

**Matter of Raphaelson & Levine Law Firm, P.C. v
Cellino & Barnes**

2024 NY Slip Op 32939(U)

August 19, 2024

Supreme Court, New York County

Docket Number: Index No. 805449/2023

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of
THE RAPHAELSON AND LEVINE LAW FIRM, P.C.,
Petitioner,

INDEX NO. 805449/2023

MOTION DATE 07/12/2024

MOTION SEQ. NO. 001

- v -

CELLINO & BARNES and SACCO & FILLAS, LLP,
Respondents.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14

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

The Raphaelson and Levine Law Firm, P.C. (Raphaelson), petitions pursuant to Judiciary Law § 475 to determine the amount of the charging liens for attorneys’ fees, if any, of the law firms Cellino & Barnes (Cellino) and Sacco & Fillas, LLP (Sacco), in connection with the settlement proceeds of a medical malpractice, lack of informed consent, statutory nursing home negligence, and wrongful death action entitled *Zayas, as Administrator of Estate of Muniz v Citadel Nursing and Rehabilitation Center at Kingsbridge*, which was litigated in the Supreme Court, Bronx County, under Index No. 22517/2018E (the *Zayas* action). Cellino, which was *Zayas’s* initial attorney, does not answer the petition. Sacco answers the petition, alleging that it had substituted for Cellino, and that it performed a substantial amount of work on the case before it was, in turn, substituted by Raphaelson. The court concludes that Raphaelson is entitled to 85% of the total contingent attorneys’ fee as may be approved pursuant to any decedent’s compromise order entered either in the Supreme Court, Bronx County, in the *Zayas* action, or in the Surrogate’s Court, Bronx County, in the administration or probate proceeding entitled *Matter of Estate of Guillermina Muniz*. The court further concludes that Sacco is entitled

to 10% of the total fee, and Cellino, or its successors, is entitled to 5%. The contingency fee shall be calculated, however, on the net proceeds of the settlement, after Raphaelson is reimbursed for expenses and disbursements that it incurred in litigating the *Zayas* action, as either such court shall determine, and after Sacco is reimbursed the sum of \$3,456.34 for expenses and disbursements that it incurred in litigating the *Zayas* action.

This court has reviewed the docket entries in the *Zayas* action, as well as the submissions of both Raphaelson and Sacco. The court notes that Cellino commenced the *Zayas* action on January 30, 2018, caused the defendant to be served with process on May 23, 2018, and moved for leave to enter a default judgment against the defendant on March 13, 2019. Cellino agreed to withdraw the motion upon stipulating to the defendant's request to vacate its default and answer the complaint, and the motion was denied as academic in an order dated March 28, 2019 (Capella, J.). After the defendant answered the complaint on April 30, 2019, and served demands for a bill of particulars and numerous items of discovery on May 3, 2019, that court entered a preliminary conference order dated September 16, 2019, which scheduled deadlines for discovery, and fixed dates upon which depositions were to be conducted. Cellino did not independently propound any discovery demands. Before any discovery could be exchanged, the courts were closed due to the COVID-19 pandemic between March 17, 2020 and June 10, 2020, and all filings were suspended until May 5, 2020. Sacco was substituted for Cellino on May 29, 2020.

On July 9, 2020, Sacco moved to compel the defendant's deposition. Sacco made demands for the defendant's records and charts, and defended the plaintiff's deposition, which was conducted on January 7, 2021. The Supreme Court, Bronx County, did not determine Sacco's motion until August 17, 2021, when it denied the motion as academic, upon simultaneously entering a compliance conference order that rescheduled the defendant's deposition for September 10, 2021, and fixed deadlines for other outstanding discovery matters. The compliance conference order, however, was not entered upon the consent of both parties,

but was submitted by Sacco to that court for its signature only minutes before a scheduled conference and, hence, without input from the defendant. In a letter dated September 10, 2021, the defendant's attorneys informed that court that,

“[m]ultiple times—most recently on August 5, 2021 and September 2, 2021—we advised plaintiff that we were inquiring with our client as to the designated Director of Nursing Services for deposition scheduling. On September 9, 2021, plaintiff's office exchanged multiple emails with the undersigned, and yet again threatened motion practice if a defense witness was not produced on September 10, 2021, a date that was unilaterally set by plaintiff in a non-consent order we had no input on. Our witness was not available on this date, which plaintiff's office would have been aware of if we had been consulted on the aforementioned discovery order.”

