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

PRESENT: HON. JUDITH J. GISCHE PART 10
Justice

Lupo

Plaintiff (s),

INDEX NO. 107565/06

MOTION DATE

- v -

MOTION SEQ. NO. 006

Peo Foods Defendant(s).

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

The motion + X-motion are decided in accordance with the annexed decision + order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

MAY 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/30/12

HON. JUDITH J. GISCHE, J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE [ ] SETTLE/SUBMIT ORDER

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

----------X

GIULIO LUPO,

Plaintiff,

-against-

PRO FOODS, LLC, PRO FOODS RESTAURANT SUPPLY, LLC. SCHIMENTI CONSTRUCTION COMPANY OF NEW YORK, INC., SCHIMENTI CONSTRUCTION COMPANY, LLC., and COPPOLA PAVING & LANDSCAPING CORP.,

Defendants.

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SCHIMENTI CONSTRUCTION COMPANY OF NEW YORK, INC., and SCHIMENTI CONSTRUCTION COMPANY, LLC,

Third-party Plaintiffs,

-against-

JAK CONSTRUCTION SERVICES,

Third-Party Defendants.

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Decision/Order

Index # 107565/06
Mot. Seq. # 006

Hon. Gische, J.:

Pursuant to CPLR §2219(A) the following numbered papers were considered by the court in connection with these motions:

PAPERS	**NUMBERED**
OSC, DHP affirm, exhibits	1
BG affirm, exhibits., Lupo affirm	2
Notice of Cross-motion, BG affirm	3
PDR affirm., DHP affd., exhibits	4
PDR supp affd, exhibit	5
RCB affd	6
BG affirm., exhibit	7

PDR supp affd, exhibits.....8
BG supp affirm.....9

Upon the foregoing papers the decision and order of the court is as follows:

This is a dispute between Plaintiff, Giulio Lupo's ("Lupo") former and present attorneys concerning their respective right to share in legal fees generated by a $1,785,000 settlement in the underlying action. Lupo's former attorneys, The Perecman Firm PLLC ("PLF"), moved by Order to Show Cause ("OSC") for a fee hearing and to have the settlement funds held in escrow, after payment of its disbursements, pending resolution of the fee dispute. Sullivan Gardner PC ("SGLF"), Lupo's current attorneys, have cross-moved for a declaration that PLF was discharged "for cause" and, therefore, not entitled to any fees, or, alternatively, that the court apportion a part of the legal fee to SGLF in an amount of not less than 1/3 the total legal fee on the entire settlement. After the original OSC was brought, PLF was paid the sum of $77,032.81, representing its disbursements. The remainder of the settlement proceeds are being held by SGLF in an interest bearing escrow account.[1] $569,322.40 of the settlement proceeds account for the entire contingent legal fee on the settlment.[2]

Underlying History of the Case

In or about 2006, Lupo hired the law firm of Perecman and Fanning, LLP (" P & F

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[1]The parties had some discussion during court conferences about whether the entire net settlement proceeds, including Lupo's portion, should be held in escrow. The court, however, is only requiring that there should at least be sufficient funds held in escrow to cover all of the legal fees due Lupo's former and current attorneys.

[2]Each attorney claims that their retainer agreement with Lupo was to collect 1/3 of the net recovery. This is a customary fee arrangement on a personal injury claim. As a consequence, there is no serious dispute that the total legal fee available, no matter how it it allocated among counsel, is the amount indicated above.

LF"), to commence a law suit on his behalf in connection with a work related accident that occurred, on November 17, 2004. P & F LF was also hired to pursue a related worker's compensation claim arising from the same incident. The instant personal injury action was originally commenced against various defendants, alleging common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). David Perecman, Esq. ("Perecman") had primary responsibility for the personal injury claim, while his then partner ("Fanning"), was primarily responsible for the worker's compensation claim. When Perecman and Fanning ended their professional association, Lupo's personal injury case remained with Perecman. Perecmen and other attorneys in PLF continued to work on the case until August 11, 2011, when Brian Gardner, Esq. ("Gardner") a member of SGLF, notified Perecman that Lupo was terminating PLF "for cause" and had hired them.

