

Kim & Cha, LLP v Lo
2012 NY Slip Op 32567(U)
October 5, 2012
Supreme Court, Queens County
Docket Number: 19872/11
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

KIM & CHA, LLP,

Plaintiff,

-against-

JAMES LO, ESQ.,
Defendant.

Index No. 19872/11

Motion
Date November 1, 2011

Motion
Cal. No. 9

Motion
Sequence No. 2

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Upon the foregoing papers it is ordered that the motion by plaintiff, Kim & Cha LLP pursuant to 22 NYCRR 130-1.1 and Judiciary Law § 475 for: an Order awarding costs and sanctions against the law firm of James Lo, Esq., P.C., for engaging in frivolous conduct and contemptuous conduct; an Order directing the Law Firm of James Lo, Esq., P.C. to pay the charging lien in the amount of ninety-five (95%) percent of the overall attorney fees to the Law Offices of Kim & Cha, LLP; an order directing the Law Firm of James Lo, Esq., P.C., to pay the Law Offices of Kim & Cha, LLP for the costs of the instant action; and cross motion by defendant, James Lo, Esq. for an order: declaring that Kim & Cha, LLP is not entitled to any portion of attorney's fees in connection with the settlement of an underlying personal injury matter where it was an outgoing attorney due to willful and gross violation of OCA; declaring that Kim & Cha, LLP is discharged for cause and not entitled to any portion of said attorney's fees due to its neglect to diligently prosecute said personal injury matter; awarding the defendant, James Lo, Esq. the full attorney's fees and allowing the defendant to release said attorney's fees being held in escrow by defendant; and awarding costs and sanctions in the amount of \$3,000.00 against plaintiff

for making a previous application to the Court and then failing to appear in Court on the prior return date of October 11, 2011 are hereby decided as follows:

In an order dated November 16, 2011, this court held that this matter shall be set down for a hearing to determine whether the Law Offices of Kim & Cha, LLP was discharged with or without cause by plaintiff and to determine the value of legal services rendered, if any, that Kim & Cha, LLP is entitled to as compensation (see, Byrne v. Leblond, 25 AD3d 640 [2d Dept 2006]; Andreiev v. Keller, 168 AD2d 528 [2d Dept 1990]; Katsaros v. Katsaros, 152 AD2d 539 [2d Dept 1989]; Williams v. Hertz Corp., 75 AD2d 766 [1st Dept 1980]; Marschke v. Cross, 82 AD2d 944 [3d Dept 1981]) and the remaining relief requested in the motion and cross motion were held in abeyance pending the disposition of the hearing. A hearing was conducted, after which the court reserved decision.

After a hearing was held on September 10, 2012, the motion and cross motion are determined as follows:

I. BACKGROUND

On October 28, 2008, Xiu Hua Huang was a pedestrian injured in a motor vehicle accident involving a truck, causing her to sustain serious personal injuries. Thereafter, Ms. Huang retained Thomas S. Kim, Esq. of the law firm of Kim & Cha, LLP (hereinafter "Kim & Cha") to represent her in an action for personal injury and entered into an agreement that provided for a contingency fee of one-third to Kim & Cha if the case was resolved favorably. Kim & Cha conducted an initial investigation but did not commence an action. In or about June 26, 2010, Ms. Huang substituted James Lo, Esq. (hereinafter "Lo") to represent her. In or about June 28, 2011 the case was settled for the amount of \$30,000.00. Lo set aside \$10,000.00 from the settlement amount representing the gross legal fee in the matter.

Kim & Cha now moves this Court, inter alia, to set its legal fees at \$9,500.00 or 95% of the \$10,000.00 legal fee received by Lo based upon the work Kim & Cha performed. On the other hand, Lo disputes that Kim & Cha is entitled to any legal fees, and asserts that Kim & Cha is not entitled to any fee because it, inter alia, and neglected to prosecute Huang's case and was discharged for cause.