Sacco ultimately did not conduct the defendant's deposition on that date or on any other date.

Rather, Raphaelson was substituted as Zayas's attorney on June 23, 2022.

Neither Cellino nor Sacco elected to be paid a per-hour fee on a quantum meruit basis. Rather, both either expressly or implicitly left the apportionment of attorney's fee up to a court of competent jurisdiction. Inasmuch as Judiciary Law § 475 authorizes attorneys who might be entitled to a share of a contingency fee to petition a court for such an apportionment, Raphaelson commenced the instant proceeding in this court on November 6, 2023.

In its unverified petition, and in an affirmation of one of its associates, Raphaelson alleged that the work that it undertook included its overall review of the case file in the *Zayas* action, and its counselling of the plaintiff on the value of the action immediately after being substituted. It further alleged that it settled the action for the gross sum of \$250,000.00, after it had negotiated down all liens that would have attached to the settlement proceeds, whereas both prior attorneys did not attempt to do so. It asserted that the prior attorneys had not even secured an offer of settlement from the defendant. Raphaelson further alleged that, in obtaining the settlement, it also “[p]ursued testimony from defendant (when prior counsel did not secure it); [u]ncovered potentially applicable policies (wh[ich] prior counsel did not secure); and “[t]horoughly prepared for and attended multiple mediations.”

In response, Cellino did not submit any papers. Sacco, in an affirmation from one of its attorneys, asserted that, in addition to the work described by the court above, it undertook “extensive work on the . . . case from January 5, 2020 to August 1, 2022” that consisted of responding to discovery demands, obtaining the decedent’s medical records, scheduling the plaintiff’s deposition, preparing the plaintiff for her deposition, submitting a proposed compliance conference order, appearing in court for a conference, entering into a mediation agreement, and scheduling a mediation session, as well as reviewing correspondence and the decedent’s medical charts. Sacco averred that it also initiated settlement negotiations.

Any charging lien on a recovery secured in this matter may be asserted with respect to legal work performed “[f]rom the commencement of an action” (Judiciary Law § 475; *see Matter of Taylor, Jacoby & Campo*, 208 AD2d 400, 401 [1st Dept 1994] [lien may only be asserted by an attorney who appears for a party in an action or special proceeding]; *see also Jaghab & Jaghab v Marshall*, 256 AD2d 342, 343 [2d Dept 1998]). “An attorney of record who is discharged without cause possesses a charging lien pursuant to Judiciary Law § 475 which constitutes an equitable ownership of the cause of action and attaches to any recovery” (*Messina v Wedderburn*, 222 AD3d 741, 742 [2d Dept 2023], quoting *Maher v Quality Bus Serv., LLC*, 144 AD3d 990, 991 [2d Dept 2016]). Since Cellino, Sacco, and Raphaelson all were attorneys of record at one point in the *Zayas* action, and neither Cellino nor Sacco was discharged for cause, all three firms are entitled to share in the attorneys’ fee (*see Messina v Wedderburn*, 222 AD3d at 742; *Case v Case*, 108 AD3d 1169, 1171-1172 [4th Dept 2013]). As between attorneys, a discharged attorney may elect, as shown by his or her conduct, to receive compensation (1) immediately based on quantum meruit, calculated pursuant to hourly billing rates, or (2) based on contingent percentage fee as proportionate share of work performed on whole case. Where that election is not made or sought at time of discharge, the presumption is that a contingent fee has been chosen (*see Cohen v Grainger, Tesoriero & Bell*, 81 NY2d 655,

660 [1993]). Nothing in the record suggests that either Cellino or Sacco ever elected quantum meruit based on their hourly billing rates. As the Court of Appeals has explained in more detail:

“Under New York law a client may discharge an attorney at any time, with or without cause (*Matter of Montgomery*, 272 NY 323, 326; *Reubenbaum v B. & H. Express*, 6 AD2d 47, 48 [Breitel, J.]). When a client discharges an attorney without cause, the attorney is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered whether that be more or less than the amount provided in the contract or retainer agreement (*Matter of Montgomery*, *supra*, at 326-327). As between them, either can require that the compensation be a fixed dollar amount determined at the time of discharge on the basis of quantum meruit (*Reubenbaum v B. & H. Express*, *supra*, at 48) or, in the alternative, they may agree that the attorney, in lieu of a presently fixed dollar amount, will receive a contingent percentage fee determined either at the time of substitution or at the conclusion of the case (*id.*).