The underlying accident occurred when Lupo, at work at an active construction site, walked across a newly poured concrete floor, covered with a milky plastic sheet.[3] Lupo fell into a depression that existed at the end and below the grade of the concrete floor, where a ramp was located. In connection with pre-trial summary judgment motions, the Hon. Edward J. Lehner, by decision and order entered February 24, 2009, dismissed all the causes of action brought pursuant to Labor Law §§ 240(1) and 241(6). The Appellate Division affirmed that decision (68 AD3d 607 [1st dept 2009]). The Appellate Division expressly held:

> ...[I]t is clear that plaintiff's fall occurred at a place where he had not been working and where he did not need to be in order to perform his assigned task of collecting a lighting fixture since he conceded that he could have accessed the

[3]The plastic sheet was a temporary cover placed while the concrete was curing.

> stairs other than by walking over the newly poured concrete surface. Moreover he acknowledged that he had been aware of the hole/ramp since he began work at the site.

The Appellate Division also held that the trial court's implicit denial of the amendment of the bill of particulars, made only after the filing of a note of issue, was proper.

As a result of these decisions, when the matter was finally tried, the only theory of liability remaining for consideration was ordinary negligence and the only defendant remaining was Coppola Paving & Landscaping Corp. ("Coppola"). The trial also proceeded on the third party complaint made by Coppola against Schimenti Construction Company of New York, Inc. and Schimenti Construction Company, LLC (collectively "Schimenti").

A jury was selected in July, 2010 and the matter was then assigned to this court to preside over the trial. The trial took place over eight days in July and August 2010. During that time, two settlement offers respectively for $400,000 and $600,000 were communicated to, and rejected by, Lupo. At the close of the evidence, the court granted Schimenti's motion for a directed verdict on the third party complaint, because it had successfully proven that it was Lupo's special employer and, therefore, not amenable to suit. Thus, when the case was submitted to the jury, it only considered the case against Coppola, which was the subcontractor at the work site responsible for pouring the concrete floor and covering it with plastic. The issue of liability against Coppola turned largely on the factually disputed issue of whether, and to what extent, the plastic covering over the concrete floor extended over the opening for the ramp.

The jury returned a verdict finding that: Coppola was negligent and that its

negligence was a substantial factor in causing Lupo's injuries; but that Lupo was not comparatively negligent. The jury awarded Lupo $240,000 for past pain and suffering, $500,000 for future pain and suffering, $185,978.22 for past loss of earnings and $1,441,318.90 for future loss of earnings. Counsel had previously stipulated that Lupo's medical expenses were $241,921.54.

Following the jury verdict, Coppola moved to set aside the verdict and to remit on the issue of damages. Lupo separately moved for a new trial to increase the damages awarded for pain and suffering. By decision and order, dated March 9, 2011 ("March 9, 2011 decision"), this court denied Lupo's motion and granted Coppola's motion only to the extent of holding that the jury's finding, that Lupo was not comparatively negligent, was against the weight of the evidence. The court directed a re-trial on that issue unless Lupo agreed to a 25% reduction in the award. The court expressly held:

> Nonetheless, the court does agree with Coppola's arguments that it was against the weight of the evidence for the jury not to have found that Lupo was also negligent. The evidence is unrefuted that no more than a week before the accident, Lupo knew there was a depression in the area in which he later fell. While Lupo speculates that in the week that passed the configuration of the ramp might have changed because it was an active construction site, even if you believe that testimony, he still had a duty to look and see if there actually were any changes that would have made the unsafe condition now safe. In fact any changes made since he had last observed the area, did not make it any more safe. The fact that the area was covered with plastic that obstructed his view, did not absolve him of investigating further to determine if there was still a four foot depression in the area, before walking right into it, falling and injuring himself. (See: Williams v. Hooper, __AD3d __ [1st dept. 2011]; Perez v. Audobon at 186th Street, LLC, 1 AD3d 492 [2nd dept. 2003]). The court, therefore, sets aside the jury verdict on the issue issues of comparative negligence, and orders that there be a retrial, unless the plaintiff agrees to accept a finding of comparative negligence at 25% and to reduce the award of damages accordingly.

(McCollin v. New York City Housing Authority, 307 AD2d 875 [1st dept. 2003]; Streich v. New York City Transit Authority, 305 AD2d 221 [1st dept. 2003]).

