

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES McMILLAN, JR.,

Claimant,

REPORT AND RECOMMENDATION

- v -

THE CITY OF NEW YORK,

CV-08-2887 (JBW)(VVP)

CV-03-6049 (ERK)(VVP)

Defendant.
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Counsel for the claimant has moved, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, for an order relieving counsel from the Amended Order, Judgment, Findings of Fact and Conclusions of Law entered by the court on September 19, 2008 (hereinafter the "Judgment"). The principal thrust of the motion is to obtain an increase in the attorneys' fees awarded in the Judgment, which were less than those provided by the retainer agreement between counsel and the claimant. Judge Weinstein referred the matter to me to consider (1) whether the circumstances surrounding the claimant's decision to enter into the retainer agreement with his counsel warrant reference of the matter to the appropriate disciplinary committee and (2) whether the Rule 60(b)(6) motion should be granted. Having considered the submissions on the motion and the testimony at an evidentiary hearing concerning these issues, I make the following findings and recommendations.

BACKGROUND

This action arose from the disastrous crash of the M/V Andrew Barberi, a Staten Island ferryboat, in New York Harbor on October 15, 2003. As a result of

the crash the claimant James McMillan sustained serious injuries to his spine that resulted in complete paralysis of his lower extremities, and substantial paralysis of his upper body. After a finding by the court that the City of New York, the owner and operator of the ferryboat, was negligent and could not take advantage of the limitation of liability available to vessel owners under admiralty law, the issue of damages to be awarded to the claimant was tried before Judge Weinstein with the assistance of an advisory jury. Judge Weinstein accepted some, but not all, of the jury's findings, and issued findings of fact and conclusions of law in support of a total award of \$18,278,000 in damages. *See Judgment*, Sept. 19, 2008.

The Judgment also addressed the issue of the attorneys' fees to be awarded to the claimant's counsel. The claimant's counsel sought an award of one-third of the net recovery after expenses. Judge Weinstein found that amount to be excessive in the special circumstances of the case, citing various factors that distinguished the action from an ordinary personal injury action. The risk to counsel of an adverse result was significantly reduced because the issue of liability had already been decided by the court. The liability determination had been made in a limitation of liability proceeding that was handled by other counsel (hereinafter "limitation-of-liability counsel," and thus the damages award to the claimant here was comparable in a sense to a "quasi-aggregate or quasi class-action" award. Judgment ¶ 3, at p. 10. After reviewing fees approved in other cases arising from the crash, Judge Weinstein limited the fee award here to 20% of the net award. Although recognizing that the claimant's counsel had rendered excellent service,

Judge Weinstein exercised his discretion in this regard to protect the claimant, “a person with limited education who was not capable of an arms-length fee negotiation.” *Id.* ¶ 7, at p. 11.

The claimant timely filed a notice of appeal from the Judgment challenging the reduction in fees awarded to the claimant’s counsel. The appeal was subsequently withdrawn, however, and the claimant’s counsel filed the instant Motion for Reconsideration pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure. As noted above, Judge Weinstein’s referral order directed me to consider the following two issues: “(1) Whether the matter of the retainer agreement and the conditions under which it was entered into warrant reference to the appropriate disciplinary committee,” and “(2) Whether the Rule 60(b) motion should be granted.” Order, May 5, 2009. The referral order also required the claimant’s counsel to furnish me with a copy of the claimant’s hospital records for the first week following the accident, and asked me to address both the procedural and substantive aspects of the Rule 60 motion.

DISCUSSION

I. THE RETAINER AGREEMENT

The following facts are taken from the testimony and other evidence offered at an evidentiary hearing at which a number of witnesses testified concerning the events that led to the claimant’s decision to enter into the retainer agreement. The witnesses included the claimant himself and his counsel Evan Torgan, as well as

the claimant's brother and sister, and the neurosurgeon who operated on him four days after the accident. The documentary evidence included the hospital records Judge Weinstein ordered counsel to submit.

