

Casazza v Poughkeepsie Crossings, LLC
2023 NY Slip Op 35270(U)
May 16, 2023
Supreme Court, Dutchess County
Docket Number: Index No. 2018-53505
Judge: Maria G. Rosa
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa, Justice

CAROL CASAZZA, Deceased, by and through
CHERYL WINTERHALT, as Executrix of the Estate
of CAROL CASAZZA,

Plaintiff,

DECISION AND ORDER

-against-

Index No. 2018-53505

POUGHKEEPSIE CROSSINGS, LLC,
POUGHKEEPSIE CROSSINGS, LLC d/b/a THE
PINES AT POUGHKEEPSIE CENTER FOR
NURSING AND REHABILITATION, THE PINES
AT POUGHKEEPSIE CENTER FOR NURSING
AND REHABILITATION and NATIONAL
HEALTHCARE ASSOCIATES INC.,

Motion Sequence: 9

Defendants.

The following papers were read and considered on Defendants' motion for an award of fees and costs associated with the trial of this matter held February 27, 2023 to March 2, 2023 and which resulted in a mistrial, and for the sealing of a confidential addendum submitted in support of the motion:

<u>Document:</u>	<u>NYSCEF Doc. No(s):</u>
NOTICE OF MOTION.....	138
AFFIRMATION IN SUPPORT and EXHIBITS A-D.....	139-143
CONFIDENTIAL ADDENDUM FOR <i>IN CAMERA</i> INSPECTION ¹	
AFFIRMATION IN OPPOSITION.....	145
REPLY AFFIRMATION.....	147

This is an action for alleged nursing home neglect/abuse and wrongful death while Decedent, Carol Casazza, was a resident at Defendants' nursing home facility from October 31,

¹ Not e-filed.

2016 through November 27, 2016. Plaintiff commenced this action on November 6, 2018, asserting violations under Public Health Law §§ 2801-d and 2803-c, as well as claims for negligence, gross negligence and wrongful death.

Jury selection and trial proceeded on February 27, 2023 to March 1, 2023. As a result of misconduct by counsel for Plaintiff during direct examination of Plaintiff's nursing expert on March 1, 2023, a mistrial was declared and counsel for Defendants was granted permission to file the instant motion for recovery of costs and expenses incurred to prepare for and conduct the trial.

In support of their motion, Defendants submitted, for *in camera* review, a confidential addendum including copies of their law firm's invoices for January and February 2023, and a draft invoice for March 2023. In total, Defendants are seeking recovery of \$70,295.92, representing \$63,020.00 in attorney's fees and \$7,275.92 in expenses. The attorney's fees are represented in the firm's invoices by time billed for attorney work on this matter from January 2, 2023 through March 14, 2023, and the expenses include travel costs, expert costs, and trial transcript costs. In response, Plaintiff's counsel does not dispute that Defendants should be entitled to some cost recovery in light of Plaintiff's trial counsel's "improper attorney conduct,"² but that any such recovery should exclude trial preparation items which may be re-utilized when this case is re-tried.

"The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1[a]). "The court may award costs . . . only upon a written decision setting forth the conduct on which the award . . . is based, the reasons why the court found the conduct to be frivolous, and the reasons why the court found the amount awarded . . . to be appropriate. An award of costs . . . shall be entered as a judgment of the court" (22 NYCRR 130-1.2).

Here, as the Court determined on the record on March 2, 2023, a mistrial was declared because Plaintiff's prior trial counsel improperly attempted to influence the testimony of Plaintiff's nursing expert during a break in testimony but while the expert was still under oath. Plaintiff's prior trial counsel also initially denied having done so when questioned by the Court. This put the Court in the untenable position of either disqualifying the witness and effectively precluding Plaintiff from being able to prove her case, or continuing trial over Defendants' objections. Either option would have imposed unreasonable and unnecessary prejudice to one side's case, therefore warranting a mistrial.

