SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

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JOHN E. WEHRUM

Plaintiff,

-against-

THOMAS A. ILLMENSEE

Defendant.

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TRIAL PART: 19
NASSAU COUNTY

INDEX NO: 3626/06

DECISION AFTER TRIAL

This matter involved a fee dispute between the plaintiff and defendant arising out of the defendant's representation of the plaintiff's brother in a tort action which originated in the Southern District of New York. It was tried before the court without a jury on October 16, 20 and 21st, 2008. Post trial memoranda were submitted November 24, 2008.

Plaintiff alleged two causes of action at the trial. The first cause of action sought a one-third referral fee from the defendant as a result of the recovery obtained by the defendant. The second cause of action was in "quantum meruit." The defendant denies the allegations.

Facts

Each party testified in his own behalf and careful consideration was given by me to the manner and substance of their testimonies. Based upon the credible evidence, the facts are found to be as follows: On or about November 1, 1996, Mr. James Wehrum, an elevator repairman, was traveling on bicycle to a call in Manhattan, New York. En route, he was involved in a verbal altercation with the driver of a BMW automobile, one Mr. Scott Lyle. A few blocks away the car struck Mr. Wehrum and he was injured. Mr. Wehrum's has a brother, John, who is an attorney. Believing that his brother James had a potential law suit, John sought out a former colleague from the US Attorney's office, the defendant Thomas Ilmensee to discuss the case. They met at the Nassau County Bar Association at the end of November. The credible testimony is that the plaintiff and defendant were not friends in any sense of the word but rather attorneys who worked for the same employer in different departments. The defendant testified that to his recollection he and the plaintiff had three conversations in twenty-three years. Listening to the facts as laid out by plaintiff, defendant pointed out the potential weaknesses in the case and the meeting ended with the defendant telling plaintiff to have his brother call me to set up an appointment. That meeting occurred on November 14, 1996 at defendant's office.

Following that meeting, several things occurred. Mr. Lyle, who had originally been charged with intentional assault eventually pleaded guilty to a charge of negligent operation of a motor vehicle. Defendant testified that he was involved in the plea arrangement with the District Attorney's office which was significant because if Lyle had been convicted of intentional assault there would be no insurance coverage and James Wehrum would not have a cause of action. After the plea was completed the defendant initiated the lawsuit.

In the interim months after the accident, James Wehrum began to experience unusual symptoms such as seizures and stuttering. Apparently repeated physical exams did not establish a direct cause of these injuries and Mr. Wehrum spent several years being seen by doctors attempting to establish a cause of his problems. The defendant testified that while he initiated suit in federal court he believed that there were many problems with the case and he then consulted with two trial attorneys, Mr. Joseph Ryan and Mr. John Quinn, about coming in and trying the case if it went to trial. Defendant testified that he consulted with James Wehrum and his wife about this and that they consented to the other attorneys involvement.

The trial was commenced January 7, 2002. The plaintiff testified at the trial on his brother's behalf, the point of the testimony being to describe his brother's symptoms to the jury and how it had changed after the accident. The jury began deliberating on January 14, 2003. While the jury was out, defendant brought in another attorney, a Mr. Frank Sheerin, to negotiate what is known as a "high-low" agreement with the defendant insurance company with a $2,000,000 low and $5,000,000 high. At this point, and according to defendant's testimony against his wishes, the plaintiff interjected himself in the negotiation with the insurance company. He went into a side room with a representative of the insurance company and when he emerged from the meeting plaintiff reported to defendant that he had been successful in raising the high/low by $500,000 on each end. Reporting this to defendant, plaintiff said he approached him in the well or just outside and said to plaintiff words to the effect of "well, I guess I earned my fee, huh?" To which the defendant replied, "yeah I guess you did." At trial, the plaintiff called Mr. Sheerin as a witness who essentially corroborated this conversation as having occurred in his presence in the courtroom. The defendant's explanation of this statement was that he was being sarcastic and did not mean it.

Thereafter, the jury returned a verdict for plaintiff in the amount of $1.2 million and the high/low therefore raised the award to the plaintiff by $1.3 million dollars.

Existence of the agreement

It is without dispute that there was no written agreement between the plaintiff and defendant. And the court agrees with plaintiff that there is no absolute requirement for there to be one in fee-

splitting disputes. *Carter v Katz, Shandell, Katz & Erasmous*, 120 Misc 2d 1009; *see also, Sable v Fuchsberg*, 128 AD2d 692, 693; *Oberman v Reilly*, 66 AD2d 686, 687, *appeal dismissed* 48 NY2d 602).

However, without a writing, the fee-splitting between attorneys is governed in this state by Disciplinary Rule 2-107, NYCRR Sec 1200.12, "Division of Fees Among Lawyers". It reads as follows:

> "A. A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of the lawyer's firm, unless:
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> 1. The client consents to employment of the other lawyers after a full disclosure that a division of fees will be made.
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> 2. The division is in proportion to the services performed by each lawyer, or, by a writing given the client, each lawyer assumes joint responsibility for the representation.
>
> 3. The total fee of the lawyers does not exceed reasonable compensation for all legal services they rendered the client."

