Cline v Great Neck Obstetrics & Gynecology, P.C.
2014 NY Slip Op 31172(U)
April 30, 2014
Supreme Court, Suffolk County
Docket Number: 06-33949
Judge: Jerry Garguilo
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[* 1]

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SHORT FORM ORDER

INDEX No. 06-33949
CAL. No. 10-00411MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 7-31-13 (#010)
MOTION DATE 10-2-13 (#011)
ADJ. DATE 10-30-13
Mot. Seq. # 010 - MD
011 - XMD

JANINE CLINE and BRIAN CLINE,

Plaintiffs,

- against -

GREAT NECK OBSTETRICS & GYNECOLOGY, P.C., VICTOR ROBERT KLEIN, M.D., MICHAEL LESLIE NIMAROFF, M.D., TERRY P. RIFKIN, M.D., GLENN J. KAUFMAN, M.D., ANITA F. SADATY, M.D., and NORTH SHORE UNIVERSITY HOSPITAL AT MANHASSET,

Defendants.

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Scarsdale, New York 10583

RAPPAPORT, GLASS, GREENE & LEVINE
Attorneys for Plaintiffs
1355 Motor Parkway
Hauppauge, New York 11749

Upon the following papers numbered 1 to 54 read on this motion to release legal fees from escrow and cross motion to disburse settlement proceeds ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 39 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 40 - 52; 53 - 54 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (010) for an order permitting the law firm of Rappaport, Glass, Levine & Zullo, LLP to release from its escrow account legal fees in the sum of $65,786.50 purportedly due and owing to its referring attorney, Fred Gunion, Esq., in the settlement of this action is denied; and it is further

ORDERED that this cross motion (011) by plaintiffs for an order directing the law firm of Rappaport, Glass, Levine & Zullo, LLP to promptly disburse the sum of $41,715.63 to plaintiffs from funds currently being held in escrow by the law firm, which funds represent proceeds from the settlement of this medical malpractice action, is denied; and it is further

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ORDERED that counsel for the respective parties are directed to appear for a hearing on this matter to be held on Monday, June 16, 2014 at 10:00 a.m. in the courtroom of the undersigned located at One Court Street, Room A-259, Riverhead, New York 11901.

Plaintiff Janine Cline gave birth by cesarean section to a baby girl at North Shore University Hospital in Manhasset, New York on March 29, 2005. Thereafter, plaintiff developed a severe infection and additional complications secondary to the infection. Plaintiffs, Janine Cline and Brian Cline, subsequently met with Michael Glass, a partner in the law firm of Rappaport, Glass, Levine & Zullo, LLP in July or August 2005 to discuss potential medical malpractice claims against the hospital and treating physicians. He initially declined representation. Plaintiffs then spoke with plaintiff Janine Cline's uncle, Fred Gunion, Esq., a Florida resident and a personal injury attorney who is not admitted to practice law in New York, about plaintiff's injuries and ongoing medical problems. Mr. Gunion advised plaintiffs that he believed plaintiff's case had merit and suggested that his medical experts in Florida look at her medical records to evaluate possible claims. He told plaintiffs that they would be responsible for payment of fees to obtain medical records, for the medical expert(s)' review of her records, and for the preparation of any reports. In mid-July 2006, plaintiffs requested that Mr. Gunion forward the medical records and reports to the law firm of Rappaport, Glass, Levine & Zullo, LLP and made an appointment with Mr. Glass. After meeting with plaintiffs again on or about August 3, 2006, Mr. Glass agreed to represent them. The instant medical malpractice action was commenced on December 6, 2006. Trial of the action commenced in May 2012. On May 31, 2012, the case settled for the total sum of $1,500,000.00.

The law firm of Rappaport, Glass, Levine & Zullo, LLP (the law firm) now moves to release from its escrow account legal fees in the sum of $65,786.50 purportedly due and owing to its referring attorney, Fred Gunion, Esq., in the settlement of this action. Submissions in support of the motion include the affidavits of Mr. Glass, Mr. Gunion and the law firm's office manager Christine Donovan; the letter dated July 17, 2006 from Mr. Gunion to Mr. Glass enclosing plaintiff's medical records and information concerning an obstetrical expert; the letter dated August 14, 2006 from Mr. Glass to Mr. Gunion, thanking Mr. Gunion for the referral of plaintiff and explaining his referral fee; and the Office of Court Administration retainer statement of Mr. Glass dated August 11, 2006 indicating Mr. Gunion as the referring individual.