The collision of the M/V Andrew Barberi that caused the claimant's injuries occurred on October 15, 2003. The claimant was brought to Staten Island Hospital as soon as he was rescued on that day, and was conscious when he arrived. Upon arrival he was examined by Dr. Edward Chang, a neurosurgeon who serves as the Head of the Department of Neurosurgery at the Staten Island Hospital. Dr. Chang determined that McMillan had suffered a fracture of the cervical spine with complete paralysis of his lower extremity and some paralysis in his upper extremity. He further determined that McMillan had suffered no brain injury. Dr. Chang continued to treat McMillan throughout his stay at the Hospital, which ended on November 4, 2003 when he was discharged and referred to the Mt. Sinai Medical Center for rehabilitation. Dr. Chang's treatment included surgery performed on October 20, 2003 for the purpose of stabilizing the cervical spine. Throughout his treatment of McMillan Dr. Chang found him to be clear thinking and bright, and felt that McMillan had no trouble comprehending what he was being told about his condition and the treatment he was receiving.

Over the course of the several days between the accident and his surgery on October 20, McMillan was visited by a number of family members, including his sister Mary McMillan and his brother Tyrone McMillan. On the days immediately after the accident, Tyrone McMillan found the claimant to be asleep for much of the

time and despondent at times both about what he had seen and experienced during the accident and about his own situation. When the claimant was awake, however, Tyrone McMillan described him as being alert and understanding, particularly on October 19, the day when he met with Evan Torgan and signed the retainer agreement engaging Torgan as his attorney. Tyrone McMillan also described his brother as a bright, street-smart individual who was strong-minded and could not be cajoled into doing anything he did not want to do. The claimant's sister, Mary McMillan, confirmed that he was alert, thinking clearly, and understood what was being discussed on October 19 when the claimant met Torgan. Both Tyrone and Mary McMillan also agreed that they did not see any pain medication being administered to their brother before or during the meeting, and that he was not in pain at the time.

It was Mary McMillan who first suggested to her brother and the other members of her family that Torgan be consulted. She had observed numerous attorneys in the hospital waiting room seeking out clients, and was concerned that they might approach her brother because she did not believe that they "would have my brother's best interests at heart." Tr. 103. She had known Torgan for about eleven years because he had been representing her and her daughter in a medical malpractice action arising from injuries to her daughter. She discussed the matter first with the claimant and other family members, and the claimant asked her to arrange a meeting with Torgan.

Torgan thus came to the hospital at Mary McMillan's request on October 19 and spent two to three hours with the claimant and members of his family discussing not only his potential representation of the claimant but also the treatment he was receiving. The meeting took place in the early afternoon. Both Tyrone and Mary McMillan were present during the discussions and heard Torgan explain the details of the retainer agreement, including the concept that Torgan would receive one-third of any recovery obtained. The claimant was fully familiar with that concept because he had previously brought a lawsuit for personal injuries under a retainer agreement with a similar provision. All of the witnesses who participated in the meeting also testified that Torgan specifically cautioned the claimant that he should consult with other attorneys before making a decision about whom he wished to retain. All of the witnesses, including the claimant himself, also agreed that the claimant fully understood what was being explained to him and was not pressured in any way to sign the agreement. Ultimately, the claimant decided he did not need to speak to other attorneys and signed the retainer agreement that day.

Dr. Chang also saw the claimant on October 19 in order to obtain written consent for the surgical procedure that was planned for the following day. He too found the claimant to be fully alert and competent during their discussions on that day. As part of his normal procedure with patients, in order to test a patient's cognitive functions, he employs a commonly used technique to determine whether the patient is oriented to person, place and time. Thus, he asks questions to elicit

whether the patient recognizes him and others in the room, whether he knows where he is, and whether he knows the date. After determining in that fashion that the claimant's cognitive functions were intact on October 19, he engaged in a discussion concerning details about the upcoming surgery, the difficulty and risks of the procedure, and other alternatives. He also sought to have the claimant repeat salient points of the discussion and of course solicited questions. He found the claimant very clear thinking on that day during that discussion.

Dr. Chang also reviewed various medical records of the claimant's stay for the five-day period from his arrival on October 15 through the time of the surgery on October 20. In particular, he examined in detail and explained records for the date of October 19 which provided hour-by-hour documentation of the claimant's vital signs, neurological status, and other data concerning his physiological status and the treatment he received that day. To describe the alertness of the patient, the records use a measuring system known as the Glasgow Coma Scale, which provides an opportunity to rate a patient's level of consciousness on a scale from 3 to 15, with 3 being comatose (i.e., unresponsive to any stimuli) and 15 being completely conscious and alert. The records reflect that the claimant was rated at 15 throughout the day. The records also separately provide opportunities for notations to be made concerning whether the patient is alert and oriented and responsive to speech. The notations for the claimant throughout the day reflect that he was completely alert and oriented and responsive to speech, and that he followed commands. Dr. Chang also explained the significance of notations

concerning pain which are found in the records. The notations reflect that the claimant was pain-free throughout the day until 5:00 p.m. when he advised the nursing staff that he was feeling a stabbing pain that he described as level 8 on a scale of 1 to 10, with 10 being the worst. He continued to feel the pain at 11:00 p.m., although slightly reduced to level 7.