“Where the dispute is only between attorneys, however, the rules are somewhat different. The outgoing attorney may elect to take compensation on the basis of a presently fixed dollar amount based upon quantum meruit for the reasonable value of services or, in lieu thereof, the outgoing attorney has the right to elect a contingent percentage fee based on the proportionate share of the work performed on the whole case (*Matter of Cordes v Purcell, Fritz & Ingrao*, 89 AD2d 870; *Paulsen v Halpin*, 74 AD2d 990, 991; *Reubenbaum v B. & H. Express*, *supra*, at 49). The percentage may be fixed at the time of substitution but, as several courts have recognized, is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery can be ascertained (see, *Matter of Cordes v Purcell, Fritz & Ingrao*, 89 AD2d 870, *supra*; *Paulsen v Halpin*, *supra*, at 991; *Reubenbaum v B. & H. Express*, *supra*, at 49; *Buckley v Surface Transp. Corp.*, 277 App Div 224, 226)”

(*Cheng v Modansky Leasing Co.*, 73 NY2d 454, 457-458 [1989]).

Since neither Cellino nor Sacco immediately sought compensation when they were discharged as Zayas’s attorney, this court is obligated to determine the proportionate share of the work performed by Cellino, Sacco, and Raphaelson, “focus[ing] on the time and labor spent by each [firm], the actual work performed, the difficulty of the questions involved, the skill required to handle the matter, the attorney[s]’ skills and experience, and the effectiveness of counsel in bringing the matter to resolution” (*Young, Fenton, Kelsey & Brown, P.C. v Wein*, 111 AD3d 1194, 1196 [3d Dept 2013], quoting *Buchta v Union-Endicott Cent. School Dist.*, 296 AD2d 688, 689-690 [3d Dept 2002] [internal quotation marks and citations omitted]). Stated another way, courts must “[c]onsider[] the amount of time spent by both the former and current

attorneys on the matter, the nature of the work performed, *and their relative contributions*" (*Kottl v Carey*, 85 AD3d 870, 872 [2d Dept 2011] [emphasis added]), the latter term which has been defined by the Appellate Division, First Department, as the "relative contributions of counsel toward achieving the outcome" of the litigation (*Diakrousis v Maganga*, 61 AD3d 469, 469 [1st Dept 2009], citing *Cheng v Modansky Leasing Co.*, 73 NY2d at 458).

Considering the time and labor spent by each attorney, the actual work performed, the difficulty of the questions involved, the skill required, the attorneys' skills and experience, and the effectiveness of counsel in resolving the matter, the court concludes that Raphaelson is entitled to 85% percent of the fee, Sacco is entitled to 10% of the fee, and Cellino is entitled to 5% of the fee (*see Buchta v Union-Endicott Cent. Sch. Dist.*, 296 AD2d at 690; *Wiley v Balla*, 2019 NY Misc LEXIS 50831, *3 [Sup Ct, Bronx County, Jul. 17, 2019] [Higgitt, J.] [while the outgoing attorney "laid the foundation for the case in the four months that they represented plaintiff," the attorney that settled the action "handled most of the significant litigation activities in the case and obtained a settlement for plaintiff"; hence, settling attorney is entitled to 85% of contingency fee, and outgoing attorney is entitled to 15%]; *see generally Soto v Adams* 189 AD2d 868, 870 [2d Dept 1993]).

Since Sacco was not discharged for cause, it also is entitled to the sum of \$3,456.34 for the reimbursement of its expenses, which the court finds were actually expended, were warranted in connection with its prosecution of the *Zayas* action, and were reasonable (*see Lansky v Easow*, 304 AD2d 533, 533-534 [2d Dept 2003] [granting attorney's application for reimbursement of expenses in the sum of \$2,084.75]; *cf. Matter of Verna Eggleston v Jennifer D.*, 88 AD3d 706, 707 [2d Dept 2011] [remitting to Supreme Court for a hearing on the reasonableness of attorney's claim for reimbursement of \$19,720.00 that he expended for social work services in a Mental Hygiene Law article 81 proceeding]). Raphaelson shall also be reimbursed for its expenses and disbursements, in an amount that shall be approved either by the Supreme Court, Bronx County, or the Surrogate's Court, Bronx County, as the case may be.

