NEW YORK STATE SUPREME COURT, PART 24– QUEENS COUNTY

Present: HON. SALLY E. UNGER

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ROMAN MALAYEV, **Index No. 708959/2017**

Plaintiff,

-against-

BOULEVARD LEASING LIMITED PARTNERSHIP, ESTATES NY REAL ESTATE SERVICES, LLC,

Defendants.

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BOULEVARD LEASING LIMITED PARTNERSHIP, ESTATES NY REAL ESTATE SERVICES, LLC,

Third-Party Plaintiffs,

-against-

VAIBHAV MAHAJAN,

Third-Party Defendant.

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This is an action for negligence in which the plaintiff alleged he suffered a traumatic brain injury from stones being thrown off the roof of defendants' building by children attending a resident's social function on the rooftop. This trial was conducted as a bifurcated jury trial. The negligence phase of the jury trial was conducted over the course of five days in April 2022. Since this was a bifurcated trial, the Court dismissed the action regarding the third-party defendant once the jury returned a verdict in his favor and the trial proceeded into the damages phase of the trial. After a few witnesses testified, it was necessary for the Court to declare a mistrial as to the damages portion of the trial and discharge the jury, because one of the jurors contracted Covid-19.

On June 9, 2022, resulting from an application by order to show cause and pursuant to CPLR 321(b)(2), this Court issued an order (hereinafter "substitution order") substituting the incoming plaintiff's law firm of The Flomenhaft Law Firm, PLLC (hereinafter "FLF") for the outgoing plaintiff's law firm of Gordon & Gordon, PC (hereinafter "G&G"). After some wrangling over discovery issues and new experts being retained, the damages phase of the trial was to be re-tried from its inception on December 1, 2022.

When the dispute about compensation arose between predecessor and incoming attorneys, the discharged attorney elected to receive compensation on a contingent percentage fee based on his proportionate share of the work performed on the whole case, rather than being paid immediately based on quantum meruit. *Lai Ling Cheng v. Modansky Leasing Co*., 73 NY2d 454, 541 NYS2d 742 at 458 (1989).

In the substitution order, this Court determined that, if the respective plaintiff's attorneys were unable to resolve their apportionment of compensation issue among themselves, at the conclusion of this case, a judicial determination would be made, based on the proportionate share of the work performed by the attorneys.

Unfortunately, G&G and the incoming law firm were not able to resolve their discrepancy over apportionment of their respective fees and have turned to this Court to resolve the issues. Therefore, an attorney fee apportionment hearing (hereinafter "apportionment hearing") was conducted on December 20, 2022 and January 5, 2023.

The Apportionment Hearing

Randy Faust, Esq., was called to testify on behalf of G&G. He is the attorney who represents the defendants in this litigation. Mr. Faust also substituted in as a successor attorney. He works for the insurance carrier who provides excess coverage over and above the first million dollars of coverage. Mr. Faust testified about the changes in the defendants' settlement positions and offers, as well as the reasons for those changes. Although Mr. Faust took an active role in the litigation upon the substitution, he was present and aware of the posture of the case throughout the trial. According to Mr. Faust, the negotiations stopped while G&G was still in the case when G&G demanded a settlement sum of $15,000,000.00.

Mr. Faust was quite candid in his testimony. He stated forthrightly that the defendants' counsel felt emboldened after the mistrial and having deposed the plaintiff's accountant. In his deposition, the plaintiff's accountant described a lifestyle not in keeping with the plaintiff's income and also testified that the plaintiff did not exhibit changes in his business acumen.

Mr. Faust continued by disclosing that his law firm conducted a significant new investigation after he substituted in place and instead of Harris Beach. Mr. Faust's firm had private investigators obtain photographs of the plaintiff's new home. Based on the new investigation, Mr. Faust believed that, had the case proceeded on the damages trial, it would have been difficult to have money offered by the defendants.

However, while G&G thought otherwise, the change in strategy of FLF did not make the defendants emboldened. On the contrary, as Mr. Faust admitted openly,

> I think Mr. Flomenhaft's addition of what we call "boardable numbers" posed a threat to the carrier. One of the things the carriers always take into account is what can be upheld on appeal and what is sustainable. The addition, if believed, the black boardable numbers made the case a bit more risky on the defense side.

