

Medina v Millwood Mkt., LLC
2020 NY Slip Op 33550(U)
September 21, 2020
Supreme Court, Bronx County
Docket Number: 309640/2010
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

CORPO MEDINA,

INDEX NUMBER: 309640/2010

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

MILLWOOD MARKET, LLC, MILLWOOD NS,
INC., SHELL OF MILLWOOD, INC., AVENTURA
CONSTRUCTION CORP., ASBESTOS LEAD
and APPLIED TECHNOLOGY SERVICES, INC.,

Defendants.

The following papers numbered 1- 4

Read on this Motion to Reargue Apportionment of Attorneys' Fees

On Calendar of 10/7/19

Notice of Motion-Affirmation, Exhibits	<u>1</u>
Affirmation in Partial Opposition	<u>2</u>
Reply Affirmation	<u>3</u>
Sur-Reply	<u>4</u>

Upon the foregoing papers, the motion to reargue by plaintiff's counsels, Ross Legan Rosenberg Zelen & Flaks, LLP ("Ross Legan"), directing a hearing for the purpose of determining whether the law firm Philip Newman P.C. ("Newman PC"), plaintiff's prior counsel, is entitled to a legal fee and determining the appropriate apportionment of legal fees between the law firms, should the Court determine that the outgoing attorneys were not discharged for cause, is decided as follows:

Ross Legan moves to reargue its motion for an order directing that a hearing be conducted for the purpose of determining whether the Newman PC is entitled to a legal fee and for determining the appropriate

apportionment of legal fees between outgoing and incoming attorneys. The motion was erroneously marked as withdrawn in this Court's Order dated May 4, 2018. As the motion was not withdrawn, the motion to reargue is granted.

This was an action for personal injuries suffered by plaintiff, Corpo Medina, on July 19, 2010 while in the course of his employment performing asbestos removal work at a construction site. On or about August 17, 2010, plaintiff retained Newman PC to represent him in connection with his workplace injuries. Newman PC initially performed substantial work upon being retained by plaintiff, including conducting multiple interviews with the plaintiff and performing a comprehensive investigation of the facts. Newman PC identified the relevant parties and drafted and served the summons and complaint. They obtained witness statements and reviewed plaintiff's substantial medical records. Further, they served numerous discovery demands and responded to numerous demands from defendants' various, changing attorneys. Newman PC retained an investigator to identify the owner of the premises and identity of the contractors at the construction site. Newman PC named several defendants in the action based upon apparent potential ownership of the premises: Millwood NS Inc., Millwood Market LLC and Shell of Millwood, Inc.. After further investigation, Newman PC determined that it was solely Millwood NS which was the titled owner of the subject premises.

After the case was filed, through discovery, Newman PC obtained contracts pertaining to the construction project that identified additional defendants; Aventura Construction, Asbestos & Lead, Inc. and Applied Technology Services, Inc., Through motion practice, the complaint was thereafter amended to add these parties as defendants. Newman PC scheduled plaintiff's and defendants' depositions on five occasions, with a preliminary conference having been held on March 11, 2011. Thereafter, they attended compliance conferences on October 31, 2011, June 1, 2012, October 5, 2012 and August 16, 2013. Newman PC explains that the depositions were adjourned as a result of their decision not to produce plaintiff for multiple depositions by individual defendants. Instead, Newman PC determined it would be best to produce plaintiff for one unified deposition, with all defendants present. The adjournments were also granted because new attorneys had entered the case for several defendants, and professional courtesy was extended to enable new counsels sufficient time to familiarize with the case.

Plaintiff terminated his relationship with Newman PC on or about November 5, 2013 due to his frustration at the pace the case was moving, and the fact that his deposition had not yet been held. Newman PC

states that they kept plaintiff fully apprised by telephone, mail and in person meetings of the adjournments of the depositions, and the reason for the adjournments. Newman PC spent many hours preparing plaintiff for his deposition, as well as preparing to conduct the depositions of defendants. One such adjournment occurred on or about August 12, 2013, when one of the defendant law firms substituted in as Millwood NS' counsel, resulting in a further adjournment of plaintiff's deposition. In response to the substitution of attorneys and the adjournments, Newman PC filed for a compliance conference. The Compliance Conference Order dated August 16, 2013 set plaintiff's deposition for November 6, 2013, and required that the depositions of the four defendants be completed in November 2013. Plaintiff terminated his relationship with Newman PC on November 5, 2013. On November 6, 2013, Michael Flaks, Esq. from Ross Legan sent a letter to Newman PC with the signed consent to change attorney and a letter from plaintiff notifying of the substitution and directing Newman PC to stop all work on his behalf.