At the court's request, Dr. Chang reviewed records of medication administered to the claimant on October 19. The only medication that might have affected the claimant's mental acuity was morphine, which was administered after the meeting with Torgan had ended. Dr. Chang explained that the claimant received 4 milligram doses of morphine at 5:30 p.m., 9:00 p.m., and midnight. The other medications that were administered that day included vitamin K, Ativan, potassium chloride, magnesium sulfate, and a nicotine patch, none of which in Dr. Chang's view would have any effect on a patient's cognitive abilities. In any event, as explained above, the notations concerning the claimant's mental status reflect no change in his alertness and consciousness throughout the day, even after the administration of the morphine.

Based on the above evidence, I conclude that the claimant was alert and clear-thinking throughout the time when he met with Torgan and made the decision to sign the retainer agreement. He was not in pain in the early afternoon when the meeting occurred, and was not under the influence of any drugs or medications that would have interfered with his cognitive abilities. His family members, as well as Dr. Chang and Torgan, all agree that the claimant is an

intelligent individual, thoroughly capable of understanding what was explained to him about the agreement. My own observation of the claimant while he testified completely supports that assessment. Finally, there is no evidence whatsoever that Torgan acted improperly or sought to take advantage of the claimant in any way in the discussions leading to the signing of the retainer agreement. Indeed, the evidence all points to the conclusion that Torgan acted entirely professionally and honorably in commencing his representation of the claimant. There is accordingly no basis for considering any disciplinary action whatsoever.

II. THE RULE 60(B)(6) MOTION

Rule 60(b) of the Federal Rules of Civil Procedure provides the court with authority to “relieve a party or its legal representative from a final judgment, order, or proceeding.” Fed. R. Civ. P. 60(b). The rule enumerates five specific grounds for relief, *see* Fed. R. Civ. P. 60(b)(1)-(5), as well as a sixth ground permitting the court to grant a Rule 60(b) motion for “any other reason that justifies relief,” Fed. R. Civ. P. 60(b)(6). It is this sixth “catchall” ground upon which the movant relies here. Although phrased broadly, and described by some courts as “a grand reservoir of equitable power,” *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 55 (2d Cir. 2004) (quoting *Matarese v. LeFevre*, 801 F.2d 98, 106 (2d Cir. 1986), *cert. denied*, 480 U.S. 908 (1987)), this ground has been sharply limited. Thus, Rule 60(b)(6) “is properly invoked only when there are extraordinary circumstances justifying relief,” or “when the judgment may work an extreme and undue hardship.” *Nemaizer v. Baker*, 793 F.2d 58, 63 (2d Cir. 1986) (internal citations omitted). Although the

provision “should be liberally construed when substantial justice will thus be served,” *Radack v. Norwegian America Line Agency, Inc.*, 318 F.2d 538, 542 (2d Cir. 1963); *see also Winslow v. Portuondo*, 599 F. Supp. 2d 337, 341 (E.D.N.Y. 2009) (Weinstein, J.), motions under Rule 60(b) are disfavored, and the party seeking relief under the rule bears the burden of proof, *United States v. International Bhd. of Teamsters*, 247 F.3d 370, 391 (2d Cir. 2001). The decision to grant or deny a Rule 60(b) motion is committed to the discretion of the district court. *Mendell In Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 731 (2d Cir. 1990), *aff’d sub nom. Gollust v. Mendell*, 498 U.S. 1023 (1991).

The movant’s central argument for relief proceeds in two steps. He maintains, first, that certain misimpressions about the claimant’s competency and his counsel’s integrity, which were publicly stated by the court at a hearing and in the Judgment, must be corrected in the interest of justice, and second, that once those misimpressions are corrected the court will have a basis to reconsider the amount of the fee to be paid to the claimant’s counsel. The movant thus describes the “undue hardship” warranting relief under Rule 60(b)(6) as (1) the damaging public misimpressions concerning the claimant and his counsel, and (2) the damaging financial impact of the reduction in counsel’s fees by \$2.5 million. Memorandum of Law in Support of Motion (hereinafter “Mem. in Support”), at 35.

