Calcagno v. Aidman, 102484/08
Decided: August 8, 2008

Justice Joseph J. Maltese

RICHMOND COUNTY
Supreme Court

The plaintiff is represented by the law firm of Calcagno & Associates

The defendant is represented by Brem Moldovsky, LLC.

Justice Maltese

DECISION & ORDER

The plaintiff, a New York attorney, sought a declaratory judgment on the applicability of Disciplinary Rule (DR) 2-107, concerning the Division of Fees Among Lawyers, which is part of the Code of Professional Responsibility.[1] After reviewing the New York Disciplinary Rules and law, this court holds that the plaintiff as a New York attorney may not share a legal fee with a Pennsylvania attorney that referred his former partner, a New Jersey attorney, a person who resided in New York, who was injured as a passenger in a New York City taxi cab operated by a New Yorker in New York. This court also holds that a violation of the Disciplinary Rules constitutes misconduct for which the New York attorney may be disciplined.[2]

Facts

In this case, the pro se plaintiff, Andrew John Calcagno, Esq., is an attorney admitted to practice law in the states of New York, New Jersey, and the District of Columbia, and is also an inactive member of the Pennsylvania bar. Calcagno & Associates, Attorneys at Law, LLC, is a New Jersey limited liability company with offices in New Jersey and New York.

The defendant, Evan K. Aidman, Esq., is an attorney licensed to practice law in Pennsylvania and in New Jersey. His principal place of practice is in Ardmore, Pennsylvania.

Procedural History

On May 28, 2008 the plaintiff pro se, Andrew John Calcagno, Esq., a New York attorney, filed an action for a declaratory judgment. On June 13, 2008, the plaintiff sought an Order to Show Cause for a preliminary injunction with temporary restraints:

1. Forcing plaintiff to violate the New York Code of Professional Responsibility, specifically, Disciplinary Rule (DR) 2-107, Division of Fees Among Lawyers, that would subject plaintiff to disciplinary action and potential sanctions;

2. Seeking a referral fee supposedly owed to defendant by way of a referral made to plaintiff's former partner, Andrew Garruto, and former New Jersey law firm, Calcagno and Garruto, LLP, when the defendant performed no legal work on behalf of the subject client, which is a violation of DR 2-107; and

3. Forcing plaintiff to litigate this matter in Pennsylvania, which does not have personal jurisdiction over the plaintiff and does not have subject matter jurisdiction involving the alleged fee sharing arrangements with a New York lawyer in a New York personal injury case.

The defendant was placed on notice to appear to argue in opposition to this court signing the Order to Show Cause. The defendant, Evan K. Aidman, Esq., did not appear or notify this court of any opposition to the court signing the Order to Show Cause. This court read the Affidavit of the Plaintiff in Support along with the Plaintiff's Memorandum of Law in Support of the Order to Show Cause, along with the filed Summons and Complaint for a Declaratory Judgement in this underlying action dated May 28, 2008.

Also attached to the Order to Show Cause was the Affidavit of Willow Rossi of 157 East 72nd Street, Apt. 14A, New York, New York 10021, dated January 6, 2006, which was part of an action brought by Evan K. Aidman, Esq., as a plaintiff against Calcagno & Associates, Attorneys at Law, LLC and Andrew John Calcagno, in the Court of Common Pleas of Philadelphia County, under docket number 1094 of the April Term 2005. That lawsuit was improperly filed in Philadelphia County and was refiled in the Court of Common Pleas of Montgomery County under file number 2007-30982. In addition to the application before this court, Calcagno has sought the dismissal of the Pennsylvania action to dismiss pending in the Pennsylvania Court of Common Pleas of Montgomery, due to a lack of personal jurisdiction over him and a

lack of subject matter jurisdiction, namely to share in a New York legal fee based upon a New York lawsuit brought by a New York plaintiff, Willow Rossi, against a New York taxi company by Calcagno & Associates, a New York and New Jersey law firm.

On July 25, 2008, the return date of this Order to Show Cause, the defendant Evan K. Aidman, Esq. appeared through New York counsel, Brem Moldonsky, LLC, who submitted an Affirmation in Opposition, as well as a Memorandum of Law and the Affidavit of the Defendant in Opposition to the Order to Show Cause, along with the Answer to the underlying Declaratory Judgment action, with attached exhibits documenting internet listings, emails and other correspondence between Calcagno's former New Jersey partner, Andrew Garruto, Esq., and their former associate, Joseph Perrone, a New Jersey attorney. Perrone, like Andrew Garruto, has never been admitted to the New York bar worked on Willow Rossi's lawsuit after the dissolution of the law firm of Calcagno and Garruto, while employed by Calcagno & Associates, LLC. Also attached is a copy of the motion filed by Calcagno seeking a summary judgment to dismiss the civil action pending in the Pennsylvania Court of Common Pleas of Montgomery County.

Calcagno also has submitted an Affirmation in Reply dated July 24, 2008.

Upon hearing the arguments of counsel, Calcagno as plaintiff pro se and Brem Moldovsky, Esq. on behalf of the defendant, Evan K. Aidman, Esq., along with reading all of the foregoing documents, this court makes the following findings and conclusions of law.

Findings of Fact

1. In the summer of 1999, Willow Rossi ("Rossi"), a resident of New York, New York, was a passenger in a New York City taxi that was involved in a motor vehicle accident in New York, New York, in which she sustained a serious injury.

2. Ms. Rossi went on the internet to seek a personal injury attorney and spotted the internet advertisement of Evan K. Aidman, Esq. ("Aidman"), whom she contacted by way of email on October 19, 1999, seeking his legal help in finding her an attorney.

