

<b>M W Moody LLC v Lewis</b>
2018 NY Slip Op 32805(U)
October 31, 2018
Supreme Court, New York County
Docket Number: 650564/2018
Judge: Carmen Victoria St. George
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - - PART 34

M W MOODY LLC and MARK WARREN  
MOODY,

Plaintiff,

Index No.: 650564/2018  
Motion Sequence No.: 001  
DECISION/ORDER

- against -

DIANA LEWIS,

Defendant.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In this action, plaintiffs seek attorney’s fees from defendant, whom it represented in an employment discrimination suit. The parties’ retainer agreement provided that, if defendant was not awarded attorney’s fees, then she would pay plaintiffs 25% of her recovery as attorney’s fees. It also noted that defendant may have the right to arbitrate a dispute over fees, should such dispute arise. The lawsuit settled in September of 2017, and the settlement was executed the following month. The settlement reinstated defendant to her position as assistant district attorney in the Bronx. It afforded defendant her requested accommodation, which was that she be allowed to prepare legal briefs from home. In addition, defendant received \$10,000 and \$40,765 in back pay.

Plaintiffs did not recover attorney’s fees from defendant’s employer as part of the settlement. Before she received a bill from plaintiffs, defendant mailed them a check for \$13,000, representing just over 25% of her upfront recovery. Plaintiffs deposited the check, noting next to Moody’s signature that plaintiffs fully reserved their rights. Plaintiffs apparently did not contact defendant after their receipt of the check, and they did not inform defendant of her potential right to arbitrate. Instead, they filed this lawsuit. In the action, they contend that because defendant was reinstated to her position with the Bronx District Attorney’s Office based on the retainer

agreement, plaintiffs have the right to 25% of defendant's salary for her job's duration. They seek a declaration that defendant violated the retainer agreement.

In this pre-answer motion to dismiss, defendant states that plaintiffs misstate the face of the retainer agreement, which gives them the right to 25% of her upfront recovery only; that plaintiffs' complaint involves a dispute of under \$50,000, and thus plaintiffs were required to notify defendant of her right to arbitration and otherwise comply with the Rules of the Chief Administrative Judge, Part 137; that the amount sought is unconscionable on its face or, at the very least, unconscionable in retrospect (quoting *Matter of Quigley (Hayes)*, 55 Misc 3d 990, 995 [Surr Ct Essex County 2017]); that plaintiffs relinquished their right to assert this claim when they cashed her check for \$13,000 in payment for their services<sup>1</sup>; and that the fee is excessive under 22 NYCRR § 1200.5 Rule 1.5. She stresses that in attorney's fees disputes the burden is on the attorneys to justify their right to the amount in dispute. She states the lawsuit lacks merit and plaintiffs commenced it solely to harass her, and she seeks sanctions including attorney's fees.

In their opposition and cross-motion for summary judgment, plaintiffs argue that the language in the retainer agreement – which provided that defendant was to pay a contingency rate of one quarter of the sums recovered “by way of settlement, judgment, or otherwise, no matter how, or in what format, those funds are recovered” – clearly establishes plaintiffs' right to a portion of defendant's future salary.<sup>2</sup> They assert that the fee dispute is for more than \$50,000 as it seeks to obtain a quarter of defendant's \$70,000 salary<sup>3</sup> for the duration of defendant's employment –

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<sup>1</sup> The Court rejects this argument without further discussion as plaintiffs cashed the check with the explicit statement that they were not waiving their rights (see *Aviation Constructors, Inc. v Baldassano Architectural Group, P.C.*, 57 AD3d 927, 928 [2nd Dept 2008]).

<sup>2</sup> Plaintiffs are correct that defendant incorrectly cites to cases and rules which relate to matrimonial disputes. Accordingly, the Court does not consider this inapplicable precedent.

<sup>3</sup> Plaintiffs acknowledge that defendant's salary is around \$70,000 (Plaintiffs Mem of Law, \*6). The Court takes judicial notice of the fact that 25% of this amount is \$17,500. The Court takes judicial notice of this statement. Therefore, the complaint incorrectly asserts that defendant owes plaintiffs around \$1,350 per week (Complaint ¶ 47), which is slightly over \$70,000, or defendant's entire salary.

which, plaintiffs posit, will be at least five years. They note that utilizing defendant's reasoning, defendant would not owe plaintiffs any money if the sole relief had been reinstatement. They argue that defendant's primary goal was reinstatement rather than back pay, and therefore a reward based on her reinstatement was logical. They contend that the normal rules protecting the client in attorney's fees disputes is inapplicable here as defendant is herself an attorney.

In reply, defendant suggests that, in addition to the reasons stated in her motion and supporting papers, plaintiffs do not have the right to a quarter of her salary because her employment was never terminated. Defendant states that she refused to resign upon the Bronx DA's October 11, 2016 request. Instead, she remained on long-term disability and, four months later, she commenced her employment discrimination suit. For this reason, she states, she did not "recover" any salary but, rather, received the equitable right to work from home. She reiterates that she did a substantial portion of the work involved in the lawsuit, among other things providing a draft of the complaint which plaintiffs largely incorporated into the final version. She states that other than participating in the relatively brief mediation session and settlement, plaintiffs did virtually no work on the case.

The Court grants defendant's motion. As defendant states, plaintiffs nowhere indicate that they discussed the fee dispute with defendant and notified her of her right to arbitrate under the Fee Dispute Resolution program. Moreover, the Court notes, plaintiffs did not assert in the complaint that the dispute "is not covered by the Fee Dispute Resolution Program" (*Kerner and Kerner v Dunham*, 46 AD3d 372, 372 [1st Dept 2007]). Therefore, they have not stated a proper cause of action (*see id.*). Furthermore, as plaintiffs affirmed when they filed the complaint in the underlying action, defendant remained an employee of the Bronx DA's office throughout their representation of her, but simply was on long-term disability. Neither party has indicated what

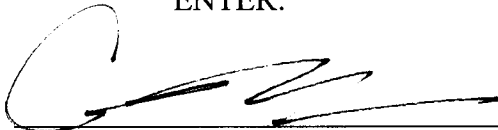
employees earn up to 66 2/3% of their salaries while they are on long-term disability (<https://www1.nyc.gov/site/olr/mbf/mbf-longterm-disability-insurance.page>). Thus, using plaintiffs' statement that defendant intended to retire five years after her reinstatement, the amount in controversy is 25% of 33 1/3% of her salary – the difference between her full salary and her long-term disability payments – or around \$29, 167. As this is under \$50,000, plaintiffs were required to follow the mandatory procedure set forth in the Fee Dispute Resolution Program. Their failure to do so, as defendant states, mandates dismissal of the complaint (*Borah, Goldstein, Altschuler, Schwartz & Nahins, P.C.*, 13 Misc 3d 823, 824 [Civil Ct NY County 2006]). Accordingly, the Court need not reach the other issues that the parties raise, although it has duly considered them, and it is

ORDERED that the motion to dismiss is granted, the cross-motion for judgment is denied, and the Clerk is directed to enter a judgment of dismissal.

Dated:

10/31/2018

ENTER:

  
CARMEN VICTORIA ST. GEORGE, J.S.C.

HON. CARMEN VICTORIA ST. GEORGE  
J.S.C.