

Grossbarth v Danker, Milstein & Ruffo, P.C.
2016 NY Slip Op 32856(U)
August 30, 2016
Supreme Court, Rockland County
Docket Number: 031526/15
Judge: Gerald E. Loehr
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JOEL GROSSBARTH as successor in interest to TOGNINO
& GROSSBARTH, LLP,

Plaintiff(s)

DECISION AND ORDER
Index No.: 031526/15

-against-

DANKER, MILSTEIN and RUFFO, P.C.,

Defendant(s)

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LOEHR, J.

The trial of this matter was held on March 7, 2016, May 17, 2016 and June 8, 2016. The issue before the court is the amount of attorney’s fees due to Petitioner Joel Grossbarth, based in quantum meruit, for his representation of Irene Bielen in an action commenced under the caption Irene Bielen as the Administratrix of the Estate of John Naclerio, deceased v the County of Rockland, Rockland County Department of Hospitals, Summit Park Hospital and Nursing Care Center and James S. Vella, M.D. in Supreme Court Rockland County, Index#3390/2009.

Grossbarth was retained in 2007 and it is uncontroverted that Grossbarth performed all the legal work from making the initial claim, appointing Ms. Bielen the Administratrix of Mr. Naclerio’s estate in Surrogate’s Court and handling the Naclerio action from commencement through the completion of discovery, the filing of the Note of Issue and providing marked

pleadings to the Court. His representation ceased on November 3, 2011 when he was suspended from the practice of law for matters unrelated to the Naclerio action. Respondents Danker, Milstein and Ruffo, P.C. then substituted as counsel in that action.

What is contested is the extent of work done and the reasonable hours required by Grossbarth in bringing the matter until the time of substitution. Both Petitioner and Respondent conceded that it was their practice when representing clients on a contingency basis not to keep detailed time records. Petitioner testified from memory and in some detail about the time he expended on various steps. Respondent, by cross examination, challenged the time claimed for each step. Respondent Milstein testified, yet as an attorney experienced in handling medical malpractice cases he failed to provide testimony as to the appropriate or reasonable time to be attributed to the various stages of work done by Grossbarth. The Court from its experience can evaluate the time reasonably required and finds that Petitioner substantially exaggerated the time and effort required to accomplish the work that he did in fact perform. Petitioner claimed that during the time period in question his billed hourly rates were between \$275 per hour and \$350 per hour. The Court finds that the rate of \$275 per hour measured with Petitioner's experience and the complexity of the matter involved, is reasonable. However, Petitioner conceded that he operated his office without any clerical help and so included all time spent on clerical matters such as typing and preparation of papers, pleadings and correspondence as well as travel time in his legal fee claim, computed at his legal fee rate. The Court finds that such services normally encompassed in office overhead are not properly included in his claim for legal fees.

The Court finds that significant portions of Mr. Grossbarth's testimony were simply not credible. For example, Petitioner claimed over 10 hours consulting with medical experts including Dr. William Bisordi, upon which he based his preparation and submission of expert

disclosure pursuant to CPLR 3101(d). Petitioner could not recall the name of the additional medical experts and claimed that Dr. Bisordi had assisted him without charge. Dr. Bisordi was called as a witness and established that he kept specific records of contacts with attorneys, but he had no recollection of contact with Grossbarth nor did his records show any indication of such a consultation nor of payments normally required.

The evidence supports Petitioner's claim for \$1,316.05 in disbursements. Having found that Grossbarth testified falsely in support of portions of his claim, the Court will disregard that which is false, but will credit the work Grossbarth actually performed for which he is entitled to some compensation in quantum meruit. Respondent Milstein confirmed that when retained on December 7, 2011, he did not need to make any amendments, modifications or changes to Grossbarth's legal work previously performed and relied on that legal work in bringing the case to conclusion by arbitration. When the Naclerio action was scheduled for arbitration, Petitioner served a notice of lien under the judiciary law upon Respondent. The Petitioner in the Naclerio action received an arbitration reward of \$257,000. Calculation of a portion of a contingent fee may also be a relevant factor to be considered in setting the fee. *Padilla v Sansivieri* 31 AD3d 64 (2d Dept. 2006) While appraised that Respondent did receive a contingent fee, approved by the Surrogate, no evidence of that final amount was submitted. Moreover, Petitioner never filed a retainer statement of his own thereby limiting his attorney fee to quantum meruit.

Recognizing that Petitioner performed all the legal work from appointment of Bielen as Administratrix of the Estate, handling the medical malpractice case from its inception, purchasing the index number and filing the summons and complaint and completing the entire discovery stage to filing of the Note of Issue, Petitioner's award of quantum meruit compensation

under 22 NYCRR 691.10 (b) is not limited to a calculation based on the number of hours worked multiplied by a reasonable hourly rate. The Court considered other relevant factors, including the time and skill required in the case, the complexity of the matter, Petitioner's experience, ability and reputation, the benefit of the services to the client, and fees typically charged by other attorneys for similar services. *Biagioni v Narrows MRI & Diagnostic Radiology, P.C.* 127 AD3d 800 (2d Dept. 2015). The award in quantum meruit also reflects this Court's assessment of the qualitative value of the services rendered after weighing all of the relevant factors considered.

In consideration of the enumerated factors, this court determines that in quantum meruit Petitioner is entitled to an award of compensation and expense reimbursement of \$21,316.05.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
August 30, 2016



Hon. GERALD E. LOEHR
J. S.C.

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