Newman PC further argues that the work it performed on behalf of plaintiff was not only competent, but of superior quality, which brought great value to the case and pushed the case forward. Newman PC fully investigated the matter and ascertained all of the parties that should be named defendants in the action. Newman PC had regular, repeated and constant contact with plaintiff, as well as with defendants, and ensured that all of plaintiff's medical care occurred prior to the substitution of attorneys. Newman PC did not retain the experts to testify in the case because it was not the appropriate time in light of where they were in the prosecution of the action when they were substituted. Depositions had not yet occurred at the time of the substitution. Newman PC argues that the handling of the case by Ross Legan devalued the case as plaintiff allegedly committed perjury during his deposition while represented by Ross Legan. Ross Legan had allegedly valued the case at \$10 million, which based upon lost earnings and injuries suffered, yet after plaintiff's deposition and the alleged perjured testimony, the value of the case plummeted. Prior to plaintiff's testimony, Ross Legan estimated plaintiff's lost earnings at approximately \$1.6 million, as set forth in their supplemental bill of particulars. After the alleged perjured testimony, Ross Legan retained an economist who ignored plaintiff's pay stubs and his lost earnings with increases over time dropped from \$1.6 million to approximately \$300,000 for future lost earnings and \$100,000 for the past lost earnings.

Newman PC argues that although the Compliance Conference Order of August 16, 2013 mandated that the deposition of plaintiff take place on November 6, 2013, and that all defendant depositions be

completed in November 2013, plaintiff's deposition did not commence until November 12, 2014, approximately one year after Newman PC's substitution. Newman PC cooperated fully with the substitution including waiving its retaining lien on plaintiff's files, papers and property in the firm's possession and immediately sending the legal file to Ross Legan. In exchange for its cooperation and waiver of its right to a retaining lien, Newman PC agreed to enter into an agreement to limit itself to the assertion of a charging lien against the proceeds of any result in the case including, but not limited to, a lien attaching to any settlement in the case. Ross Legan, by Mr. Flaks, executed an agreement that Newman PC would be entitled to the value of its services at the conclusion of the case. The parties' agreement is set forth in a contract letter dated November 6, 2013 in which Mr. Flaks agreed that Newman PC has "an attorney's lien for the value of services which will be determined at the conclusion of the case."

Ross Legan took over plaintiff's representation in the case, and states that they immediately actively prosecuted the action until it settled at mediation on December 1, 2017. Ross Legan claims that upon receipt of the legal file from Newman PC's, it was evident that the legal work performed was inadequate and severely deficient. They further argue that Newman PC was discharged by plaintiff for cause, and as such, it should not be entitled to a legal fee. If the Court determines that a fee is warranted, Ross Legan contend it should be minimal, to represent the substandard litigation it performed on plaintiff's behalf.

Ross Legan argues that Newman PC discharge was for cause because they committed multiple acts and omissions of malpractice. The initial complaint dated November 4, 2010, and the amended complaint dated December 6, 2012, which added Applied Technology Services, Inc. as a defendant, and were prepared and served by Newman PC. However, those pleadings failed to plead separate causes of action for Labor Law §240(1) and Labor Law §241(6), and merely alleged violations of same within the general negligence allegations. The Labor Law causes of action should have been separately pled and Newman PC's failure to do so, argues Ross Legan, was substandard Labor Law litigation practice and constituted legal malpractice. As further proof of Newman PC's alleged legal malpractice, the complaint, bills of particulars and supplemental bills of particulars served by Newman PC failed to allege specific Industrial Code violations, which is required to support a Labor Law §241(6) cause of action.