II. DISCUSSION

Under New York law, attorneys can assert two types of liens to secure the payment of fees from their clients. First, under New York common law, an attorney may obtain a retaining lien on a client's files, papers and property in the attorney's possession (see, In re Heinsheimer, 214 NY 361, 364 [1915]; Goldstein, Goldman, Kessler & Underberg v. 4000 E. River Road Associs., 64 AD2d 484, 487 [4th Dept 1978]). Absent exigent circumstances, an attorney may withhold turning over a client's files to a successor attorney until a court determines the amount of the lien and whether turnover of the files should be conditioned on payment or the posting of security (see, Renner v. Chase Manhattan Bank, No. 98-926 [CSH], 2000 U.S. LEXIS 16150, at *2-3 [SDNY Nov. 8, 2000]).

The second way an attorney can secure a lien is under Judiciary Law § 475. This statute provides the basis upon which an attorney may assert a charging lien against the proceeds resulting from the attorney's assertion of an affirmative claim on the client's behalf. The rationale behind the charging lien under this provision is that the attorney is entitled to a lien against a fund created through the attorney's own efforts (Greenberg v. State, 128 AD2d 939, 940 [3d Dept 1987]). The charging lien may also attach to a fund created to settle a client's claim (Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 AD2d 183, 187 [1st Dept 2002]).

A. Was Kim & Cha Dismissed for Cause?

Lo argues that Kim & Cha was dismissed by Ms. Huang for cause and is not entitled to any legal fee (see, Friedman v. Park Cake, Inc., 34 AD3d 286, 287 [1st Dept 2006] [stating that where an attorney is discharged for cause, she is entitled to no compensation]). In support of this argument, Lo asserts that Kim & Cha failed to diligently prosecute the case for 1-1/2 years, i.e. from December 3, 2008 the date of the retainer to July 7, 2010, the date beginning the transfer of the case to the incoming attorney. The court finds Lo's allegations without merit. The bare conclusory allegations of neglect and failure to prosecute contained in the affirmation of the attorney are insufficient to establish a prima facie case. Thus, Lo's claim of failure to prosecute is without merit.

Lo testified and suggested that Ms. Huang was dissatisfied with the services of Kim & Cha, and because of this dissatisfaction she elected to change attorneys. Evidence of a general dissatisfaction with an attorney's performance or a difference of opinion between attorney and client does not establish that the attorney was discharged for cause absent some evidence that the attorney failed to properly represent the client's interest (Costello v. Kiaer, 278 AD2d 50, 50 [1st Dept 2000]).

Moreover, "[a]ttorney-client relationships frequently end 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]). Something more than a personality conflict or difference of opinion is required to establish discharge for cause and "[c]ourts typically find a discharge for cause where there has been a significant breach of legal duty" (D'Jamoos v. Griffith, 2006 WL 2086033, at 5 [EDNY July 25, 2006] (quoting Allstate Ins. Co. v Nandi, 258 F Supp 2d 309, 312 [SDNY 2003])). Here, there is no evidence that the conduct of W&W breached any trust and confidence with Mr. Na.

Additionally, the court notes that in Vallejo v. Builders for Family Youth, 2007 WL 10386, at 5 (Sup Ct, Kings County, Jan. 2, 2007), the court found that because the letters to previous counsel regarding his discharge never mentioned cause and referred to the matter of his compensation, counsel was not discharged for cause (see also, Realuyo v. Diaz, 2006 WL 695683, at 7 [SDNY, March 17, 2006] [finding no evidence of discharge for cause because, inter alia, the client's termination letter to attorney failed to specify the reason for termination and requested an accounting of the lawyer's fee]). Here, the letter requesting transfer of the file from Kim & Cha to Lo dated June 29, 2010, makes no reference to cause ("Defendant's Exhibit "F" attached to Notice of Cross Motion). Indeed, this letter dated June 29, 2010 requesting transfer of the case file mentions that Kim & Cha "[i]f you claim a charging lien, kindly provide your O.C.A. number along with a detailed list of work you claimed to have performed so that I may review same". This statement clearly demonstrates that at the time of discharge of Kim & Cha, Lo believed that Kim & Cha potentially would be entitled to some fee, the amount of which would be based upon the actual work performed. Moreover, no evidence was submitted from Ms. Huang by affidavit or testimony to show that the reason she discharged Kim & Cha was because she was dissatisfied with their services. Therefore, the Court finds that Kim & Cha was not discharged for cause and maintains a charging lien for its fee (see, Calabro v. Bd of Educ of City of New York, 39 AD3d 680, 681 [2d Dept 2007]).