Plaintiffs cross-move for an order directing the law firm to promptly disburse the sum of $41,715.63 to plaintiffs from funds currently being held in escrow by the law firm, which funds represent proceeds from the settlement of this medical malpractice action. Plaintiffs argue that the law firm entered into an improper fee sharing arrangement with Mr. Gunion after the law firm was retained by the Clines without disclosing to the Clines, and obtaining their oral and written consent to, a division of fees between the attorneys. Plaintiffs's submissions include their affidavits; a letter dated May 24, 2006 to them from Mr. Gunion enclosing a "QuickBooks" printout of "expenses to date in our efforts to develop a case concerning [plaintiff's] postpartum problems", requesting their payment, and recommending the obstetrical expert; the Office of Court Administration closing statement of Mr. Glass dated July 26, 2012 indicating gross amount of recovery $1.5 million, net amounts to client $1,158,284.37, compensation to Mr. Glass $229,578.43 and "Participation fee of referring attorneys in the amount of $65,786.50 DISPOSITION TO BE DECIDED."; and various e-mails and letters between plaintiffs, Mr. Glass and Mr. Gunion.

In his affirmation, Mr. Glass maintains that he changed his mind about representing plaintiffs after having been advised by plaintiff Janine Cline that her uncle, Mr. Gunion, was a prominent medical malpractice attorney and after receiving a letter from Mr. Gunion, requesting that he represent plaintiffs, together with medical records and a positive expert's report from an obstetrical expert. In addition, Mr. Glass avers that he sent Mr. Gunion correspondence dated August 14, 2006 that confirmed a fee sharing agreement in which Mr. Gunion's fee would come out of the firm's fee, and sent him a copy of the Judicial Conference Retainer Statement that his office had filed with the Office of Court Administration on August 11, 2006. He explains that during the course of the long litigation, he spoke on multiple occasions with Mr. Gunion to, among other things, discuss the case, liability theories, difficulties with experts, and shared notes and memoranda on their obstetrical expert. Mr. Glass also states that "[w]e would not have reconsidered and accepted representation of the Clines if not for Mr. Gunion's contribution. Mr. Gunion had provided the expert predicate for the case and it was my intention that he would participate in our legal fee at the conclusion of the case."

Mr. Gunion avers in his affidavit that plaintiffs requested that he represent them in the instant action, that he advised them of its impracticality but that he would refer plaintiff to "a competent New York attorney" and "would continue to represent her and to work for and with her towards an equitable and satisfactory conclusion, be it through settlement or trial." He maintains that he "made it clear to [plaintiff] that although I would be the referring attorney, I would remain personally responsible for the progress and success of her case and that I was available and would remain available to consult, perform legal work on her case and/or consult and strategize on the case at any time for her, her family and her New York attorney." He repeats that plaintiff was always in complete agreement with his plan and legal efforts on her behalf. Mr. Gunion specifically states that he "advised [plaintiff] by telephone and in person, that as the referral attorney, I would receive a referral fee paid only from the fee of the New York attorney's fee and that any fee that I received would be calculated based on the exact same percentages as the fee allowed and paid to the New York attorney by way of the sliding scale medical malpractice fee schedule in New York and that my fee would have no impact on her net proceeds." He describes his initial involvement in detail then states "[a]s the case came on for trial, I spoke with the Clines about the issues on several occasions and made and received 'update' telephone calls from Mr. Glass regarding the status of the case. In addition, as the uncle of [plaintiff], I would periodically see her at family functions. On those occasions I would spend time with her discussing the case. When the case settled, I spoke with [plaintiff] several times and received a thank you note from her for helping them bring the case to a successful conclusion."

Plaintiffs maintain in their affidavits that they were referred to Mr. Glass by plaintiff Janine Cline's mother, not by Mr. Gunion. They deny Mr. Gunion's averments concerning their request that he represent them and his advisements to them that he would be the referring attorney and would receive a referral fee and would be personally involved in the legal work. Plaintiffs contend that he never performed any legal services in this matter.

Mr. Glass states in his affirmation that he had Ms. Cline sign a standard sliding scale medical malpractice retainer agreement. Plaintiffs aver, and submit a letter in support, that they requested a copy of said retainer and Mr. Glass responded that he could not locate it. Notably, no copy of said retainer has been provided to the Court.

Mr. Glass has no recollection of any discussion with the Clines in July 2006 concerning the fee arrangement with Mr. Gunion. According to Mr. Glass, his usual custom and practice in 2006 would be to generally advise his clients of the interests of the attorney who referred the case unless he believed that the clients were already aware of said interests from the referring attorney. He further states that "[o]ur firm's form retainer agreement, as it existed in 2006, did not contain any reference to Mr. Gunion, his participation in the case, or his fee interest" but that he had specific recollections of informing Mrs. Cline several times, particularly as the trial approached, that he was speaking with Mr. Gunion on various issues and near the end of the case that he was consulting on settlement issues with Mr. Gunion, who agreed with his settlement recommendations, and that "Mr. Gunion was being paid for his work on the case 'out of our fee.'" Plaintiffs assert that they never received a copy of an agreement or contract with Mr. Glass that they signed concerning attorney's fees, and that once they learned of the fee sharing arrangement after the action had been settled and the proceeds received, they specifically and repeatedly directed the law firm not to disburse any of the settlement funds to Mr. Gunion.

