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| <b>Ramos v 2121 Westchester Ave, LLC</b>   |
| 2016 NY Slip Op 33161(U)   |
| December 19, 2016  |
| Supreme Court, Bronx County  |
| Docket Number: Index No. 21879/2012E   |
| Judge: Ben R. Barbato  |
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: IAS PART 21**

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ALBERT RAMOS,

Plaintiff,

-against-

2121 WESTCHESTER AVE, LLC and R.G. ORTIZ  
FUNERAL HOME, INC.,

Defendants.  
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Index No.: 21879/2012E

Decision & Order

**HON. BEN BARBATO:**

**The following papers were considered on the motion by Robert B. Marcus, Esq., of Schwartzapfel Lawyers, P.C. (“movant”), for an order resolving a fee dispute between movant and respondents Mitchell Baker, Esq. (“Baker”), of Baker Leshko Saline & Blosser, LLP and John Keegan, Jr. (“Keegan”), of Keegan, Keegan & Strutt, P.C., and the cross-motion by respondents for order dismissing movant’s proceeding:**

**PAPERS**

**NUMBERED**

|   |   |
|---|---|
| Notice of Motion and annexed Exhibits and Affidavits..... | 1 |
| Cross-Motion and annexed Exhibits.....                    | 2 |
| Reply Affirmation.....                                    | 3 |

Upon the foregoing papers, the motion by movant is hereby granted; the cross-motion by respondents is hereby denied.

The underlying negligence action was commenced to recover damages for personal injuries sustained by the plaintiffs during a construction site accident, which occurred on March 15, 2012. Plaintiffs Albert Ramos (“Ramos”) and Michael Gugliermo (“Gugliermo”) thereafter retained movant’s law firm for purposes of prosecuting their individual claims arising out of the accident on April 10, 2012 and April 13, 2012, respectively. Both plaintiffs signed a retainer agreement, the terms of which provided that movant would receive a contingency fee in the amount of thirty-three and one-third percent of the net sum recovered in connection with the plaintiffs’ claims for services rendered.

On August 17, 2012, both plaintiffs executed separate “stop-work” letters addressed to movant, which informed movant that the plaintiffs had opted to have respondent Baker represent their interests in the negligence proceeding. Respondent Baker thereafter commenced an action bearing the instant index number on August 22, 2012, on behalf of plaintiff Ramos only; plaintiff Gugliermo ultimately retained movant Keegan to litigate his claim. In October 2012, movant spoke with respondent Baker and sent him a letter seeking payment for disbursements incurred during movant’s representation of the plaintiffs, and indicating the need for further

communication regarding the movant's fee. In an October 15, 2012 letter, respondent Baker conveyed his uncertainty as to whether movant had performed sufficient work to merit a charging lien, and stated his preference that such a determination be decided by the court upon disposition of plaintiff Ramos' claim.

On September 30, 2014, a closing statement was filed with OCA, which indicated that plaintiff Ramos received a total settlement in the amount of \$1,700,000. Upon learning of the settlement, movant again requested that he be reimbursed for expenses incurred during his representation of plaintiff Ramos and that he receive a portion of the total attorneys' fees awarded in connection with plaintiff Ramos' settlement – which amounted to approximately \$566,667. Movant similarly requested an apportionment of the attorneys' fees granted in plaintiff Gugliemo's case.<sup>1</sup> Respondents contend that there was cause to discharge movant based upon, among other things, the movant's alleged inaction and lack of communication with the plaintiffs, and therefore, movant is precluded from claiming a charging lien or entitlement to attorneys' fees.

Pursuant to Judiciary Law §475, upon the commencement of an action, an attorney is afforded a charging lien that “attaches to a verdict, report, determination, decision, judgment, or final order in his client's favor, and the proceeds thereof in whatever hands they may come.” In cases where a client relieves his initially-retained counsel and obtains new representation for the same matter, it is likely that a fee dispute will arise between the two attorneys. Under such circumstances, the “outgoing attorney may elect to take compensation on the basis of a presently fixed dollar amount based upon quantum meruit for the reasonable value of services or, in lieu thereof, the outgoing attorney has the right to elect a contingent percentage fee based on the proportionate share of the work performed on the whole case” (*Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454, 458 [1989]).