As to the first hardship, the publicly stated misimpressions about which the movant complains consist of an assertion by the court at a hearing on September 17, 2008 that the claimant was “too weak, in too much pain, and too uneducated” to

make a decision about retaining the movant as counsel, Mem. in Support at 37,¹ and an assertion in the Judgment that the claimant was therefore “not capable of an arms-length fee negotiation,” Judgment ¶ 7, at 11. These observations, the movant contends, strongly suggest that the movant took advantage of the claimant in negotiating the retainer agreement.

Any publicly stated misimpressions by the court about the claimant’s competence and his counsel’s integrity could conceivably be damaging. The movant has not provided any specific evidence that any such damage has yet occurred, however, which is not surprising because the court’s statements were not particularly derogatory, nor do they appear to have been widely disseminated. The statements contain no finding that counsel acted improperly. No transcript of the September 17 hearing at which allegedly damaging statements were made has been filed in the record, and thus the only public record of any statements made there is found in the movant’s papers. The only other publicly filed record containing any arguably damaging matter is the Judgment, which simply states that the court “exercises its discretion to protect the claimant, a person with limited education who was not capable of an arm-length fee negotiation.” Judgment ¶ 7, at 11. Given the relatively mild disapproval of counsel’s conduct that may be inferred from the court’s statements, and in the absence of any showing that the court’s statements have caused actual damage, the factual review and conclusions in the first section of

¹As the transcript of the September 17 hearing has not been filed in the public record, the court relies on the movant’s characterization of the court’s statements at the hearing, as set forth in the motion papers.

this report and recommendation, if adopted, will provide a public record that should be adequate to correct any misimpressions about the claimant or his counsel's behavior.

As to the second asserted hardship, the reduction in fees, other than counsel's disappointment in obtaining less than what he expected to obtain from the Judgment, counsel has not identified any hardship that the Judgment has caused. The fee awarded by the court – 20% of the net recovery after deducting expenses – will amount to well over \$3.5 million. Counsel declined to make any submissions to substantiate a “lodestar,” but even at \$1,000 per hour, it would have taken more than 3,500 hours of attorney time – almost two entire years of effort – to reach that amount. There has been no suggestion that anything approaching that amount of time was devoted to this case. In the circumstances, one can hardly consider a fee award exceeding \$3.5 million to be insufficient or unjust.

The movant acknowledges the court's authority to review the appropriateness of fee awards. *See, e.g., In re Goldstein*, 430 F.3d 106, 110-11 (2d Cir. 2005); *In re Zyprexa Products Liability Litigation*, 424 F. Supp. 2d 488, 492 (E.D.N.Y. 2006). This authority extends to situations such as the one before the court where the parties themselves do not challenge the validity of a fee contract.² *E.g., Rosquist v. Soo Line R.R.*, 692 F.2d 1107, 1111 (7th Cir.1982); *Schlesinger v. Teitelbaum*, 475 F.2d 137, 141 (3d Cir. 1973). The movant points, however, to other opinions which

²Indeed, the claimant here actively supports his counsel's application for an increase in the fee award, which would have the effect of reducing his own recovery.

have cautioned courts against intruding into contractual relationships between attorneys and clients. *See McKenzie Const., Inc. v. Maynard*, 758 F.2d 97, 101-02 (3d Cir. 1985) (“It should therefore be the unusual circumstance that a court refuses to enforce a contractual contingent attorney's fee arrangement because of events arising after the contract's negotiation.”); *In re San Juan Dupont Plaza Hotel Fire Litigation*, 768 F. Supp. 912, 921 (D.P.R. 1991) (“Generally, courts should be reluctant to intrude into contractual relationships between attorney and client.”). Both cases, however, also recognized the court's duty to review contingent fee awards to ensure their reasonableness. Thus, in *McKenzie*, the court declined to uphold the lower court's determination that a contingent fee arrangement was appropriate and remanded the matter for further consideration. In so doing, the court held that a reduction in a contingent fee does not depend on a finding that the lawyer's conduct was unethical. 758 F.2d at 100. And in *San Juan Dupont Plaza Hotel*, the court established ceilings on contingent fees, holding that “[e]ven when an attorney can show that a client signed a contingency fee agreement, the court is not required to give ‘blind deference’ to contractual fee agreements and must ultimately be responsible for fixing a reasonable fee for the judicial phase of the proceedings.” 768 F. Supp. at 921 (*quoting Ramos Colón v. Secretary of Health & Human Services*, 850 F.2d 24, 26 (1st Cir. 1988)) (internal quotations and brackets omitted).