Moreover, Ross Legan contend that the pleadings prepared by Newman PC were incorrect as Newman PC repeatedly asserted that plaintiff fell through a hole in the roof, when in actuality, plaintiff's leg fell

through the roof decking due to a partial collapse. Erroneously describing the subject accident in verified pleadings could have led to a denial of plaintiff's summary judgment motion. Ross Legan corrected those alleged mistakes by accurately describing how the accident happened in the second amended complaint and in the amended bill of particulars dated May 24, 2016. Additionally, the bill of particulars dated April 8, 2011 prepared by Newman PC inadequately alleged that plaintiff sustained "a knee injury contusion with subsequent hematoma formation, with injury to the anserine insertion of the pes" and that "plaintiff was injured about the neck and back". Ross Legan asserts that it corrected the deficiencies concerning the injuries allegation by serving supplemental bills of particulars and an amended bill of particulars wherein they provided a full recitation of plaintiff's injuries that were absent from Newman PC's pleadings. Furthermore, Newman PC also claimed an egregiously low CPLR §3107 (c) response of one million dollars. Ross Legan remedied the alleged mistake by serving a supplemental demand of \$10 million. Newman PC also failed to timely move for a default judgment which led to the dismissal of the action against Millwood Market LLC for lack of prosecution.

Ross Legan contends that Newman PC provided valueless services which demonstrated cause for plaintiff's termination of Newman PC's representation. The summary of work provided by Newman PC shows that the work performed was minimal: filing an initial complaint in November 2010; filing an amended complaint in December 2012, which added Applied Technology Services, Inc. as a co-defendant; served a bill of particulars with supplemental particulars along with discovery responses and demands. After Ross Legan took over the case, they prepared a motion for leave to amend the pleadings dated March 13, 2014; a corrective amended pleading; multiple supplemental bills of particulars dated July 2, 2014, August 29, 2014, January 5, 2015 and July 5, 2017; a corrective amended bill of particulars dated May 24, 2016; a corrective CPLR §3017 (c) demand dated March 14, 2014; liability and damages expert responses; and, a summary judgment motion. After the action was placed on the trial calendar, Ross Legan participated in a mediation which ultimately led to the settlement of the case for \$2.5 million. Upon obtaining the settlement, Ross Legan negotiated a reduction of the Workers' Compensation lien beyond the statutory required reduction.

Ross Legan claims that an account of the respective legal services provided by Newman PC and Ross Legan demonstrates that Newman PC's services were negligible in comparison to the time and money expended by Ross Legan, the work performed and the value of the respective services. The file turned over by Newman PC consisted of a few red wells mostly filled with medical records and pleadings. By the time the case

was completed, the entire file consisted of 22 additional red wells in addition to summary judgment motion papers. Moreover, while Ross Legan incurred \$32,665.66 in litigation expenses, Newman PC only incurred \$1,274.68 for its expenses. Ross Legan claims it spent a total of 433 hours in prosecuting the case, as opposed to Newman PC's work, which should not have consumed more than 15 hours, exclusive of court appearances. Ross Legan conducted all of the extensive depositions, with plaintiff's deposition held over three days and defendants' depositions held over five days. Ross Legan prepared the plaintiff's summary judgment motion which included the affidavits of a civil engineer. They also obtained other expert affidavits supporting plaintiff's contentions regarding the extent of his injuries, including plaintiff's treating knee surgeon, back surgeon, an orthopedic consultant, a vocational expert and an economist.

The action settled for \$2.5 million on December 1, 2017. The total legal fee is \$822,444.79, which has been held in escrow pending this Court's resolution of the fee dispute. Ross Legan argues that based on the applicable law, Newman PC is not entitled to any legal fee as it was discharged by plaintiff for cause. Ross Legan further argues that if the Court finds that Newman PC was not discharged for cause, the work performed by Newman PC was de-minimis in relation to the time expended by Ross Legan, the nature of the work provided by each counsel and the value of the legal work performed. In opposition Newman PC argues that it is entitled to 50% of the total fee. As the attorneys have been unable to agree on the amount of money due Newman PC, if any, the matter must now be determined by this Court.

In that regard, a Hearing was held on this matter, commencing on January 23, 2019, and continuing on February 25, 2019, February 26, 2019, April 15, 2019, April 22, 2019, May 29, 2019, June 3, 2019, June 17, 2019, August 5, 2019, August 6, 2019, and concluding on October 7, 2019. During the Hearing, numerous documents were introduced into evidence, as set forth on the Court's Exhibit Sheet. One of the exhibits, Defendant's Exhibit B dated January 23, 2019 was a chronological list of the legal work performed by Newman PC. The list is detailed and extensive. It is clear that the preparation of the case by Newman PC incorporated a substantial amount of time, labor and legal expertise over a three year period, as set forth by the testimony during the Hearing, and in the documents entered into evidence.