Here, movant has adamantly refused to accept payment pursuant to quantum meruit, requiring this court to determine his “percentage fee on the basis of the proportional share of the work performed on the case” (*Pearl v Metropolitan Transp. Auth.*, 156 AD2d 281, 283 [1<sup>st</sup> Dept. 1989]). As an initial matter, this court does not believe there has been an adequate showing that movant was discharged for cause to warrant a denial of reasonable compensation for movant's work in connection with either plaintiffs' cause of action, particularly in light of the fact that the plaintiffs' stop-work letters state only that they decided to “go on another course in this matter.” Nor does this court find merit in respondent Baker's largely conclusory allegations that, movant engaged in unethical conduct because “[p]resumably, Mr. Marcus and Schwartzapfel and Partners have agreed to some division of the fees if any are recovered,” or on the basis that there was an inherent conflict in representing both plaintiffs in a joint action under the circumstances presented herein.

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<sup>1</sup> Plaintiff Gugliemo received a settlement amount of \$75,000. In accordance with the retainer, his attorney was entitled to thirty-three and one-third percent of the net sum recovered, approximately \$25,000. However, movant filed the instant order to show cause in connection with the Index Number 21879/2012E, which was purchased by respondent Baker in connection with the complaint pertaining to plaintiff Ramos only. Nonetheless, movant Keegan joined in respondent Baker's cross-motion.

Upon review of the parties' respective papers, it is apparent that the incoming attorney, respondent Baker, performed substantially more work than movant. In sum and substance, over the course of six months, movant filed a summons and complaint, obtained certain medical records, and engaged in correspondence with OSHA to investigate Workers' Compensation matters. Although movant served the notice of claim on the potential municipal defendants, such claims never came to fruition, and movant himself acknowledges that there was no viable cause of action against the City of New York or the Department of Buildings. Nonetheless, this court understands that such effort was undertaken so as to preserve any potential claim plaintiff Ramos may have had, which required the expenditure of at least a modicum of time and effort.

In contrast, respondent Baker filed his own summons and complaint, completed discovery, conducted depositions, filed several motions on behalf of plaintiff Ramos, and prepared for and engaged in mediation with mediator Robert Adams of National Arbitration and Mediation, which ultimately resulted in settlement of the matter. Additionally, respondent Baker prepared the customary settlement documents. In light of the disparity in work load, this court finds that the appropriate percentage of attorneys' fees to be awarded to movant is six percent (6%) (*see Shabazz v City of New York*, 94 AD2d 569 [1<sup>st</sup> Dept. 2012] [holding that a 95%-5% contingency fee split was appropriate given the minimal amount of work done by the outgoing attorney in comparison to that of the incoming attorney]). Although respondent Keegan did not file a separate itemization of the work he performed in securing a settlement agreement for plaintiff Gugelimo, it appears as though movant completed similar, if not overlapping, work with respect to both plaintiffs. Thus, this court believes that the most reasonably prudent course of action is to apportion the same percentage of fees with respect to Gugliemo's settlement award. Additionally, the court finds that the movant is entitled to disbursements requested by herein.

Accordingly, it is hereby

ORDERED, that movant Robert B. Marcus' motion is hereby granted to the extent that this court finds him to be entitled to 6% of the attorneys' fees recovered in connection with plaintiff Ramos' settlement and 6% of the attorneys' fees recovered in connection with plaintiff Gugliemo's settlement; and it is further

ORDERED, that the respondents' cross-motion is hereby denied; and it is further

ORDERED, that respondent Mitchell Baker is directed to pay movant Robert B. Marcus in the amount of \$34,000 as movant's contingency fee for services rendered in the prosecution of plaintiff Ramos' claim and \$448.99 in disbursements within forty-five (45) days of service of notice of entry; and it is further

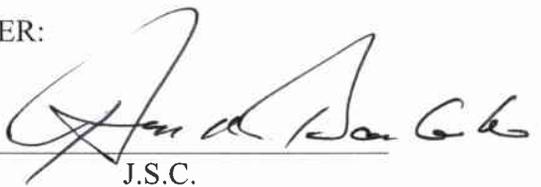
ORDERED, that respondent John Keegan, Jr., is hereby directed to pay movant Robert B. Marcus in the amount of \$1,500 as movant's contingency fee for services rendered in the prosecution of plaintiff Ramos' claim and \$313.58 in disbursements within forty-five (45) days of service of notice of entry; and it is further

ORDERED, that movant is directed to serve a copy of this order with notice of entry upon all parties within twenty (20) days of entry and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: ~~November 29, 2016~~  
12/15/16

ENTER:

  
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J.S.C.  
BEN R. BARBATO