The movant expends considerable argument attempting to demonstrate the reasonableness of the one-third contingency arrangement found in the retainer

agreement. He cites a provision of New York law governing the conduct of attorneys which deems contingent fee arrangements under which an attorney obtains no more than one-third of the sum recovered in the litigation to be “fair and reasonable.” *See* N.Y. Comp. Codes R. & Regs. tit. 22, § 603.7(e). The issue before the court on this motion, however, is not whether the contingent fee arrangement is reasonable under New York law, but whether the fee awarded by the court results in an undue hardship. On that score, New York law provides considerable support for the notion that it does not. In cases involving medical, dental or podiatric malpractice, New York law limits attorneys’ fees under a schedule which, if applied to this case, would yield an award of less than \$2 million – considerably less than what counsel is receiving under the Judgment. *See* N.Y. Jud. Law § 474-a.³ Although the claimant’s award here was not for medical malpractice, the computation of damages was quite similar to those in a medical malpractice case, with the bulk of the award attributed to future pain and suffering and future medical and subsistence expenses. If a fee award of less than \$2 million would be considered appropriate in a comparable medical malpractice case, then a fee in excess of \$3.5 million here cannot constitute an undue hardship.

The movant further argues that the court did not adequately consider counsel’s experience and expertise, or the risks counsel faced when entering into the retainer agreement. The Judgment, however, discloses otherwise. The court

³That provision limits fees to 30% of the first \$250,000 recovered, 25 % of the next \$250,000, 20% of the next \$500,000, 15% of the next \$250,000, and 10% of any amount over \$1.25 million.

expressly recognized that counsel furnished excellent service to the claimant. Judgment ¶ 2, at 9. The court also considered the level of risk, but came to a conclusion different from the movant about the level of risk, in part because the issue of liability had been fully decided in the claimant's favor before counsel had to devote effort and expenditures on intensive trial preparation, and in part because the existence of numerous other claimants provided opportunities for all counsel to achieve economies of scale and hold down expenses. Judgment ¶ 3, at 10.

In one respect, however, the Judgment may unfairly penalize counsel. As noted above, the Judgment reduces the fee award in part because the efforts of other counsel – i.e., limitation-of-liability counsel – led to the determination of liability upon which the claimant's damages award was based. Limitation-of-liability counsel have now petitioned the court for an order requiring all attorneys who have obtained damages awards for claims arising from the crash, whether by settlement or by judgment, to contribute a percentage of their fees to a fund to compensate limitation-of-liability counsel for services that benefitted the entire group of claimants; that petition remains *sub judice*. It would be unfair to deduct any such percentage from the award made to counsel here, since that award has already been reduced to take account of the fact that counsel here did not have to expend time and resources in the effort to impose liability on the City. Any such

percentage that may be awarded should instead be charged against the claimant's portion of the Judgment.⁴

CONCLUSION

For the foregoing reasons I recommend (1) that, as there is no basis for disciplinary action against the claimant's counsel, no referral to any disciplinary body should be made, and (2) that the motion pursuant to Rule 60(b)(6) to amend the Judgment be denied. I further recommend, however, that an order be entered specifying that any obligation to contribute to a fund to compensate limitation-of-liability counsel be satisfied out of the claimant's portion of the damages award.

* * * * *

Any objections to the Report and Recommendation above must be filed with the Clerk of the Court within 14 days of receipt of this report. Failure to file objections within the specified time waives the right to appeal any judgment or order entered by the District Court in reliance on this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see, e.g., Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 474, 88 L.Ed.2d 435 (1985); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298 (2d

⁴The Judgment directed that \$2.5 million be held in escrow pending an anticipated appeal or other disposition of the disputed fees. I recommend that an amount equal to 10% of the net fees that are received by the claimant's counsel, after deductions for expenses are made from the overall award of damages, be set aside in that escrow fund to cover any percentage that may be awarded to counsel who handled the liability litigation.

Cir.), *cert. denied*, 113 S. Ct. 825 (1992); *Small v. Secretary of Health and Human Serv.*, 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

Viktor V. Pohorelsky

VIKTOR V. POHORELSKY
United States Magistrate Judge

Dated: Brooklyn, New York
March 4, 2010