The court notes that, where an attorney or his or her firm is a party to the action, he or she may not submit an affirmation as a vehicle for providing the court with the facts underlying the dispute. CPLR 2106(a) does not afford attorneys who are parties to an action this privilege (see *John Harris P.C. v Krauss*, 87 AD3d 469, 469 [1st Dept 2011]). “[T]o make a competent, admissible affirmation,” an attorney who is a party “must first appear before a notary or other such official and formally declare the truth of the contents of the document” (*Doumanis v Conzo*, 265 AD2d 296, 296 [2d Dept 1999]). Here, David Silverman, an attorney associated with Raphaelson, and Tonino Sacco, and member of Sacco, submitted affirmations on behalf of their firms, even though the firms themselves are parties to this proceeding. Hence, their submissions are not in evidentiary form. Nonetheless, the court will permit them to submit the contents of their affirmations in affidavit form (see *Khurdayan v Kassir*, 223 AD3d 590, 591 [1st Dept 2024]) on or before September 30, 2024.

In light of the foregoing, it is,

ORDERED that the petition is granted to the extent that,

- (a) Sacco & Fillas, LLP, is awarded the sum of \$3,456.34 as and for the reimbursement, from the proceeds of settlement, of the expenses and disbursements that it incurred in prosecuting the action entitled *Zayas, as Administrator of Estate of Muniz v Citadel Nursing and Rehabilitation Center at Kingsbridge*, Supreme Court, Bronx County, Index No. 22517/2018E,
- (b) The Raphaelson and Levine Law Firm, P.C., is awarded a sum, from the proceeds of settlement, that will reimburse it for the reasonable expenses and disbursements that it incurred in prosecuting that action, as shall be determined in any decedent’s compromise order entered either by the Supreme Court, Bronx County, in that action, or by the Surrogate’s Court, Bronx County, in the proceeding entitled *Matter of Estate of Guillermina Muniz*, as the case may be,
- (c) The Raphaelson and Levine Law Firm, P.C., is awarded 85% of the total of any attorneys’ fee that shall be approved in any decedent’s compromise order entered either by the Supreme Court, Bronx County, in the action entitled *Zayas, as Administrator of Estate of Muniz v Citadel Nursing and Rehabilitation Center at Kingsbridge*, Supreme Court, Bronx County, Index No. 22517/2018E, or by the Surrogate’s Court, Bronx County, in the proceeding entitled *Matter of Estate of Guillermina Muniz*, as the case may be,

(d) Sacco & Fillas, LLP, is awarded 10% of the total of any attorneys' fee that shall be approved in any decedent's compromise order entered either by the Supreme Court, Bronx County in the action entitled *Zayas, as Administrator of Estate of Muniz v Citadel Nursing and Rehabilitation Center at Kingsbridge*, Supreme Court, Bronx County, Index No. 22517/2018E, or by the Surrogate's Court, Bronx County, in the proceeding entitled *Matter of Estate of Guillermina Muniz*, as the case may be, and

(e) Cellino & Barnes, or its successors-in-interest, sharing equally, is awarded 5% of the total of any attorneys' fee that shall be approved in any decedent's compromise order entered either by the Supreme Court, Bronx County, in the action entitled *Zayas, as Administrator of Estate of Muniz v Citadel Nursing and Rehabilitation Center at Kingsbridge*, Supreme Court, Bronx County, Index No. 22517/2018E, or by the Surrogate's Court, Bronx County, in the proceeding entitled *Matter of Estate of Guillermina Muniz*, as the case may be, and

any other relief requested in the petition is denied; and it is further,

ORDERED that, on or before September 30, 2024, The Raphaelson and Levine Law Firm, P.C., and Sacco & Fillas, LLP, shall submit the content of their attorneys' affirmations in the form of an affidavit.

This constitutes the Decision and Order of the court.

JOHN J. KELLEY, J.S.C.

8/19/2024
DATE

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