"It is well established that Supreme Court has inherent authority to supervise the fees attorneys charge for legal services." Stortecky v. Mazzone, 85 N.Y.2d 518, 525 (1995); In re Lafferty, 297 A.D.2d 469, 469-470 (1st Dept. 2002). Section 90(2) of the Judiciary Law provides that "[t]he supreme court shall have the

power and control over attorneys and counselors-at-law". See In re Wong, 275 A.D.2d 1, 5 (1st Dept. 2000). It is well-settled that a client may discharge an attorney at any time, with or without cause. Cheng v. Modansky Leasing Co., 73 N.Y.2d 454, 457 (1989). The discharged attorney may elect to receive compensation immediately based on quantum meruit or on a contingent percentage fee based on his or her proportionate share of the work performed on the whole case. Cohen v. Grainger, Tesoriero & Bell, et. al., 81 N.Y.2d 655 (1993). If the discharged attorney does not at the time of the discharge elect the method of payment, it is presumed that a contingent fee has been chosen rather than a quantum meruit recovery. Id.

It is well settled that the award of reasonable counsel fees is within the sound discretion of the trial court. See, DeCabrera v. Cabrera-Rosete, 70 N.Y.2d 879 (1987). The apportionment of fees should be based upon factors including the amount of time spent by the attorneys on the case, the nature and quality of the work performed and the relative contributions of counsel toward achieving the outcome. See, Diakrousis v. Maganga, 878 N.Y.S.2d 668 (1st Dept. 2009).

In the instant action, at the time of the substitution of attorneys, Ross Legan acknowledged that Newman PC had an attorney's lien for the value of its services which would be determined at the conclusion of the case. Having presided over the Hearing for 11 days, the testimony of the witnesses and the evidence presented during the Hearing, it is this Court's finding that Newman PC was not discharged for cause. A client may discharge attorney at any time with or without cause; however, when the client discharges an attorney without cause, the attorney is entitled to recover compensation from the client measured by fair and reasonable value of services rendered. See, Morrison Cohen Singer & Weinstein v. Zuker, 610 N.Y.S.2d 226 (1st Dept. 1994)(Attorneys who were discharged by clients were entitled to fair and reasonable value of their services; most of clients' claims concerned reasonable strategic choices regarding litigation which did not, as matter of law, constitute malpractice and, thus, discharge was not for cause); Ziprowski v. Goodman, 597 N.Y.S.2d 59 (1st Dept. 1993); Pearl v. Metropolitan Transportation Authority, 548 N.Y.S.2d 669 (1st Dept. 1989). General dissatisfaction with an attorney's performance does not establish the basis for discharging an attorney for cause. See, Nabi v. Sells, 919 N.Y.S.2d 335 (1st Dept. 2011).

In the instant matter, Newman PC's discharge resulted from plaintiff's dissatisfaction with the pace of the lawsuit and, specifically, the rescheduling of his deposition. Contrary to Ross Legan's contention, there is no evidence that Newman PC committed any legal malpractice in prosecuting plaintiff's case, or that it

breached the trust and confidence of plaintiff. There is no evidence that any action or inaction by Newman PC curtailed or prejudiced a right or cause of action of plaintiff. Moreover, the evidence shows that the disagreement between plaintiff and Newman PC resulted from plaintiff's concern with the strategic choice made by Newman PC to withhold plaintiff's deposition until all defendants could attend together. Newman PC's explanation for this decision, to avoid plaintiff having to appear several times for multiple depositions, is reasonable. Furthermore, Ross Legan's argument that it incurred significantly more litigation expenses than Newman PC is explained by the fact that expert witnesses are retained later in the litigation, usually once discovery has been held. Thus, the small amount of Newman PC's litigation expenses is not a direct correlation to the legal work performed.

Thus, it is the finding of this Court that the apportionment of attorneys' fees shall be 20% in favor of Newman PC and 80% in favor of Ross Legan. The record establishes that Newman PC did significant and important preliminary work in investigating, commencing and prosecuting the action prior to being substituted. The work that Newman PC performed helped achieve the favorable result for plaintiff. This decision also takes into account the substantial, professional and effective legal work performed by Ross Legan from the inception of its representation of plaintiff through the time it obtained the \$2.5 million settlement. Unquestionably, Ross Legan's experience and work-product led to this favorable settlement.

This constitutes the decision and Order of this Court.

Dated:

9/21/20



Hon. Alison Y. Tuitt