

Miller v Falco

2017 NY Slip Op 33159(U)

June 19, 2017

Supreme Court, Suffolk County

Docket Number: Index No. 609001/16

Judge: Jr., Paul J. Baisley

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Short Form Order

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

PUBLISH

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 609001/16

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RAHEEM MILLER, JACLYN LARKIN and MIA
RENEE MILLER, an infant, by her parent and natural
guardian, RAHEEM MILLER,

DECISION AFTER HEARING

PLAINTIFFS' ATTORNEY:
CHRISTOPHER J. CASSAR, P.C.
13 East Carver Street
Huntington, New York 11743

Plaintiffs,

-against-

ANTHONY FALCO, as Executor of the Estate of
PAULINE FALCO,

DEFENDANT'S ATTORNEY:
GANFER & SHORE, LLP
Matthew Tobias, Esq.
360 Lexington Avenue
New York, New York 10017

Defendant.

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The history and background of this action have been outlined extensively in the December 14, 2016 order of this court dismissing plaintiff's action, as well as in the several orders emanating from this court in a prior related action, *Anthony J. Falco, as Executor of the Estate of Pauline Falco, Deceased, v. Raheem Miller*,¹ including the Decision and Order After Inquest issued simultaneously herewith. The actions involved the wrongful filing by Raheem Miller and his attorney, Christopher Cassar, P.C., of, first, a mechanic's lien, and second, a notice of pendency, against property belonging to the Estate of Pauline Falco (the "Estate") located at 21 Blackberry Lane, Huntington, New York, which allegedly impaired the ability of the Estate to market and sell the property and caused the Estate to incur substantial attorney's fees in seeking to void the impediments to title.

The December 14, 2016 order directed a hearing to determine the amount of fees, costs and sanctions to be assessed against plaintiff and his attorney in connection with the wrongful filing of the notice of pendency, which hearing was conducted before the undersigned on January 26, 2017. The sole witness produced on behalf of the Estate was William A. Jaskola, Esq., a commercial litigation associate with the firm of Ganfer & Shore, LLP, and the attorney principally responsible for handling this matter and the several other matters involving the Estate, under the supervision of managing partner Steven Shore. He testified that another partner, Ira Matesky, and an associate, Matthew Tobias, also performed services on behalf of the Estate.

Mr. Jaskola testified that the Estate was forced to incur significant legal fees and costs in defending against Mr. Miller's claims. In support of his testimony, Mr. Jaskola introduced into evidence the written retainer agreement entered into between the firm and Anthony Falco as executor, as well as copies of the monthly invoices rendered to plaintiff in connection with this

¹ Commenced in this court under Index No. 606648/15.

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matter for services provided during the time period from June 17, 2016 through December 31, 2016. The invoices reflect that the legal services rendered herein include reviewing the summons and complaint; writing to plaintiff's counsel to demand withdrawal of the action and notice of pendency; emails, letters, conferences and telephone calls with various parties and attorneys, including between and among the attorneys at Ganfer & Shore; research and drafting of pre-answer motion to dismiss complaint and memorandum of law in support; review opposition; prepare reply affidavit and memorandum of law; prepare motion to cancel notice of pendency and fix undertaking; review opposition; review order granting motion to dismiss complaint; prepare notice of entry of order. The invoices reflect that the hourly billing rates for Steven Shore, Ira Matesky, Matthew Tobias and William Jaskola are \$625.00, \$525.00, \$400.00, and \$385.00, respectively. A fifth attorney, Justin R. Bonanno, whose billing rate is \$465.00, also provided services that were billed to the Estate, although he was not mentioned in Mr. Jaskola's testimony.

Mr. Jaskola's testimony and the invoices admitted into evidence reflect that, although a separate billing file had been opened for the case commenced by Raheem Miller against Anthony Falco as Executor of the Estate (designated as matter number 06329.002 - "Miller Litigation"), the firm included under that matter number various services rendered in connection with the prior action to vacate the mechanic's lien, as well as services rendered in connection with the Estate's efforts to market and sell the property. The August 10, 2016 and September 10, 2016 invoices in particular contain numerous entries pertaining to the mechanic's lien action, some of which are duplicative of those that were charged to the Estate in the prior mechanic's lien litigation. (Mr. Jaskola's testimony acknowledged the duplicate billing, which he testified amounted to \$1,265.50 which he stated should be deducted from the invoice dated August 10, 2016.) The total amount of attorney's fees reflected by plaintiff's billing records that plaintiff is seeking to recover in this matter is \$73,320.50, together with costs and disbursements of \$1,341.35, for a total of \$74,661.85.