Notices of Appeal were filed on behalf of Lupo and defendants. Following the March 9, 2011 decision, several court conferences were scheduled and eventually a firm re- trial date of December 5, 2011 was set. Before the re- trial date was set, the court scheduled this case for a conference on three separate occasions. These conferences were originally scheduled at the behest of Coppola, which wanted to discuss settlement. They were adjourned, however, because Lupo was neither prepared to settle the case at that time, nor prepared to proceed with re-trial. In addition, Lupo's relationship with PLF was clearly breaking down.

The first conference was held on June 30, 2011. Lupo was physically present in court that day with PLF attorneys Perecman, and Adam Hurwitz ("Hurwitz'). Lupo also came to court with another attorney, Genevieve LoPresti ("LoPresti"), who was not associated with PLF, but came at Lupo's behest and as his personal advisor. Pereceman and Hurwittz state, and Lupo does not deny, that various aspects of the case were discussed with Lupo that day and the matter was adjourned to allow Lupo to consider his legal options.

A second conference was held on July 21, 2011, at which Coppola made an offer to settle the matter for $1,500,000. At that conference Perecman and Perter D. Rigelhupt ("Rigelhupt") of PLF were in court. Lupo and LoPresti were also in court. The offer was rejected, after which Lupo, Perecman, Rigelhaupt and LoPresti privately met and discussed the matter further for approximately an hour. It was PLF's understanding by that time that Lupo wanted to appeal the March 9, 2011 decision and to seek a stay of

the re-trial from the Appellate Division. The case was adjourned for another conference, partly to allow Lupo to pursue a stay.

The next conference, held on September 1, 2011, occurred after PLF had been informed that it was terminated "for cause", but before a formal substitution of new counsel had yet occurred. Perecman and Peter Sullivan, Esq. ("Sullivan"), a partner at SGLF, both appeared at the September 1, 2011 conference on behalf of Lupo. Coppola reiterated its $1,500,000 settlement offer. The court set a trial date sufficiently in the future so that SGLF could be properly substituted and would have an ample opportunity to seek a stay from the Appellate Division. A trial date of December 5, 2011 was set.

SGLF sought, and successfully obtained, an appellate stay of the re-trial. Thereafter, they were successful in negotiating a final settlement of the matter for $1,785,000.

From the inception of the case in 2006 until August 11, 2011, Perecman and attorneys working with him at either P & F LF or PLF did all of the necessary legal work on behalf of Lupo. They conducted all pre-trial discovery and motion practice, prepared and defended dispositive motions and prosecuted an appeal of the summary judgment determination. They prepared for and conducted an eight day trial and subsequently prepared all post trial submissions, including motion submissions. They made all of the post trial appearances through the date that they were formally terminated. They filed a Notice of Appeal following the jury verdict and this courts March 9, 2011 decision.

Following its retention, SGLF attorneys reviewed materials to familiarize themselves with the case, obtained a stay from the Appellate Division of the re-trial, attended mediation at the Appellate Division, negotiated a settlement of the underlying

matter and, thereafter, negotiated a further settlement of the worker's compensation lien.

Discussion

The accusations and cross-accusations of malpractice and unprofessional conduct on this motion and cross-motion are bitter, hostile, vitriolic, personal, intense, unprofessional, and, in the end, baseless. For the reasons that follow, the court holds that Lupo has failed to make out a *prima facie* case that Perecman and/or PLF was discharged for cause, thereby, precluding the need for a hearing on that issue. Friedman v. Park Cake, Inc., 34 AD3d 286 (1st dept. 2006).

The court further holds that the remaining issue of how to divide the disputed portion of the contingent legal fee shall be referred to a Special Referee to hold a testimonial hearing and report back to the court on how it should be distributed as between Lupo's former and current counsel.

The Termination of the PLF

It is black letter law that, notwithstanding the existence of a written retainer agreement, a client may terminate the attorney client relationship at any time, with or without cause to do so. Campagnola v. Mullholland, Minion & Roe, 76 MY2d 38, 43 (1990); Doviak v. Finklestein Partners, LLP, 90 AD3d 696 (2nd dept. 2011). Where the discharge is without cause, recovery of fees by the attorney is limited to recovering, in *quantum meruit*, the reasonable value of the services provided. Where the discharge is for cause, and occurs before the completion of services, the attorney has no right to compensation or a retaining lien. Campagnola v. Mullholland, Minion & Roe, supra; Papadopoulos v. Goldstein, Goldstein & Rikon, P.C., 283 AD2d 649 (2nd dept. 2001).