The record does not support a finding that the plaintiff was ever an associate in the defendant's law firm. During the trial, the plaintiff did place into evidence a piece of stationery that had the plaintiff listed as "Of Counsel" to defendant. Neither party was able to adequately explain how this occurred. Regardless, the testimony clearly established that the parties had absolutely no professional relationship of any kind, and to rely on the existence of the stationery to prove same is fruitless.

The court credits the testimony of the plaintiff's brother, James, that he consented to his brother being paid a fee. But without a writing, there are several requirements that must be met: a division in proportion to the services performed by each lawyer or a writing given to the client whereby each lawyer assumes joint responsibility for the representation.

Here, the plaintiff did not keep time records. He testified that he appeared at most or all of the case appearances but admits he did so as brother rather than attorney and certainly not attorney of record. Plaintiff never acknowledged any responsibility for the litigation. The evidence is clear that the plaintiff did not comply with section (2) and under prevailing case law, he cannot recover fees pursuant to the alleged oral contract without having done so. See *Lynn v Purcell*, 11 Misc. 3d 400; (Nassau County Supreme Court, J. Warshawsky); affirmed as modified, 40 AD3d 729 (2nd

Dept., 2007) and *Weinstein, Chayt & Chase v. Breitbart*, 31 AD3d 753 (2nd Dept., 2006). While plaintiff testified credibly that his brother was told on at least three occasions that plaintiff was to receive a fee, there is no testimony on the record that the plaintiff had assumed joint responsibility for the representation, a clear and strict requirement of 2-107. Based upon the foregoing, I find that the plaintiff cannot recover pursuant to an oral agreement.

Defendant further claims that the plaintiff is barred from recovering a fee because in addition to DR 2-107 he also violated DR5-107 (A) (I).

> "Section 1200.21. [DR 5-102] Lawyers as witnesses reads as follows:
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> > "(a) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify"...

The court does not find that this Rule applies to plaintiff because he did not "accept employment" on his behalf of his brother. He never contracted with his brother or defendant's firm. Nor did he ever "advocate on issues of fact before any tribunal.." He never made an appearance in court, appeared as counsel for depositions or conferences. He did testify at the damages portion of the trial as to his brother's several seizures and speech difficulties that developed months after the accident. I find that he did not violate this disciplinary rule in fact or in substance.

Quantum Meruit

Having held herein that the plaintiff cannot be compensated pursuant to the oral contract, the final issue to be dealt with is the third cause of action which sounds in quantum meruit-that is to be compensated for the plaintiff's legal services rendered on behalf of his brother.

According to New York Jurisprudence, (Attorneys, Sec.195) an attorney who has rendered services to a client without express agreement as yet with a reasonable belief that he is entitled to compensation may recover on the quantum meruit for the reasonable value of the services so performed. In order to recover, however, the movant must show circumstances sufficient to support an implied promise to pay for such services. Thereafter the party has the burden of establishing performance, the value thereof, and the nexus between the performance of the services and liability to pay therefor. Factors to be considered are the time required for the work performed; amount of money involved; the effect on the litigation; the results accomplished and the character of the employment, whether regular or casual.

Applying these criteria to the case at bar, the court finds that plaintiff had a reasonable expectation to be paid because his brother testified that he expected and wanted plaintiff to be paid from the defendant's fee. As for the work done, it is difficult to establish this with any degree of certainty because the plaintiff did not keep time records of his involvement in the case. If the defendant had kept time records of his work they would have been helpful in establishing the contact had with plaintiff but he did not keep records either. Additionally, the plaintiff testified in his own words that while he attended many court appearances, he never appeared as counsel, only providing support for his brother and assisting him in understanding what was going on at the time. At the depositions, which he attended, plaintiff made a point of testifying that he was not present as counsel but that was a "lawyer who was the plaintiff's brother." The line between plaintiff acting as brother or counselor becomes extremely blurred at times.

The evidence however does clearly establish work done on behalf of his brother that is both quantifiable and undeniable and that of course is the negotiation of the increase in the high/low settlement by half million dollars.

As a result of plaintiff's direct and sole effort, his brother received $500,000 and the court finds that he should receive a direct one-third of that amount, or $165,000 in quantum meruit. This recovery by James Wehrum was a direct result of his brother, the plaintiff herein, negotiating on James' behalf and which negotiation had a direct positive result on the outcome of the case.

For all of his other work on the case, including but not limited to his ongoing contact with the attorneys over the life of the 7 year litigation, reviewing of documents, attending all conferences, and assisting with the Lyle plea in criminal court, the plaintiff is awarded an additional 17,500.00.

Accordingly, plaintiff is awarded a money judgment in the total amount of $182,500.

Submit Judgment on notice.

This constitutes the decision and order of this Court.

ENTER

DATED: January 9, 2009

HON. ARTHUR M. DIAMOND
J. S.C.

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