The court acknowledges that many of the services related to the prior mechanic's lien action had not been billed to the Estate at the time the inquest was completed on August 11, 2016, including counsel's attendance at the inquest itself. However, the Estate did not request leave to supplement the record in the mechanic's lien action to include post-inquest services, and the court's order setting this matter down for a hearing did not authorize the Estate to consolidate its claims for damages in the two actions. Accordingly, the court declines to consider the services rendered in connection with the prior action in assessing the amount of attorney's fees and costs to be imposed in the instant matter.

The factors to be considered in determining the reasonableness of an attorney's fee include "(1) the time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; (2) the lawyer's experience, ability, and reputation; (3) the amount involved and benefit resulting to the client from the services; (4) the customary fee charged for similar services; (5) the contingency or certainty of compensation; (6) the results obtained; and (7) the responsibility involved" (*Diaz v Audi of America, Inc.*, 57 AD3d 828, 830 [2d Dept 2008]). The determination must also take into account the hours reasonably expended and the prevailing hourly rate for similar legal work in the community (*RMP Capital Corp. v Victory Jet, LLC*, 139 AD3d 836 [2d Dept 2016]).

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Mr. Jaskola testified as to his educational and professional background, which includes 20 years' experience as a commercial litigation attorney at various firms in Nassau County and New York City. No evidence was offered as to the background and experience of the other attorneys whose services appear on the invoices. In light of the foregoing, the court is constrained to disallow all of the charges attributable to attorneys other than Mr. Jaskola.

Here, Ganfer & Shore's invoices include "block" entries by date for each billing attorney that recite multiple activities and the total time expended but do not provide a breakdown of the time expended for each task. Many of the block entries include services related to the current matter as well as services related to the prior matter under Index No. 60448/15. The court is unable to determine, however, what portion of the time represented by such block entries pertains to the current matter and what portion pertains to the prior action. The court is thus constrained to disallow all of those "tainted" block entries. With respect to Mr. Jaskola, those disallowed entries represent 59.5 of the total of 133.7 hours billed by Mr. Jaskola, leaving a balance of 74.2 hours deemed to be attributable solely to the instant action. Although substantially all of the services alleged to have been performed by Mr. Jaskola appear to have been reasonable and necessary, the court is unable to determine the reasonableness of the time expended for any of the services particularized in the block entries. It is well established that where the time records and other evidentiary proof submitted in support of an application for attorney's fees are deficient, the court has discretion to reduce the number of billable hours (*RMP Capital Corp.*, *supra*, 139 AD3d 836 at 840; *Matter of Rourke v New York State Dept. of Correctional Services*, 245 AD2d 870 [3d Dept 1997]). Rather than engage in a page-by-page and line-by-line analysis of the submitted invoices, the court exercises its discretion and reduces the number of Mr. Jaskola's total allowable billable hours by 20%, from 74.2 to 59.36.

As to the hourly billing rate, Mr. Jaskola offered no evidence to establish that an hourly billing rate of \$385.00 for a commercial litigation associate is the prevailing rate for similar legal work in Suffolk County where the action was commenced. The court finds that the billing rate is excessive for the Suffolk County area for the time period at issue, and finds that an hourly billing rate of \$350.00 is more reasonable and appropriate.

Accordingly, the court finds plaintiff is entitled to recover the Estate's attorney's fees for this matter in the amount of \$20,776.00, together with disbursements of \$769.96,² to be paid by Raheem Miller and his attorney, Christopher Cassar, P.C., jointly and severally.

Not specifically addressed by the court in its prior order or by the testimony or evidence introduced at the hearing is the issue of whether Mr. Cassar's law firm violated any ethical rules in identifying Jaclyn Larkin as a plaintiff in this action without authority to do so. By copy of this

² The court disallows the following disbursements that were made in connection with the prior matter under Index No. 606648/2015 or are otherwise unexplained: transcript of the inquest, \$506.25; mileage expense, \$52.14; "taxi" for Steven J. Shore, \$13.00.

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order, the issue is respectfully referred to the Grievance Committee for the Tenth Judicial District for such action as it may deem appropriate.

The foregoing constitutes the decision and order of this court.

Dated: June 19, 2017



J.S.C.
HON. PAUL J. BAISLEY JR.