Fee forfeiture is a penalty which is intended to promote public confidence in the members of an honorable profession whose relationship with clients is personal and confidential. Campagnola v. Mullholland, Minion & Roe, supra.

There is no clear legal definition of what constitutes a "for cause" termination of counsel. There are, however, certain parameters established in the common law by which such a determination may be made. See: D'Jamoos v. Griffith, 2006 WL 2086033 (EDNY 2006). The salient consideration is whether or not there was misconduct by the attorney which justified the client ending the relationship. See: Doviak v. Finklestein Partners, LLP, supra; Matter of Wingate, Russotti & Shapiro, LLP v. Friedman, Khalif & Associates, 41 AD3d 367 (1st dept. 2009) lv. den. 10 NY3d 702 (2008). Courts typically find a discharge "for cause" where there has been a significant breach of a legal duty. Allstate v. Nandi, 258 F Supp 2003 (SDNY), D'Jamoos v. Griffith, supra, Sang Seok Na v. Bernman, 18 Misc3d 1133 (NY Sup. Queens Co. 2008). The principle that an attorney must not engage in misconduct is so important that a "for cause" termination may even be based upon misconduct that occurred while the relationship was in tact, but not discovered until after the relationship was over. Doviak v. Finklestein Partners, LLP, supra.

Certainly a "for cause" determination can be made where an attorney has committed malpractice. Campagnola v. Mullholland, Minion & Roe, supra. On the other hand, it is not necessary that a client actually establish a malpractice in order to terminate his or her attorney "for cause." Boglia v. Greenberg, 63 AD3d 973 (2nd dept. 2009); D'Jamoos v. Griffith, supra. Violations of disciplinary rules can also justify a "for cause" termination Doviak v. Finklestein Partners, LLP, supra; Quinn v. Walsh, 18 AD3d 638

(2nd dept. 2005). Where, however, there is substantial compliance with the disciplinary rules, relatively minor deviations will not result in fee forfeiture. Fischbarg v. Douchet, 63 AD3d 628 (1st dept. 2009). Moreover, the forfeiture is limited to the period of time following when the violation first occurred. Margrabe v. Rusciano, 55 AD3d 689 (2nd dept. 2008),.

A "for cause" termination does not include dissatisfaction with strategic choices made in the litigation. Dovlak v. Finklestein Partners, LLP, supra. Nor does it ensue where the attorney client relationship has ended because of personality conflicts, misunderstandings or differences of opinion having nothing to do with any impropriety by either the client or the lawyer. Klein v. Eubank, 87 NY2d 459 (1996). Sang Seok Na v. Berman, 18 Misc3d 1133 (NY Sup. Queens co. 2008), Martens v. BOCES, 1999 WL 294801 (SDNY 1999)(n.o.r.).

Ordinarily a "for cause" determination is made after a testimonial hearing. Hee Jun Cheon Lee v. Garcia, 80 AD3d 541 (1st detp. 2011). No hearing is necessary, however, where the party asserting that the termination of his or her attorney was "for cause" fails to establish a *prima facie* showing. Friedman v. Park Cake, Inc., supra.

On this motion, Lupo's arguments that PLF was discharged for cause are based upon two separate categories of claims. Lupo points to: [1] Perecman's allegedly improper and hostile conduct toward him and [2] the PLF's alleged legal mishandling the case.[4]

Lupo argues that Perecman's conduct toward him violated 22 NYCRR §1200, rule 1.4, which requires a lawyer to keep the client reasonably informed about the status of a

[4]These claims are summarized in Gardner's February 14, 2012 affirmation, pages 7 through 13.

matter, promptly comply with a client's reasonable requests for information and explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Lupo's only proof of Pereceman's claimed offensive conduct toward him is contained in Lupo's February 14, 2012 affidavit. Lupo complains that Perecman called him a criminal, stupid and otherwise berated him during the case; Perecman failed to communicate that the settlement offers made were subject to offsets for attorneys fees, worker's compensation liens and disbursements; Perecman originally told him that the case was worth $7,000,000 and no settlement offers were communicated to plaintiff prior to trial; Perecman had no communications of any substance with Lupo following this court's March 9, 2011 decision; Perecman failed to: explain why he was not objecting to Schimenti's motion for a directed verdict; provide a copy of the Appellate Division decision; explain why Perecman conceded that Coppola was not liable under the Labor Laws; or to explain the difference between structured payments and lump sum payments to Lupo.