Mr. Faust acknowledged the defendants' view that if the re-trial of the damages case was conducted in the same way as the first i.e., with no black boardable numbers, no admission of evidence of objective testing such as diffusion tensor imaging (hereinafter "DTI") and no testimony from treating physicians, that it would have been a weak presentation by plaintiff which would have resulted in a reduced award on appeal, if the jury awarded a high verdict. On cross-examination, the attorney of record and Mr. Faust engaged in the following exchange:

> Q Is it fair to say the medical and scientific contributions I added to the case significantly altered that calculus?
> A Certainly. For sure if the DTI was admissible.
> Q Is it fair to say my contributions to the case after I came in drastically altered the risk calculation of the carrier?
> A Sure.
> Q Given the lifestyle and internet discoveries that you made regarding Mr. Malayev, that the majority, the vast, vast amount of the offer and the decision to settle now for $3.5 million was generated by my contributions?
> A Certainly from a sustainability standpoint, yes.

Quite specifically, G&G's failure to admit any of the imaging or radiological testimony played a big role in the defendants' scrutiny of the case for the appeal. Again on cross-examination, Mr. Faust pinpointed the plaintiff's weakness by failing to admit the DTI imaging:

> Q By the way, the fact there was discussion about DTI with no admission of any of the imaging and no radiology testimony, did that also figure into your appellate analysis?
> A It was a substantial factor.
> Q Why is that?
> A Again, from the common sense approach and from my experience, the images shown to the jury on the DTI are pretty powerful.

According to Mr. Faust, the appeal of the liability verdict had been perfected. The defendants' intention had been that if the jury verdict on damages was adverse, they would have proceeded to conclusion on appeal. Ultimately, however, the defendants did not pursue their appeal, because their appellate counsel believed the black boardable numbers, which only came into the analysis due to FLF, would not be reduced on appeal. Although G&G wanted to paint a picture of the attorney of record as reckless by his new approach to the case, Mr. Faust was resolute in stating this was not so. During his re-direct examination, the following occurred:

> Q When Mr. Flomenhaft was asking you about the altered risk and the work he did to alter the risk, his work actually put Mr. Malayev's case in jeopardy from the Plaintiff's point of view; isn't that true?

> A No. I don't understand that. Let me explain what happened here, it's pretty simple from the standpoint of Mr. Flomenhaft coming into the case and adding what I keep saying is black boardable numbers that weren't in the case before, that on appeal we were reluctant - - or appellate counsel is reluctant to opine those black boardable numbers would be reduced if we didn't get an outright dismissal.

Simone Malayev, the plaintiff's wife, testified at the initial trial and at the apportionment hearing. Based upon her testimony, what this Court found perplexing, if not inexplicable, was that she was never asked by G&G whether she wished to be named as a co-plaintiff in this action. This was revealed during the attorney fees apportionment hearing. Moreover, had she been told she could have been a co-plaintiff, she would have wanted to be included. "Because it's my life too and as much as he is going through it, I am going through it in my own way. Just as much as it changed his life, it has changed my life." Aside from it being the more professional approach to have named the spouse as a co-plaintiff, what is so baffling about this glaring omission is the Court's recollection of Ms. Malayev's testimony during the trial.

During her trial testimony, Ms. Malayev explained the couple has three young children, one of whom is an infant. She testified that his temperament and disposition changed dramatically from the time of the incident. Ms. Malayev basically described her husband as being an absent father and husband since his injury in the sense that he did not assist in caretaking for the children and did not help with household chores. Further, when any of the children made noise, he was unable to withstand it and would seclude himself in a room where he couldn't hear them. So, when she needed him most in helping with the children, he was unable to help. There are few spouses more appropriate as a co-plaintiff with loss of services claims or more deserving of sympathy from a jury than a spouse having to care for three young children without spousal support. The fact that predecessor law firm did not even inquire whether Mrs. Malayev wanted to be a co-plaintiff is confounding to this Court.

At the apportionment hearing, Ms. Malayev testified that her husband was emotionally drained after the first trial and the mediation thereafter. She did not feel pressured to settle by either G&G or FLF. She left the settlement decision and decisions about the case to her husband, the named plaintiff, because it was his case, not hers. Apparently, the plaintiff had certain expectations when he entered the mediation and that was for a settlement figure of $5 million. "Roman had a number in his mind that he became comfortable with and they just slowly kept notching that number down and Mr. Flomenhaft made a lot of logical – he had a lot of logical reasoning as to why we should strongly consider to accept the numbers that they were offering."

Mr. Malayev primarily testified about settlement negotiations and explained the trial was very difficult for him emotionally, which was why he decided to settle the case. He did not have the wherewithal to go through it again. What is interesting is that all during his testimony of the settlement negotiations, as well as G&G's witness, neither of them discussed weighing any factors, in arriving at a recommended settlement figure by G&G. Ultimately, while it is the client's decision whether and for what amount to settle, typically an experienced attorney will weigh the strengths and weaknesses of their case with their client before they arrive at a particular recommendation of a demand or settlement figure. Here, it seems the plaintiff himself was the

driving force for the determination of a suitable settlement and the figures were not based on any particular objective analysis.

Mr. Peter Gordon testified on behalf of G&G. He testified he has been practicing law for a little over 30 years, but it has been a general practice. While Mr. Gordon testified that his practice has included personal injury cases, at no time did he state he had a single traumatic brain injury (hereinafter "TBI") case before this one. Although he has been the attorney for other members of the Malayev family, based on Mr. Gordon's testimony, it seems this representation was confined to real estate transactions.

Mr. Gordon testified he maintained the bag of rocks the plaintiff secured for him as evidence and obtained a surveillance video which was used at trial depicting the children on the roof throwing rocks off the rooftop garden. His predecessor law firm conducted the initial investigation, commenced the litigation, engaged in discovery and defended against a motion for summary judgment. His trial counsel successfully defended against the CPLR 4401 motion during the trial and secured a liability verdict by using the video and the rocks.

Mr. Flomenhaft testified about the challenges that faced him upon his substitution as the plaintiff's attorney of record. Primarily, Mr. Flomenhaft highlighted the need to amend the bill of particulars to delve into the special damages attributable to the dementia, oppose the post-verdict CPLR 4404 motion and try to ameliorate the damage caused to plaintiff's case by the "Access Hollywood" television video, which portrayed the plaintiff as a highly functional wizard in the jewelry design of Brittany Spears' engagement ring. The video was presented at the initial trial, but the contrast of that video compared to the way in which the plaintiff appeared at trial was never explained by plaintiff. This, combined with the photographs of the plaintiff's residential mansion and the consistently high praises on social media of the plaintiff's mastery, did not bode well for FLF's ability to recover a significant verdict, in his expert estimation. FLF also surmised there would be significant credibility issues concerning the plaintiff. Therefore, he strategized to build his damages case on objective evidence, which had been lacking previously.

Mr. Flomenhaft continued in his testimony by discussing the objective evidence which G&G and trial counsel possessed, but did not use, to plaintiff's disadvantage. G&G had continually emphasized that the plaintiff's claim was a subjective one. However, the MRI report contained probative objective evidence which was demonstrative of brain damage through DTI. This evidence would have been key to counter the argument that the plaintiff was not truly injured, because from outward appearances, he was functioning well. Nonetheless, plaintiff's predecessor law firm only marked the MRI report for identification during the trial and never admitted it into evidence. The DTI showed several areas of white matter abnormality in all four parts of the plaintiff's brain and this was important to support any large verdict. Nonetheless, the MRI report, the DTI results and the full record for the MRI were not admitted into evidence. Moreover, the full MRI report was never obtained by G&G. The full report showed the axonal injury, i.e. tearing of the brain's connecting nerve fibers, pictorially.

Although accusations were made by G&G that FLF did not intend to conduct a damages trial in this case, quite the contrary was true, as established in Mr. Flomenhaft's testimony. FLF designated Dr. Lipton as his neuroradiologic expert. Dr. Lipton assisted in Mr. Flomenhaft's

preparation for trial by converting some of the evidence from the DTI into a three dimensional exhibit. Clearly, FLF intended to proceed to trial, but also had this objective evidence to utilize in his negotiations with defense counsel.

What is also clear is that G&G had the objective evidence at their disposal but lacked the expertise to recognize its value. Some of this evidence they possessed in hand, and other evidence they did not acquire. The plaintiff's records of treatment and testing by Dr. Paul Harch, a traumatic brain injury specialist in New Orleans were not obtained. These records also would have been of probative value in demonstrating the plaintiff's brain function in the temporal lobe, (the area which is associated with memory, perception and processing auditory information) and give substantiation for the plaintiff's personality changes, which were discussed during the trial. Based on the available evidence, which was neglected by G&G and developed by FLF, there was support for an objective reason why the plaintiff went through his drastic personality changes.

The Work Performed By Respective Counsel

G&G conducted the initial drafting of pleadings, attended depositions and engaged in pre-trial discovery, defended against a motion for summary judgment and a CPLR 4401 motion in the midst of trial. G&G conducted settlement negotiations and represented the plaintiff at trial, taking the case to a liability verdict in favor of the plaintiff. Although the plaintiff retained several expert witnesses who testified at trial, only one even mentioned the possibility of future decline of mental acuity of the plaintiff. This was relayed as little more than an insignificant possible side effect of the injuries sustained by the plaintiff. There were no imaging films admitted into evidence or radiology testimony elicited by G&G at trial. The issue was not delved into in any depth or detail during the trial.

FLF amended the pleadings to include a claim for future economic loss due to future care needs and developed that claim based upon medical and scientific substantiation of the dementia claim, which had been largely overlooked by G&G, engaged in additional discovery and defended against a stay on appeal. FLF also defended against the post liability verdict CPLR 4404 motion. FLF also prepared for and participated in mediation. Due to the added value Mr. Flomenhaft brought to the case, he caused the defendants to retain higher quality experts and upgrade their defense overall.

Discussion

The plaintiff's predecessor law firm represented the plaintiff for approximately six years, as compared to the incoming law firm which represented the plaintiff for less than a year. However, apportionment of attorneys' fees is determined by the individual circumstances of each case. *Board of Managers of the Boro Park Vil.-Phase I Condo. v Boro Park Townhouse Assocs.*, 284 AD2d 237, 726 NYS2d 606 (1st Dept 2001). Actually, there are several factors to be considered, "including the work performed, the amount recovered, the quality of services, the circumstances of the case, the contributions of the respective attorneys toward achieving the outcome and the time spent on the case". *Id*. In this Court's view, in this type of scenario, it is not the time, but the

quality of representation that has more significance and the results achieved by that representation.

In the instant case, the plaintiff did not discharge G&G for cause. Ideally, the plaintiff had hoped G&G and FLF could work together on the re-trial of the damages portion of the trial, but as the plaintiff testified, the attorneys could not play well together in the proverbial sandbox. The plaintiff clearly felt that the incoming attorney is better versed in cases involving TBI and therefore would be better equipped to handle his case. The plaintiff was correct in making this assessment and it was borne out by the testimony of defense counsel. Mr. Faust was quite candid in stating that it was due to the work of the incoming attorney that the defendant increased its offer to the amount at which the case ultimately settled.

G&G certainly made some blunders. The failure to name the plaintiff's wife is one which was already discussed. This is only compounded by its failure to utilize any of the treating physicians for their testimony at trial, or even to contact some of them in the course of the six years this case was pending or during his initial investigation, to determine how they might be useful in this case. Dr. Schweiger, the expert witness in the initial trial also barely touched on the potential of Mr. Malayev having dementia; and G&G made no claim for special damages which would have been associated with this and major future care special damages at that. While these errors are egregious, the fact is that G&G did obtain a plaintiff's verdict on liability. Therefore, this Court cannot conclude the discharge was for cause.

Since Mr. Malayev did not discharge his attorney for cause, pursuant to Judiciary Law §475, G&G possesses a charging lien which creates an equitable ownership of the cause of action and thereby attaches to any recovery. They are entitled to be compensated based upon the fair and reasonable value of the services rendered. *Sterling Corporate Tax Credit Fund XXV, L.P. v. Youngblood Senior Hous. Assoc., LLC,* 115 AD3d 932, 932, 982 NYS2d 392 (2nd Dept 2014).

G&G has attempted to argue that FLF should not have settled the case for $3.5 million, because at some point when the plaintiff was represented by G&G, the plaintiff would not accept anything less than a $6 million settlement. Moreover, because FLF's experts were able to present documentation of $11.5 million in special damages, G&G seemed to be of the mind that FLF must have pressured the plaintiff to settle for the $3.5 million. G&G believed FLF ought to have taken the gamble of presenting the newly calculated special damages to a jury. This was a reckless wager G&G thought should have been taken despite plaintiff's thriving family diamond business which has a heavy social media presence, hundreds of 5 star reviews attesting to plaintiff's own excellent reputation as the Chief Executive Officer of the Forever Diamonds business and plaintiff's family recently residing in a $2.1 million mansion, purchased during the trial, while his purported income was far less than the annual real estate taxes on the residence.

Incredibly, during the apportionment hearing, G&G's witness expressed that, in his view FLF sold out the plaintiff by settling the case at the $3.5 million amount. In their view, (interestingly enough, based upon the special damages claim developed by their successor, not them), the case should have settled for far more than $3.5 million. So it seems G&G is willing to rely upon the expertise of FLF in developing the special damages claim, but not willing to rely upon his

expertise, even in the face of the pitfalls of the case, when assessing the amount to settle the case.