The conduct of Plaintiff's former trial counsel constituted "frivolous conduct" as defined in 22 NYCRR 130-1.1(c), insofar as it was patently without merit in law³ and was in violation of the Court's specific directive that there be no communication during the break between the witness and counsel regarding her testimony. The Appellate Division, Second Department has held under similar circumstances that an award of "costs . . . incurred in participating in the first trial" should be paid by Plaintiff's former trial counsel or his law firm to Defendants (*see Bermejo v New York*

² Affirmation of Ann. R. Johnson, Esq. in Response (NYSCEF Doc. No. 145) at ¶4 (quoting *Sawh v Bridges*, 120 AD2d 74 [2d Dept 1986]).

³ See Rules of Professional Conduct 3.3(f), 3.4(c), and 8.4.

City Health and Hosps. Corp., 135 AD3d 116 [2d Dept 2015]). Defendants' actual expenses for the trial, other than travel, are therefore recoverable (22 NYCRR 130-1.1[a]).

The amount of reasonable attorney's fees recoverable "requires a determination . . . based upon a demonstration of the hours reasonably expended on the litigation and what is reasonable compensation for the attorney based upon the prevailing rate for similar work in the community" (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836, 839 [2d Dept 2016]). Here, consistent with the *Bermejo* case, Defendants should be reimbursed for the reasonable attorney's fees incurred to prepare for and conduct the first trial which will need to be either redone or substantially duplicated for the re-trial. Thus, expenditures for attendance at jury selection and trial are recoverable. Because Plaintiff must now procure a new expert, all expenditures related to Defendants' expert witnesses (who may need to be changed or supplemented) and preparing for cross-examination of Plaintiff's expert are also recoverable. However, the expenditures for the procurement and organization of medical records and other evidence, work on motions *in limine* and other pretrial work product (other than pertaining to experts), preparations for jury selection, pretrial conferences, communications with clients and insurance carriers, and travel time are not recoverable.

Defendants' billing records include charges related to this motion. An award of attorney's fees for the cost of making an application for fees, "or so called 'fees on fees,'" is not recoverable in "the absence of unmistakably clear intent" to permit such a recovery (*Matter of Lillian G.*, 208 AD3d 871 [2d Dept 2022]). Here, the scope of leave granted by the Court on March 2, 2023 did not include the attorney's fees incurred for the making of Defendants' motion, and permission to seek those fees "should not be implied" (*id.*). The Court has discretion, however, to award the costs of a motion in favor of any party (CPLR 8106). Because the Court directed Defendants to make the application for attorney's fees and costs by motion, it is appropriate that they recover the filing fee for the motion of \$45.00 plus the 2.99% credit card fee for a total of \$46.35.

Based on the three billing invoices submitted and finding that the hourly rates charged by Defendants' attorneys are in line with rates customarily charged by attorneys in this region for similar services:

- the amount of recoverable attorney's fees is computed to be \$15,858.50, which includes: time spent on pretrial expert preparations on January 20, 24, and 25, and February 5, 6, 13, 15, 24 and 26, and March 6; and trial attendance and related preparations on February 27 and 28, and March 1 and 2;
- the amount of recoverable expenses is computed to be \$6,749.85 for expert's fees and investigation costs, copies of trial transcripts, and the court fees for this motion;
- for a total of \$22,608.35.

The sum should be payable to Defendants' counsel jointly and severally by Plaintiff's prior trial counsel and the law firm of Finkelstein & Partners, LLP.

Based on the foregoing, it is hereby

ORDERED that Defendants are awarded the sum of \$22,608.35 payable jointly and severally by Jeffrey M. Brody, Esq. and Finkelstein & Partners, LLP to Defendants' counsel within thirty (30) days of service of this decision and order with notice of its entry; and it is further

ORDERED that **Defendants' confidential addendum submitted in hard copy to chambers for *in camera* inspection shall be sealed, and the Clerk is hereby directed to scan and e-file the document on the NYSCEF System to be accessible only to Defendants' counsel and the Court.**

This matter remains scheduled for a further pretrial / settlement conference on October 3, 2023 at 9:15 a.m. and for jury selection on January 29, 2024.

The foregoing constitutes the decision and order of the Court.

Dated: May 16, 2023
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

Scanned to the E-File System only

Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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