Lupo claims the case was legally mishandled because PLF: failed to allege additional industrial code violations in support of the Labor Law §241(6) claims; failed to timely amend the bill of particulars; improperly conceded that the case should be dismissed against Schimenti and improperly withdrew the Labor Law claims against Coppola. Perecman denies most of the conduct alleged or otherwise provides a context in which to understand Lupo's claims. PLF explains its legal handling of the issues raised and why there was no misconduct.

Notwithstanding Lupo's lengthy list of complaints about his six year relationship with Perecman and PLF, upon scrutiny, they lack substance. Lupo's claims about lack of

civility were never raised by letter of otherwise before the March 9, 2011 decision and Lupo never terminated the attorney client relationship with Perecman before then, despite ample opportunity to do so. His claim that Perecman repeatedly berated him as stupid and called him a criminal are bare boned with no detail of specific incidents. A general lack of civility, without more, is insufficient to sustain a "for cause" discharge particularly where, as here, the law firm's efforts resulted a substantial benefit to the client. Martens v. BOCES, supra.

Perecman denies that he berated Lupo. He admits that Lupo's criminal history was discussed but explains that it was in the context of trying the case. Lupo's background is significant for the history of a prior felony conviction, which was virtually certain to (and did) come out at trial. CPLR §4513. Lupo's criminal past was extensively discussed with him in connection with strategic choices about how to deal with this unfavorable material which was sure to be known by the jury.[5] Lupo does not deny the detail provided by PLF about how and why Lupo's criminal history was discussed with him. Discussion of Lupo's criminal history in this context is not misconduct.

Perecman does not deny that when Coppola made settlement offers at trial, he did not do a mathematical analysis of the legitimate set-offs before Lupo rejected them. Perecman does claim that, in general, Lupo was told during the course of his representation in this and the worker's compensation matter, that he would be responsible for a worker's compensation lien against any recovery. Lupo does not deny

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[5]Strategy on credibility issues was extremely important at the trial because the finding of liability hinged largely on whether the jury would believe Lupo's factual claim that the void over the ramp where he fell was covered in plastic, or, as Coppola claimed was trimmed at the point where the depression for the ramp began. In addition, given the late onset of Lupo's symptoms following the accident, there was also a significant issue of credibility on causation.

being so counseled. Nor does Lupo does claim that he lacked understanding that he had to pay his attorneys or that the four experts testifying on his behalf at trial where charging for their services. In any event, while it is preferable that attorneys discuss specific liens that attach to a client's settlement, the failure to do so is not a basis for fee forfeiture under the termination "for cause" rules. Friedman v. Park Cake, Inc., supra; In re Koeppel, 32 Misc3d 1245 (NY Co. Surr. Ct. 2011). Consequently, the fact that Perecman did not tell Lupo what he would net after payment of liens before Lupo rejected the settlement offers cannot support a "for cause" discharge of PLF.

Lupo's claim, that PLF initially valued the case at $7,000,000, provides no basis for a finding of misconduct. As cases develop over time, and information is disclosed, the projected estimated value of a case will may change. Jury determinations dependant on credibility assessments are difficult to predict. Likewise Lupo's claim, that he was not told about any settlement offers before trial, is meaningless in the absence of proof that there were any such offers.

Lupo's claims about PLF's failure to communicate with him following this court's March 9, 2011 decision is completely refuted by documentary proof. Certainly there was a breakdown in communication following the March 9, 2011 decision, but a breakdown in communication is not the same as a failure by an attorney to communicate with a client. Between March 28, 2011 and July 14, 2008 there were no fewer than five (5) letters sent to Lupo with information about the status of the case and asking him to contact PLF to further discuss the matter. Following the July 21, 2011 conference an extremely detailed letter setting out Lupo's options and memorializing the private consultation Lupo had with PLF attorneys in court was sent to him. PLF contends and Lupo does not dispute that he

did not respond to these letters. In addition there is written communication demonstrating that PLF provided Lupo's advisor, LoPresti information and records from the underlying trial in order for her to help advise Lupo.

