117, 123 [1st Dept 2012]).

Preliminarily, plaintiffs are not entitled to recover \$14,188.20 for making this fee application (Doc 229 [Giunta-Popeil Affirmation] ¶¶ 3-4, 22 [asserting that they spent 32.5 hours of time spent and fees incurred preparing this inquest attorney fee application]). Awarding plaintiffs this sum would amount to an impermissible award of fees on fees. “It has been established that an award of fees on fees must be based on a statute or on an agreement...” (*Sage Realty Corp. v Proskauer Rose LLP*, 288 AD2d 14 [1st Dept 2001]). Absent any statute or agreement allowing fees on fees, the request must be denied (*see Batsidis v Wallack Management Co., Inc.*, 126 AD3d 551, 553 [1st Dept 2015]).

Here, no such statute or agreement permits recovering these fees on fees. Additionally, in its July 25, 2023 decision on Motion Sequence No. 04, the court expressly “[awarded] plaintiffs their reasonable attorney’s fees spent uncovering defendant’s misrepresentations and time spent on this motion and subsequently directed plaintiffs “to file papers in support of an inquest on attorney’s fees spent uncovering defendant’s misrepresentations and time spent on this motion.” meaning Motion Sequence No. 04, plaintiffs’ motion to strike and for adverse inferences (Doc 227 [MS 04 Decision] at 4).

Next, the court declines to award the full \$113,376.25 that plaintiffs seek for fees incurred uncovering defendants’ omissions/misrepresentations and making the sanctions motion. First, the time records and entries submitted by plaintiffs’ counsel indicate numerous instances of

duplicative and excessive work being performed. The submissions provided indicate that multiple attorneys were billing for tasks that are essentially the same in nature, making these tasks, and such work by counsel, duplicative and unnecessary. Additionally, the records submitted indicate more than excessive instances of counsel double and even triple billing for meetings, court appearances, court conferences, and even for group meetings and conversations with one another.

For instance, counsel's submissions provide that on May 11, 2023, plaintiffs' counsel triple billed for a meeting that took place between three attorneys, JDS, MS and LG. Specifically, the attorney labeled as "JDS" billed 1.3 hours to "[p]repare for and have meeting regarding motion," the attorney labeled as "MS" billed 1 hour for a [c]onference call with [JDS] and [LG] to discuss motion to strike/adverse inference and upcom[ing] proceedings," and the attorney labeled as "LG" billed another 1.0 hours for a "zoom [meeting] with JDS and M[S] regarding strategy for adverse inference motion, further revisions and edits" (Doc 231 [Contemporaneous Time Records]).

Thus, based on these submissions and time entries, it is clear that these three attorneys were billing for essentially the same meeting or conference call that took place, rendering it duplicative and even excessive given the tasks being performed and the current posture of this case.

Further, the submitted time records are also rife with block billing and excessive billing. For instance, on April 17, 2023, attorney "LG" billed 6 hours for "drafting and revising facts for attorney affirmation for adverse inference motion, including email communications between Yaci/Angela and Simela, timeline of Simela starting new practice, communications with referral sources, notification of litigation, cell phone and Jackson affidavits, etc." (Doc 231 [Contemporaneous Time Records]). Additionally, on May 17, 2023, attorney "LG", again, inputted another 6-hour entry for "researching and searching for analogous cases to support striking pleading, adverse inference, incorporating in argument sections, further drafting memo of

law” (*id.*). Finally, on May 23, 2023, attorney “LG” inputted a 6-hour entry “for memo of law, continue researching and drafting new sections on fraud on the court, adverse inference for failure to comply with discovery, adverse inference vs resolving issues, why evidence is crucial, etc” (*id.*).

These block-billed entries prevent the court from determining the reasonableness of the requested attorneys’ fees, as it is impossible to differentiate or specify how much time plaintiffs’ counsel spent on each of the tasks that are listed. Further, the entries, specifically the first two six-hour billing blocks, and the second two six-hour billing blocks, are also indicative of excessive billing on plaintiffs’ counsel’s part, further warranting a reduction in the award. Under the circumstances, the court finds that a 50% reduction of the requested \$113,376.25 award is appropriate to account for inefficiencies, excessiveness, and duplicative efforts and work (*see David Z. Inc. v Timur on Fifth Ave., Inc.*, 7AD3d 257, 258 [1st Dept 2004] [reducing award of attorneys’ fees from \$13,793 to \$7,500 after finding the original award “excessive”])

Thus, the court declines to award plaintiffs the full amount requested [\$127,564.45]. As discussed above, the court declines to award plaintiffs \$14,188.20 that they seek for their counsels’ work on this fee application. Further, the court also exercises its discretion to reduce the remaining amount [\$113,376.25] by 50%. As such, the court awards plaintiff’s attorneys’ fees in the amount of \$56,688.13 [50% of the remaining \$113,376.25].

The court has considered the parties’ remaining arguments and finds them unavailing.

Accordingly, it is

ORDERED that the clerk is directed to enter judgment, in favor of Plaintiffs, and as against defendants, in the amount of \$56,688.13, and defendants shall have execution therefor.

26
10/ /2023
DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE	
		<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER