

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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CYNTHIA MONDESIR, Administrator of the Estate
of NAOMI MONDESIR, deceased and CYNTHIA
MONDESIR, individually,

Index No.: 710246/2020

AFFIRMATION IN SUPPORT

Plaintiff(s),

-against-

OLUYEMISI ADEBAYO and HARRY'S NURSES
REGISTRY, INC..

Defendants.

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HARRY'S NURSES REGISTRY, INC.,

Third Party Plaintiff.

-against-

GARDITE MONDESIR and EDDY MONDESIR

Third Party Defendants.

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MARYELLEN DAVID, an attorney duly admitted to practice law in the State of New York, hereby affirms the following to be true under penalties of perjury:

1. I am associated with SHAEVITZ & SHAEVITZ, present counsel to the Plaintiff, CYNTHIA MONDESIR, Administrator of the Estate of NAOMI MONDESIR, deceased and CYNTHIA MONDESIR, individually, herein. We respectfully submit that the instant motion should be granted in its entirety with all attorney fees denied to TARSHIS & HAMMERMAN, LLP, or in the alternative this matter be set down for a hearing regarding the division of the attorney fees between SHAEVITZ & SHAEVITZ and TARSHIS & HAMMERMAN, LLP.

2. This matter arises from an incident occurred on April 21, 2015 wherein the decedent sustained severe burns. Specifically, the decedent was being cared for by an LPN, OLUYEMISI ADEBAYO who was employed by HARRY'S NURSES REGISTRY, INC. due to developmental delays and health issues relating to her premature birth at 24 weeks gestation. The care by ADEBAYO/HARRY'S NURSES REGISTRY, INC., consisted of home-care of the decedent at the decedent's home, 255-267 Memphis Avenue, Rosedale, NY 11427, which included the bathing of the decedent by ADEBAYO/HARRY'S NURSES REGISTRY, INC. On April 21, 2015 ADEBAYO placed and submerged the decedent in a bath of scalding hot water, causing severe burn injuries of about 50% of the decedent's total body surface, that lead to complications results in pneumonia, sepsis and ultimately death six days later on April 27, 2015.

3. Initially, plaintiff mother retained the office of SHAEVITZ & SHAEVITZ to represent her for a claim of personal injuries against the defendants.

4. During the period of our initial representation we prepared the petition and submitted same to Surrogate's Court, Queens County seeking Letters of Administration. This included your affiant personally going to the funeral home to pick up a copy of the paid funeral bill. We commenced an investigation into the facts, requesting the autopsy report from the NYC Medical Examiner, contacting and discussing the pending criminal charges against Adebayo with the assigned ADA, researching the corporate entity Harry's Nurses, sending contact/notice of our representation to all tortfeasors, requesting the hospital records, researched and gathered all news articles about the incident and criminal charges against Adebayo.

5. Subsequently, unknown to this office, the biological father and the plaintiff mother were arrested for charges unrelated to this incident. The biological father, Corey Brock, sought legal counsel for those criminal charges from TARSHIS & HAMMERMAN, LLP, specifically, Stuart Tarshis, Esq.

6. Cynthia Mondesir, the infant's mother and plaintiff herein, has relayed that upon discussion with Mr. Tarshis, this death of their child was mentioned. Mr. Tarshis indicated that he would only represent Corey Brock on the criminal charges if and only if we transferred the wrongful death action to his firm. See Exhibit "A." Corey Brock corroborates further that Mr. Tarshis stated that if his firm substituted SHAEVITZ & SHAEVITZ in the wrongful death action then it "would be better" because his office would represent both actions (wrongful death of the infant plaintiff and Corey Brock's criminal charges).

7. TARSHIS & HAMMERMAN, LLP substituted SHAEVITZ & SHAEVITZ in approximately in late May, 2015 or early June, 2015. The extent of TARSHIS & HAMMERMAN, LLP work on this claim is as follows: letter to surrogate's court indicating the substitution; email to the claim representative at the insurance carrier for Adebayo. The Letters of Administration that our office petitioned for were issued on July 13, 2015. TARSHIS & HAMMERMAN, LLP then facilitated a funding loan for the parents of the infant (July 15, 2015) and filed a summons and complaint on July 14, 2015, forwarding same to a process server to effectuate service upon the defendants. Also, rather than conducting their own investigation into the facts, TARSHIS & HAMMERMAN, LLP retained Irwin Blye Investigations, Inc. It is unclear what that investigation revealed.

8. As indicated by both parents of the infant (Exhibits "A" and "B."), they were not happy with TARSHIS & HAMMERMAN, LLP representation in the wrongful death action. As such, the plaintiff/infant's mother returned to SHAEVITZ & SHAEVITZ and re-retained this office on the wrongful death action. Notice of same with the consent to change attorney was faxed to TARSHIS & HAMMERMAN, LLP on September 15, 2015. (Exhibit "C.")

9. Upon substitution, TARSHIS & HAMMERMAN, LLP refused to continue to represent Corey Brock in his criminal case. (See Exhibits "A" and "B.")

10. As such, TARSHIS & HAMMERMAN, LLP only represented the plaintiffs in this action for less than 3 months. It must be noted that outgoing counsel *only* prepared, filed and effectuated service of the summons and complaint. All other proceedings in the litigation was performed by Shaevitz & Shaevitz.

11. Upon our re-retention, we immediately assumed prosecution of the litigation that their office had commenced. We were in contact with both claim representatives for both defendants. We received the answers from both defendants, prepared a Bill of Particulars and discovery demands/responses, prepared and served bad faith correspondence to both defendants. Dimitri Kotzamanis, Esq., formerly of this office, appeared in court on every date that the Adebayo's criminal charges was calendared, keeping abreast of the D.A.'s investigation via continual conversations with the A.D.A. prosecuting the matter.

12. Throughout the next year, we vigorously negotiated with the insurance carrier for Adebayo, demanding tender of their policy (\$500,000.00). In late February, 2017, Adebayo's insurance carrier finally tendered the policy. A petition for wrongful death regarding the partial settlement with Adebayo with permission to continue the litigation

against Harry's Nurses Registry, was filed on May 17, 2017. Investigation into all applicable liens with negotiation for the reduction of the NYC HRA / Medicaid lien and the aforementioned funding lien were performed by this office. This necessitated service of a Citation, and appearances before Hon. Peter J. Kelly, Surrogate of Queens County on 10/19/17. Ultimately, a decree was issued on November 8, 2017 compromising the \$500,000 settlement with Adebayo, and directing release of the settlement funds. (See Exhibit "C.")

13. Litigation against Harry's Nurses Registry continued. The insurance policy was a consent policy, and the owner, Harry Dorvillier, refused to consent to any settlement for FIVE YEARS. His argument was based upon a faulty belief that Adebayo was an independent contractor, and thus, Harry's Nurses was not vicariously liable for her actions. However, through a thorough investigation conducted by this office, the prior criminal charges brought against Mr. Dorvillier and Harry's Nurses Registry by NYS Attorney General which ultimately destroyed his defense on this issue. This office conducted a deposition of Mr. Dorvillier which lasted all day.

14. Harry's Nurses Registry prepared and served a third-party summons and complaint against Gardite Mondesir, the owner of the home where the incident occurred. They alleged that the homeowner was responsible for the heat of the water in the bath due to maintenance of the hot water heater. Investigation by this office revealed that in the NYC D.A.'s criminal investigation against Adebayo, a complete inspection of the boiler and hot water heater was conducted, revealing no defect. A site inspection was conducted for all counsel to inspect the boiler/hot water heater. Counsel for Harry's Nurses Registry's retained an expert that conducted an inspection on their behalf.

15. Our client, the infant plaintiff's mother was produced for a deposition several times, and she was questioned for hours on both days. We worked at great length to prepare her for both days of these depositions.

16. Depositions were also conducted of the third-party defendant, Gardite Mondesir, and two other witnesses were produced by the defendant Harry's Nurses, in addition to the owner, Harry Dorvillier.

17. Throughout the course of the litigation, a total of EIGHTEEN (18) discovery conferences were conducted before this Honorable Court. This also necessitated a discovery motion to compel discovery from Harry's Nurses Registry. The matter was ultimately placed on the trial calendar, with the filing of a Note of Issue.

18. Defendant and third-party defendant filed motions for summary judgment on liability. It is significant to note that these motions fill an entire banker box that is busting at the seams. Each defendant in their motions killed at least 1 tree each. This office prepared a lengthy opposition to the motions. The opposition with exhibits consisted of 467 pages. Three (3) motion conferences were held to argue the motions. We were successful in defending the motion by Harry's Nurses. (E-Law print out showing all court appearances is attached hereto as Exhibit "E").

19. Jury selection was scheduled for January 6, 2020. The trial preparation conducted by this office was exhaustive. Trial subpoenas were served, preparation of our client for trial, trial memorandum was prepared, trial binders prepared, etc....

20. A jury was selected. The parties appeared before this Court to begin the trial. Prior to opening statements, a settlement conference was conducted. However, the owner of Harry's Nurses was still refusing to give consent to settle to his insurance carrier.

Defense counsel permitted William McCabe of SHAEVITZ & SHAEVITZ to speak directly with Harry Dorvillier. They spoke extensively about the case and Mr. Dorvillier's personal feelings of being attacked. He expressed his desire to speak directly to the infant's mother and grandmother. After an emotional conversation between the plaintiff mother and Mr. Dorvillier in the presence of both counsels, he gave consent to his insurance carrier to tender the policy limits. (\$1,000,000.00)

(21.) This office is in the process of preparing wrongful death compromise petition and final accounting regarding that settlement. Obviously, the pandemic has delayed this process.

22. The entirety of prosecution of this claim was performed by Shaevitz & Shaevitz. Outgoing counsel only represented the plaintiff for less than 3 months wherein the only work performed was the filing and service of the summons and complaint. (Any other litigation was prevented by the fact that Letters of Administration were not issued until July 13, 2015.

23. The work performed on this case by Shaevitz and Shaevitz to settle the wrongful death litigation against both defendants can be summed in one word—everything. We prepared the petition for the Letters of Administration; prosecuted the lawsuit; cooperated with and kept abreast of the criminal prosecution of Adebayo; investigated the “independent contractor claim” set forth by Harry’s Nurses; conducted all discovery in every aspect; obtained the plaintiff’s medical records, autopsy and criminal investigation; conducted all depositions and a site inspection; prepared a Bill of Particulars and all written discovery responses and demands; appeared at over 18 court conferences; successfully defended a summary judgment motion; prepared the matter for trial; selected

a jury; prepared a wrongful death petition and interim accounting as to the settlement with Adebayo, and will be filing a wrongful death petition and final accounting as to the settlement with Harry's Nurses.

24. It is respectfully submitted and requested that judicial notice be made that there is no fee agreement between petitioner and respondent.

25. Oliver Shaevitz, Esq. attempted to discuss a division of fees based upon quantum meruit. However, outgoing counsel blatantly refused to discuss a reasonable agreement based upon quantum meruit. Stuart Tarshis, Esq. asserted that they were entitled to a portion of the fee on both the \$500,000.00 settlement with Adebayo and the \$1,000,000 settlement with Harry's Nurses. When it was pointed out that they did not prosecute the litigation; negotiations failed. Several offers were made to resolve outgoing counsel's claim unsuccessfully.

26. A good faith effort was made by Shaevitz & Shaevitz to resolve the division of fees without judicial intervention. However, Tarshis & Hammerman, LLP has frustrated this effort, by their failure to set forth any valid reason and/or supply any evidence to support their disingenuous claim that they did any substantive work, with the exception of the summons and complaint.

27. It is therefore necessary that we seek the Court's intervention to resolve this issue.

28. Based upon minimal work on the wrongful death claim, it is respectfully requested that the Court find as a matter of law that Tarshis & Hammerman, LLP is not entitled to any fee, or in the alternative, if they are entitled to any fee, such calculation be limited to the \$500,000 settlement with Adebayo, and not any portion of the settlement with Harry's Nurses.

29. The Second Department has succinctly held that "[a]n attorney who is discharged for cause . . . is *not entitled* to compensation or a lien." [Emphasis added.] Schultz v. Hughes, 109 AD3d 895, 971 N.Y.S.2d 536 (2nd Dept. 2013). See, Callaghan v. Callaghan, 48 A.D.3d 500; 852 N.Y.S.2d 273 (2nd Dept. 2008). Campagnola v. Mulholland, Minion & Roe, 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990). Although New York courts have not explicitly defined "cause" as a basis for an attorney's discharge, the case law reflects that the term means that the attorney has engaged in some kind of misconduct, has been unreasonably lax in pursuing the client's case, or has otherwise improperly handled the case. Campagnola, *supra*. However, the Appellate Term provides some guidance stating, "[a]n attorney is discharged for cause where he or she has engaged in misconduct, has failed to prosecute the client's case diligently, or has otherwise improperly handled the client's case or committed malpractice." Filler v. Motta, 2014 N.Y. Misc. LEXIS 3845, 2014 NY Slip Op 24242 (N.Y. App. Term Aug. 18, 2014).

30. Herein, it is respectfully submitted that this case epitomizes discharge for cause.

31. Pursuant to NYS Rules of Professional Conduct, Rule 1.5 (d) (1), [a] lawyer shall not enter into an arrangement for, charge or collect: (1) a contingent fee for representing a defendant in a criminal matter."

32. As indicated above, the substitution in the wrongful death action was premised upon no fee being charged to defend Corey Brock in his unrelated pending criminal charges.

33. NYS Rules of Professional Conduct Rule 4.5 is also of probative value. In that it states: "(a) In the event of a specific incident involving potential claims for personal

injury or wrongful death, no unsolicited communication shall be made to an individual injured in the incident or to a family member or legal representative of such an individual, by a lawyer or law firm, or by any associate, agent, employee or other representative of a lawyer or law firm representing actual or potential defendants or entities that may defend and/or indemnify said defendants, before the 30th day after the date of the incident, unless a filing must be made within 30 days of the incident as a legal prerequisite to the particular claim, in which case no unsolicited communication shall be made before the 15th day after the date of the incident. (b) An unsolicited communication by a lawyer or law firm, seeking to represent an injured individual or the legal representative thereof under the circumstance described in paragraph (a) shall comply with Rule 7.3(e)." See also, Rule 7.3 (a) A lawyer shall not engage in solicitation: (1) by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client; or (2) by any form of communication if: (i) the communication or contact violates Rule 4.5, Rule 7.1(a), or paragraph (e) of this Rule; (ii) the recipient has made known to the lawyer a desire not to be solicited by the lawyer; (iii) the solicitation involves coercion, duress or harassment

34. As indicated by the statements of the parents of the infant plaintiff, representation of Mr. Brock in the criminal case was secured only if the firm represented them in the wrongful death case.

35. "Where there are conflicting claims as to whether an outgoing attorney was discharged with or without cause, a hearing is necessary to resolve such dispute." Schultz, supra. As such, the matter should be set down for a hearing.

36. If this Court should find that the respondent was discharged without cause, then respondent should only recover the reasonable value of his or her services in quantum meruit. Breidbart v. Wiesenthal, 117 A.D.3d 766, 985 N.Y.S.2d 719 (2nd Dept. 2014). The Court of Appeals in Cohen v. Grainger, Tesoriero & Bell et al., 81 N.Y.2d 655, 622 N.E.2d 288, 602 N.Y.S.2d 788 (1993) states that substituted counsel may only be entitled to a percentage of the fee actually recovered by the incoming counsel based upon the pro rata share of the work the two attorneys performed in obtaining the recovery. The Court explained:

It is settled that a client may discharge an attorney at any time, with or without cause (Lai Ling Cheng v. Modansky Leasing Co., 73 NY2d 454, 457; Matter of Montgomery, 272 NY 323, 326). As against the client, a discharged attorney may recover the "fair and reasonable value" of the services rendered (Matter of Montgomery, *supra*, at 326-327), determined at the time of discharge and computed on the basis of quantum meruit (*Id.*; Reubenbaum v. B. & H. Express, 6 AD2d 47, 48). Only if the client and attorney agree may the attorney receive a fee based on a percentage of the recovery (Lai Ling Cheng v. Modansky Leasing Co., 73 NY2d, at 457-458; Reubenbaum, *supra*, at 48).

37. In determining a discharged attorney's proportionate share of the work, the Court considers a) the time spent by each firm on the matter, b) the nature of the work performed, c) the contributions of counsel d) the quality of service and e) the effectiveness in achieving the ultimate resolution. Lai Ling Cheng, *supra*; Buchta v. Union-Endicott Central School Dist., 296 A.D.2d 688, 689-90, 745 N.Y.S.2d 143 (3rd Dept. 2002).

38. The actions of TARSHIS & HAMMERMAN, LLP had little to do with achieving the ultimate resolution of this matter. The vigorous manner in which SHAEVITZ & SHAEVITZ pursued this matter on behalf of the plaintiffs is thoroughly described above. Despite years of hard-fought opposition and no offer of settlement, SHAEVITZ &

SHAEVITZ persevered undaunted and thoroughly prepared this case for trial. This perseverance resulted in the two settlements.

39. In the matter at bar, there was no agreement reached between petitioner and respondent. As such, any recovery should be computed on the basis of quantum meruit. Herein, as Shaevitz & Shaevitz conducted essentially all of Surrogates and litigation of the wrongful death, it is respectfully submitted that under the principles of quantum meruit, TARSHIS & HAMMERMAN, LLP would be entitled to a nominal amount if anything, calculated solely on the settlement with defendant for \$500,000. No lien should exist against the settlement of \$1,000,000 with Harry's Nurses.

40. NO PRIOR APPLICATION HAS BEEN MADE IN THIS OR ANY OTHER COURT FOR THE SAME OR SIMILAR RELIEF AS REQUESTED HEREIN.

WHEREFORE, it is respectfully requested that the relief requested herein be granted in its entirety, and for such other and further relief as this Court may deem just and proper.

Dated: July 13, 2020
Jamaica, NY



Maryellen David, Esq.