B. Calculation of the Fee

A discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based upon his or her proportionate share of the work performed (Fernandez v. New York City Health and Hospitals Corp., 238 AD2d 544, 545 [2d Dept 1997]). In determining a discharged attorney's proportionate share of the work, the court considers the time and labor involved, the difficulty of the case, the

skill required to handle the matter, the results achieved, the amount of money involved, and the fee customarily charged for similar services (see, Buchta v. Union-Endicott Central School Dist., 296 AD2d 688, 689-90 [3d Dept 2002]). Here, Kim & Cha requests that this court award it a 95% share of the attorney fees based upon the amount of work performed. Lo asserts that he is entitled to the majority of attorney's fees because he performed the majority of the work which led to a successful final settlement in Ms. Huang's favor. Lo argues that if this court should find that attorney's fees are warranted, it should limit Kim & Cha to fifteen percent (15%) based upon the fewer hours it spent on the case in proportion to the time expended by Lo and the successful result of settlement in the client's favor (§ 15 Defendant's Affirmation of James Lo, Esq. in Support of Cross Motion and in Opposition to Plaintiff's Motion dated October 19, 2011).

Kim & Cha elicited evidence to show the work performed by Kim & Cha. It was established and it was undisputed that Kim & Cha, among other things, "performed an investigation of the motor vehicle accident, filed a claim for no fault benefits, attained medical reports and records from medical providers, prepared and delivered to the liability insurance carrier a "pre-suit special settlement packet", and "attempted to settle the instant matter on several occasions with the defendant's law firm and the defendant's liability carrier" (§ 11 Attorney Affirmation of Michael D. Robb, Esq. in Support of Motion). However, this court finds that Lo's share of the total work performed in this case was far more extensive and disproportionately greater than the amount of work performed by Kim & Cha. Lo, among other things, performed preliminary interviews and fact gathering, and most importantly, conducted successful settlement negotiations. Because of the successful result achieved, which the court accords significant weight, the court determines that Lo is entitled to a significantly greater portion of the total fee. In light of the foregoing, the court finds that a fee of twenty percent (20%) of the gross attorney's fees of \$10,000.00, namely the gross sum of \$2,000.00, is reasonable for Kim & Cha's legal work on the case inclusive of any disbursements (see, Podbielski v. KMO 361 Realty Assocs., 6 AD3d 597, 597 [2d Dept 2004] [granting counsel five percent of the net contingency fee for providing advise to appellate counsel and arranging for the collection of judgment]; Greenberg v. Cross Island Industries, Inc., 522 F Supp 2d 463, 2007 WL 3285810 [EDNY 2007] [granting attorney's fees of five percent of the net attorney's fee to originating attorney who performed preliminary fact gathering and drafted and filed the complaint]).

The remaining contentions raised by the parties on their motion and cross motion are either without merit or academic in light of this court's determination, and therefore, are denied.

III. CONCLUSION

Based upon the foregoing, it is hereby

ORDERED, that attorney's fees and disbursements in the amount of \$2,000.00 be paid by James Lo Esq., P.C. to Kim & Cha, LLP, either (1) within twenty (20) days after receipt of the settlement amount, or (2) if the settlement amount has already been paid, within twenty (20) days after a copy of this decision and order with notice of entry is served on James Lo Esq., P.C.

Defendant's Exhibits C, D and E are being returned to defendant with a courtesy copy of this order. A courtesy copy of this order is also being mailed to plaintiff.

This constitutes the decision and order of the court.

Dated: October 5, 2012

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Howard G. Lane, J.S.C.