FLF has a concentration in his practice and has handled hundreds of TBI cases in his career. As he testified, his is primarily a referral practice from other attorneys. He is a lecturer on neuroscience at Fordham Law School, is on the Board of Advisors at the Center of Neuroscience and Law at New York Law School and gave several lectures at the International Brain Mapping Conference in 2022. Columbia Law School created a special appointment for him to be the director of neuro law for their Program for Imaging and Cognitive Sciences to advise them on medical legal issues related to brain imaging. The credentials of FLF are impressive.

It appears to this Court that G&G's criticisms of the work contributed by FLF and the decisions which led to the successful resolution of this matter, were merely second-guesses with no basis for substantiation. The Court is not criticizing G&G's trial counsel in this regard, but rather the man behind the curtain calling the shots.

G&G has also attempted to ridicule FLF for amending the complaint to include a claim for future economic loss. However, G&G erroneously viewed this amended future economic loss claim as a claim for future lost wages. Clearly, they did not see the distinction between a future lost wages claim and the future economic loss based upon future care needs. G&G focused on the amended claim as one for lost wages which would be unsustainable, because at the initial trial, Mr. Malayev testified that he would receive a paycheck from his family business whether he goes to work or not.

Moreover, in an attempt to sling mud at FLF, they cited another case in which FLF was also involved in a fee dispute with another law firm from whom he took over a case in litigation and recovered only 10% of the total counsel fees. *See Salas-Aleman v Lenox Manor Owners, Inc*. 210 AD3d 564, 176 NYS3d 784 (1st Dept 2022). However, the fact that these two cases involved one of the same firms involved in the fee dispute is where the similarities end. In *Salas-Aleman*, the court below made its decision upon a motion. In the case at bar, there was approximately 4 hours of testimony. In *Salas-Aleman,* the appellate court found there was insufficient evidence to support the contention that Mr. Flomenhaft's representation was pivotal in resolving the litigation. In the case at bar, the defendant's attorney himself testified that FLF's representation was what made the defendant raise its offer of settlement amount to $3.5 million from $1 million.

Additionally, in *Salas-Aleman*, the record indicated a settlement offer in the same range of the ultimate settlement was considered earlier in the case. In the case at bar, the only way a higher amount was contemplated was the amount at which defense counsel would be appealing a jury verdict. The defendant decided that if the jury awarded $5 million or more, it would appeal. There was no indication that the defendant was willing to settle for anything near that amount when G&G was involved. When the $1 million offer was made, G&G was still representing the plaintiff, but not thereafter. The settlement offer amount only increased once FLF amended claim of future economic loss based upon dementia, medically and scientifically substantiated the claim and produced his "blackboardable numbers" for this claim.

It is clear to this Court that the efforts of FLF, not only contributed, but were the cause of the increase in the settlement offer by the defendants. When G&G was substituted for FLF, the last offer had been $1 million. Based solely upon the contributions of FLF, the case settled at the amount of $3.5 million.

This case is similar to *Wingate, Russotti & Shapiro, LLP v. Friedman, Khafif & Assoc.*, 41 AD3d 367, 839 NYS2d 469 (1st Dept 2007). In that case as well, the initial firm conducted the preliminary investigative work, preparation of pleadings and discovery. Here, G&G also conducted a trial to obtain the liability verdict. However, in the case at bar, FLF also performed a substantial amount of work which was more effective in reaching the ultimate recovery *Young, Fenton, Kelsey & Brown, P.C. v Wein*, 111 AD3d 1194, 976 NYS2d 584 (3rd Dept 2013). Although it took him less time to add the value to the case, the enhanced value is significant. In recognition of the contributions of both firms toward achieving the outcome, G&G is awarded its 33⅓% of the net sum of $1 million, i.e. measured by and limited to the offer of settlement procured by G&G before it was substituted out of the case. FLF is entitled to his 33⅓% fee of $2.5 million, i.e. measured by and limited to the enhanced amount of the final settlement.

In this Court's June 9, 2022 order, G&G was to be fully paid for their disbursements before the file was turned over and this was effectuated as acknowledged by G&G.

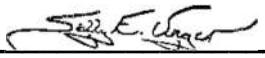
Accordingly, it is

ORDERED, that Gordon and Gordon, PC shall be compensated solely to the extent of the 33⅓% due as set forth in the retainer agreement between G&G and the plaintiff in attorney's fees on the first $1 million of the settlement; and it is further

ORDERED, that The Flomenhaft Law Firm, PLLC shall be compensated solely to the extent of the 33⅓% due as set forth in the retainer agreement between FLF and the plaintiff in attorney's fees for the balance of $2.5 million of the settlement.

This constitutes the decision and order of the Court.

Dated: February 10, 2023



SALLY E. UNGER, A.J.S.C.