Plaintiffs further assert that they are entitled to an additional $41,715.63 from the law firm based on the law firm's agreement during settlement negotiations that plaintiffs would "walk away with $1.2 million" of the $1.5 million settlement offer. Plaintiff states in her affidavit that during settlement negotiations she advised Mr. Glass that "we would not settle unless we were assured that we would walk away with $1.2 million" and that "Mr. Glass guaranteed us that we would receive $1.2 million net from the $1.5 million settlement." Mr. Glass denies having made such a promise, arguing that $1.2 million is an amount in excess of plaintiffs' actual net settlement based on the sliding scale.

Former Code of Professional Responsibility DR 2–107 (A) [22 NYCRR former 1200.12][1], which was the law in effect at the time of the conduct at issue, provided:

> (A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's law firm, unless:
>
> (1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.
>
> (2) The division is in proportion to the services performed by each lawyer or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
>
> (3) The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client.

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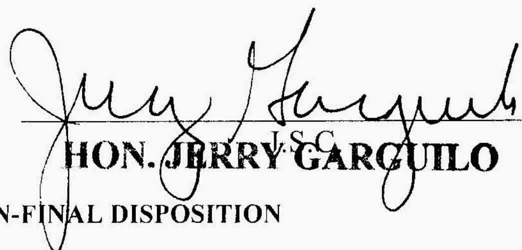
[1] DR 1-101 to 9-102 [22 NYCRR §§ 1200.1 to 1200.46] were repealed effective April 1, 2009. Rule 1.5 (g) of the Rules of Professional Conduct concerning fees and division of fees currently apply to the within circumstances.

The "letter of engagement rule" (22 NYCRR 1215.1) "requires attorneys to provide all clients with a written letter of engagement explaining the scope of legal services, the fees to be charged, billing practices to be followed, and the right to arbitrate a dispute under Rules of the Chief Administrator of the Courts (22 NYCRR) part 137" (***Seth Rubenstein, P.C. v Ganea***, 41 AD3d 54, 60, 833 NYS2d 566 [2d Dept 2007]; *see* ***Vandenburg & Feliu, LLP v Interboro Packaging Corp.***, 70 AD3d 931, 931, 896 NYS2d 111 [2d Dept 2010]). By affirmation in opposition and reply, Mr. Glass states that he informed plaintiffs on July 30, 2012 and plaintiffs' current counsel on or about June 11, 2013 that their original retainer agreement had been inadvertently discarded, during disposal of the excess medical records "redwelds." He provides a copy of the exact form retainer that plaintiffs purportedly signed and the only form of medical malpractice retainer used by his firm in 2006. Mr. Glass notes that plaintiffs do not deny nor have they ever denied that they signed a written retainer, and that the retainer was standard in all respects and provided for the customary medical malpractice sliding scale fee in accordance with Judiciary Law § 474-a. Plaintiffs, by their attorney, reply that they have continuously maintained their full satisfaction with their representation by the law firm and that the firm is entitled to its fee, and that whether or not the Court decides to reduce the firm's fee by $41,715.63 does not alter their position that Mr. Gunion is not entitled to receive any portion of said fee.

In the absence of a copy of the retainer agreement, the law firm bears the burden of establishing that the terms of the alleged fee arrangement were fair, fully understood, and agreed to by plaintiff (*see* ***Seth Rubenstein, P.C. v Ganea***, 41 AD3d 54, 64, 833 NYS2d 566; *see also* ***Gary Friedman, P.C. v O'Neill***, 115 AD3d 792, 982 NYS2d 359 [2d Dept 2014]; ***Doviak v Finkelstein & Partners, LLP***, 90 AD3d 696, 934 NYS2d 467 [2d Dept 2011]). Upon establishing the foregoing, Mr. Glass shall recover in quantum meruit the fair and reasonable value of the services that he rendered on behalf of plaintiffs (*see id.*).

In addition, the issues raised by the parties' conflicting affidavits turn on the relative credibility of their assertions such that a hearing is required to determine, among other things, whether Mr. Gunion is entitled to any compensation from the law firm's fee and if so, in what amount (*see* ***Genton v Arpeggio Rest., Inc.***, 232 AD2d 274, 648 NYS2d 552 [1st Dept 1996]; *see also* ***Leskinen v Fusco***, 18 AD3d 387, 796 NYS2d 54 [1st Dept 2005], *lv to appeal dismissed* 6 NY3d 807, 812 NYS2d 445 [2006]). Therefore, the motion and cross motion are denied and this matter is referred to a hearing as indicated hereinabove.

Dated: Apr. l 30, 2014



HON. JERRY GARGUILO
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**