

Vicari v 36 Ave. Realty, LLC

2013 NY Slip Op 32848(U)

September 11, 2013

Supreme Court, Queens County

Docket Number: 700406/10

Judge: Howard G. Lane

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This opinion is uncorrected and not selected for official publication.

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

CAROL VICARI,

Plaintiff,

-against-

36 AVENUE REALTY, LLC, et al.,

Defendants.

Index No. 700406/10

Motion
Date April 17, 2013

Motion
Cal. No. 125

Motion
Sequence No. 3

Papers
Numbered

Order to Show Cause.....	EF 17
Affirmation in Support of Order to Show Cause.....	EF 18
Exhibits.....	EF 19
Affirmation in Opposition.....	EF 22
Affirmation in Opposition.....	EF 23

Upon the foregoing papers it is ordered that this motion by petitioner Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP (hereinafter "Silbowitz") for an order determining the dollar amounts of the liens for respective services rendered herein to plaintiff with the firm of Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, receiving ninety-five percent (95%) of the net legal fee, and respondents Scott Baron & Associates (hereinafter "Scott Baron" receiving four percent (4%) thereof and Newman, Anzalone & Associates ("Newman") receiving one percent (1%) thereof is hereby decided as follows:

After a hearing held on July 30, 2013, Silbowitz's motion for an order directing a hearing to determine the amount of attorneys fees entitled to outgoing firms, Scott Baron and Newman regarding the case of Carol Vicari v. 36 Avenue Realty, LLC, et al. (Index No. 700406/10) is determined as follows:

FILED
SEP 17 2013
COUNTY CLERK
QUEENS COUNTY

I. BACKGROUND

On January 27, 2010, plaintiff Carol Vicari was injured in an accident. Thereafter, Mrs. Vicari retained Newman to represent her in an action for personal injury. Newman conducted an initial investigation but did not commence an action. Thereafter, Mrs. Vicari discharged Newman and substituted respondent Scott Baron. Scott Baron represented the plaintiff until on or about February 23, 2011 when plaintiff executed a consent to change attorney substituting Silbowitz to represent her. Thereafter, on or about February 23, 2011, all disbursements were paid to Scott Baron, the file was transferred and Silbowitz and Scott Baron entered into a stipulation in which the parties agreed that absent agreement among the parties, the percentage of attorneys' liens is deferred until the conclusion of the litigation at which time a hearing would be scheduled before the Court to determine legal fees.

This action was settled for the sum of \$150,000.00 with a net legal fee of \$48,965.25. The parties were unable to reach an agreement on legal fees, and thereafter, the instant motion pursuant to the stipulation ensued. Silbowitz now moves this Court to set the legal fees it is entitled to based upon the work it performed. Silbowitz does not dispute that Scott Baron is entitled to some legal fees, but asserts that Scott Baron is only entitled to an amount in proportion to the total amount of legal work actually performed by the three participating law firms of Newman, Scott Baron and Silbowitz. By order of this Court dated May 16, 2013, this matter was set down for a hearing to determine the value of the legal services rendered, if any that Scott Baron and Newman are entitled to as compensation (see, 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]). On the call of the case on July 30, 2013, Newman defaulted and failed to appear. A hearing was conducted and was continued to August 2, 2013. At the hearing, Howard R. Schatz, Esq. testified on behalf of the petitioner, Silbowitz and W. Bradford Bernadt, Esq. testified on behalf of the respondent, Scott Baron & Associates. At the conclusion of the hearing, the Court reserved decision.

II. DISCUSSION

A. 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, Scott Baron requests that this court award it an "equitable share of the attorney fees" based upon the amount of work performed. On the other hand, Silbowitz asserts that if this Court should find that attorney's fees are warranted, it should limit Scott Baron's proportionate share to four percent (4%) based upon the fewer hours it spent on the case in proportion to the vastly extensive time expended by Scott Baron & Associates.

Petitioner Silbowitz elicited evidence to show the work performed by Scott Baron and Newman. It was established and it was undisputed that Scott Baron, among other things, "obtained and reviewed file from prior attorney, obtained additional medical records and exchanged same with defendant's attorneys and insurance carrier, filed a summons and complaint and attempted settlement negotiations. However, this Court finds that Silbowitz's share of the total work performed in this case was far more extensive and disproportionately greater than the amount of work performed by Scott Baron. Silbowitz, among other things, performed preliminary interviews and fact gathering, and drafted, served, and filed an amended summons and complaint, conducted and responded to discovery, conducted depositions, appeared in court, prepared for trial, and conducted settlement negotiations. In light of the foregoing, the Court finds that a fee of four percent (4%) of the gross attorney's fees of \$48,965.25, namely the sum of \$1,958.61, is reasonable for Scott Baron's legal work on the case (see, Brown v. Governale, 28 AD3d 617 [2d Dept 2006] [holding that outgoing counsel, who merely commenced an action, was entitled to 5% of the legal fee where incoming counsel filed an amended summons and complaint, conducted discovery, successfully opposed a motion for summary judgment, and represented the plaintiff at a mediation which resulted in a settlement]; 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]; Poulas v James Lenox House, Inc., 11 AD3d 332 [1st Dept 2004] [holding that outgoing counsel was entitled to 3% of the legal fee where outgoing counsel "merely filed and served a three-page summons and complaint in the action and obtained some medical records during the 11 months it served as plaintiff's attorney ... [while] the

incoming firm...., by contrast, inter alia, responded to defendants' discovery requests, conducted approximately 10 depositions, retained experts on liability and damages, conducted voir dire, engaged in settlement negotiations and secured a highly favorable settlement for plaintiff, whose injuries, although serious, were difficult to establish clinically"]; 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]).

III. CONCLUSION

Based upon the foregoing, it is hereby

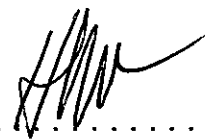
ORDERED, that attorney's fees in the amount of \$1,958.61 be paid to Scott Baron & Associates and \$489.65 be paid to Newman, Anzalone & Newman, LLP by Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP, either (1) within twenty (20) days after receipt of the settlement amount, or (2) if the settlement amount has already been paid, within twenty (20) days after a copy of this decision and order is served on Silbowitz, Garafola, Silbowitz, Schatz & Frederick, LLP with notice of entry.

This constitutes the decision and order of the court.

Counsel are directed to contact chambers at (718) 298-0674 by October 4, 2013 for retrieval of any exhibits admitted into evidence and left with the court at the conclusion of the hearing, otherwise the exhibits will be destroyed without further notice.

A courtesy copy of this order is being mailed to the respective parties.

Dated: September 11, 2013


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Howard G. Lane, J.S.C.