Lupo's claim, that he was mistreated because he was not consulted about decisions made to release Coppola from Labor Law claims and Schimenti from the case are interrelated with claims that these decisions prove the case was legally mishandled. These were not strategic decisions in the sense that PLF could have continued these claims. Once discovery was complete, is was clear that the claims were devoid of legal merit and pursuing them could have exposed Lupo and PLF to sanctions. 22 NYCRR Part 130.

It became clear that Schimenti was Lupo's employer and, therefore, immune from suit under the Worker's Compensations Laws. See: Worker's Compensation Law §29, Gannon v. JWP Forest Electric Corp., 275 AD2d 231 (1st dept. 2000). Lupo, as s union employee, was being paid by a union shop paymaster, but he actually worked for Schimenti. This was the same legal basis that Schimenti's motion for a directed verdict on the third party complaint was granted. Neither Lupo nor SGLF offer any plausible legal theory which would support a direct case by Lupo against Schimenti. Likewise, Coppola had no plausible liability under the Labor Laws. Coppola, a subcontractor which did not employ Lupo, had no authority to supervise and control Lupo's work at the site. Labor Law §§240, 241; Walls v. Turner v. Construction Co., 4 NY3d 861; Russin v. Louis N. Picciano & Son, 54 NY2d 311(1981). This is, of course, is without even considering the fact that the Appellate Division dismissed the Labor Law causes of action for other reasons. The reach of the Appellate Division decison would have applied equally to

Coppola. Again nether Lupo nor SGLF raise any plausible legal reasons why Coppola is a proper Labor Law defendant. Since the claims conceded by PLF otherwise had no legal merit, such concession cannot constitute any legal mishandling of the case. By the same reasoning, even if Lupo was not consulted in advance about these decisions, they were not strategic, and any failure to obtain Lupo's input on them, is not misconduct.

The other claims of Perecman's "misconduct" are so insignificant that they do not rise to the level of misconduct that warrants a fee forfeiture. Turning to the other claims that the case was legally mishandled, the court finds they also lack merit.

To the extent that Lupo insinuates that PLF committed malpractice, the contention is rejected outright. Lupo does not claim, and cannot prove, that he would have obtained a more favorable result in the underlying litigation but for PLF's actions. Waggoner v. Caruso, 14 NY3d 874 (2010). Nor do the claims warrant a finding of misconduct under a lesser standard. Boglia v. Greenberg, 63 AD3d 973 (2nd dept. 2009).

Lupo claims that PLF should have alleged other industrial code provisions in support of the Labor Law §241(6) claim, specifically relating to tripping hazards and lighting. See: 22 NYCRR §23-1.7(e); 22 NYCRR §23-1.30. PLF claims it did allege a violation of 22 NYCRR §23-1.7. In any event, the problem with Lupo's argument is that he fails to explain how these provisions, even if alleged, would have pertained to the facts of his case. Lupo does not claim that he tripped over anything. He fell into a void. He does not show any facts that there was insufficient lighting or that lighting had anything to do with his accident. In fact, at trial he claimed that he fell because he could not see the hole through the plastic covering. In any event, deciding which industrial code provisions apply to the facts of a particular labor law case is usually a strategic

decision. Doviak v. Finkelsetin Partners, supra.

The final claim has to do with PLF's attempt to amend a bill of particulars that was denied for lateness. Seizing on the lateness aspect, and without knowing what the particular amendment was, Lupo surmises that there must have been misconduct. PLF apparently attempted to belatedly include an OSHA regulation in the bill of particulars. This OSHA regulation, whether untimely alleged or not, had no effect on the outcome of the case, and the "error" was of such an insignificant nature that it does constitute misconduct that would justify forfeiture of a fee for six years of work that resulted in an extremely favorable result for plaintiff..

The Award of Fees to the Respective Law Firms

Since the PLF was not discharged for cause, it is entitled to its proportionate share of the contingent legal fee. Campagnola v. Mulholland, Minion & Roe, supra.; Cohen v. Grainger, Tesoriero & Bell, 81 NY2d 655 (1993).

As a preliminary matter, the court rejects PLF's position that SGLF is not entitled to recover any part of the contingent fee because it committed malpractice in its representation of Lupo. Not only is there no standing by PLF to assert such a claim on Lupo's behalf (E/O Schneider v. Finmann, 15 NY3d 306 [2010]), but the argument that SGLF could have obtained a better settlement had it known about an additional $241,000 in damages that had been agreed to, but was not part of the jury award, is completely speculative. See: Rudolf v. Shayne, Dachs, Stanisci, Corker and Sauer, 8 NY3d 438 (2007). Thus, it is unnecessary to decide the disputed issue about whether SGLF did or did not know about the additional $241,000 when negotiated the final settlement..

Since the court has disposed of Lupo's "for cause" claim, all that remains to be

decided is how to divide the contingent legal fee between Lupo's former and current counsel. Lupo, although submitting an affidavit in support of SGLF cross-motion, concedes that he has no financial interest in the outcome of this dispute and he seeks no portion of the fee for himself.

Where the dispute over a legal fee is between attorneys (as opposed to an attorney and former client), the discharged attorney may elect to receive compensation immediately upon discharge or as a percentage of the contingent fee, based upon his or her proportionate share of the work performed on the whole case. Where, as here, no election was made until after the cased in finally resolved, it is presumed that former counsel desires to share in the contingent fee. Cohen v. Grainger, Tesoriero & Bell, supra. In determining each law firm's share of the contingent fee, the court considers the relative contributions of each counsel, measured by the amount of time spent by former and current counsel on the matter, the nature of the work performed and the results each counsel achieved. Cohen v. Grainger, Tesoriero & Bell, supra; Kotti v. Carey, 85 AD3d 870 (2nd dept. 2011); Hinds v. Kilgallen, 83 AD3d 781 (2nd dept. 2011); Nabi v. Sells, 70 AD3d 252 (1st dept. 2009). In splitting the fee, neither attorney should be unjustly enriched at the expense of the other. Nabi v. Sells, supra. The court should also make sure that the fees awarded are not disproportionate to the services actually provided. Lawrence v. Graubard Miller, 11 NY3d 588 (2008).

The consideration and determination of these issues usually requires a testimonial hearing. Lee v. Riverhead Bay Motors, 2011 WL 5295036 (NY Co. Sup. Ct.). Although PLF requests a fee hearing, it also argues that the hearing should be limited. PLF claims that there can be no dispute that it is entitled to the fee earned on the first $1,500,000 of the settlement because an offer to settle the case for that amount was

outstanding at the time Lupo discharged it. While this is an important argument to be considered in connection with the resolution of the dispute, the court opts for a hearing at which all relevant considerations are weighed, including the relative time each counsel spent on the case and the overall results achieved by each counsel, and a final decision can be reached on how to apportion the contingent legal fee earned on this case. The hearing on this matter will be referred to a Special Referee for this purpose.

Conclusion

In accordance herewith it is hereby:

ORDERED that the motion is granted to the extent that the amount of $569,322.40 plus interest earned to date shall continue to be retained in an interest bearing escrow account maintained by Sullivan Gardner PC, pending final disposition of the legal fee dispute in this case or further order of the court, whichever is earlier and it is further

ORDERED that all other sums may be distributed by Sullivan Garner PC as escrow agent to their rightful owner and it is further

ORDERED that the cross-motion to declare that the Perecman Firm, LLC was terminated for cause is denied and it is further

ORDERED, ADJUDGED AND DECLARED that the Perecman Firm PLLC, was terminated without cause and it is further

ORDERED that the motion and cross-motion are also granted to the extent that the movant and cross-movant's dispute about what part of the contingent legal fee earned in this matter each law firm is entitled to is referred to the Special Referee for a testimonial hearing and to report back to the court on the dispute and it is further

ORDERED that movant is directed to file a copy of this decision and order with the Special Referee's office within 30 days of when this decision and order first appears on

the Supreme Court Records On Line Library ("SCROLL") so that the matter may be calendared and it is further

ORDERED that any requested relief not otherwise granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
April 30, 2012

SO ORDERED:

J.G. J.S.C.

FILED

MAY 08 2012

NEW YORK
COUNTY CLERK'S OFFICE