3. Rossi did not know Aidman; she never met him in person, nor did she ever

sign a retainer agreement with him to represent her in her personal injury claim.

4. Aidman referred Rossi to Andrew Garruto, a partner in the law firm of Calcagno and Garruto at its New York, New York office, whom he knew to be admitted to practice law in New Jersey, but who had a partner that was admitted to practice in New York.

5. Aidman claims that he entered into a referral fee agreement with Andrew Garruto ("Garruto") as a result of the following internet "instant message" exchange:

LegalAidman: Hi Andy. Did Willow officially retain you?

Garuvanagh: Yes. Thanks again.

LegalAidman: Did we ever officially settle on a referral fee?

LegalAidman: I have basically been assuming that you would send me a third, yet I don't know that we ever really discussed this.

Garuvanagh: one third of my one third fee - how's that

LegalAidman: fab

6. After a series of other inquiries between 2000 and 2003, Garruto forwarded the following e-mail to Aidman on October 27, 2003:

FYI, my partnership dissolved last month, and the willow rossi file is now being handled by calcagno & associates at my former office address in cranford, new jersey. contact andrew calcagno's associate, joe perrone, at 908-272-7300 for updates. -andy garruto new office: 609 franklin avenue, nutley, nj 07110

(973) 661-4455

7. Aidman sent e-mails to Joseph Perrone, Esq., a New Jersey associate of Calcagno & Associates, who was not admitted to practice in New York, seeking the status of the case and whether there were any settlement offers.

8. The only correspondence Aidman ever had with Calcagno's former New Jersey partner and his New Jersey associate was inquiring about the progress of the case and when it would settle, and stating that he expected a one-third of the attorney fee or 1/9th of the total fee, namely $10,000.

9. Garruto acknowledged in a court certification concerning the Pennsylvania action on September 9, 2005 that on December 8, 1999 he was a partner of Calcagno and Garruto, with full authority to bind the firm and that on that date, he agreed to pay a one-third referral fee to Evan K. Aidman, Esq., with regard to the accident case involving Willow Rossi. Garruto claims he orally told Calcagno of Aidman's one-third referral fee and documented it in the file on the first page of the intake sheet. He claims that Calcagno at all times had full access to this file, which contained the intake sheet, as well as a notation in the file costs section where referring attorneys' information is customarily placed.

10. Calcagno, in his affidavit in support of preliminary objections pursuant to the Pennsylvania Rules of Civil Procedure (PA R.Civ.P.) No. 1028(a)(1) in the original Pennsylvania Court of Commons Pleas action in Philadelphia County that, unbeknownst to him, Aidman allegedly contacted Garruto in his firm's New York office and referred Willow Rossi to Garruto. Calcagno argued in court that he became aware of the alleged referral fee agreement made by Garruto after they terminated their partnership, more specifically, when the case settled and Aidman sought a $10,000 referral fee.

11. It is undisputed that Willow Rossi never agreed to a joint fee arrangement. Apparently, she took the name of Garruto referred to her by Aidman and dealt with Garruto, Perrone and Calcagno, with no involvement with Aidman other than a few e-mails initiated by Aidman to ascertain if she retained the lawyer (Garruto), whom he referred.

12. At no time did Aidman ever sign a retainer agreement with Willow Rossi, nor did he ever meet with her to discuss her case, nor did he ever collect any information or medical records, nor did he negotiate with any insurance claims representatives to settle the case, nor did he ever draft any pleadings in the case, nor did he ever conduct any depositions in the case, nor did he ever speak with the New York attorney of record in the case, Andrew John Calcagno, Esq., nor did he have any internet or written correspondence with attorney Calcagno.

13. In Aidman's answer to the complaint and his affidavit of opposition to the Order to Show Cause, he admits that he did not file a New York Retainer Statement with the court administration as is required when commencing a negligence action in New York under title of the New York Code of Rules and Regulations Section 603.7 (22 NYCRR Â§603.7(a)). After a settlement or judgment after trial, a Closing Statement is also required under 22 NYCRR 603.7(b), which discloses all attorneys who shared in the legal fees, which should be agreed to and signed by the client. Aidman's name does not appear on either court form.

14. Calcagno asserts that under the New York Code of Professional Responsibility, which contains the Disciplinary Rules (DR), specifically DR 2-107(a)(2), he is precluded from sharing a legal fee with another law firm where the lawyer had no role in the case other than to refer an injured person to another lawyer, especially when that other attorney is not licensed in New York and who performed absolutely no services on behalf of the client.

15. Aidman asserts that Garruto, as Calcagno's New Jersey partner at the time, agreed by the above e-mail correspondence to share the legal fee with Aidman. He states he had authority to bind the partnership to that agreement and, notwithstanding the fact that Garruto was never a New York attorney, nor the fact that he left the partnership before the settlement of the case, Calcagno is obligated to pay on the legal fee agreement.

Conclusions of Law

Disciplinary Rules

The Disciplinary Rules (DR) of the New York Code of Professional Responsibility which are contained in Part 1200 of Title 22 of the New York Code, Rules and Regulation (NYCRR) provide in part as follows:

DR 1-102 Misconduct

(a) A lawyer or law firm shall not:

(1) Violate a disciplinary rule . . . [3]

DR 2-107 Division of Fees Among Lawyers

(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 law firm unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is in proportion to the services performed by each lawyer or, by a writing given to 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.

(b) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.[4]

New York Retainer Statements

The Rules of the Supreme Court, Appellate Division Â§603.7 contained in the New York Code of Rules and Regulations (NYCRR) states in part:

Claims or Actions for Personal Injuries

(a) Statements as to Retainer:

(1) Every attorney who, in connection with any action or claim for damages for personal injuries or for property damages or for death or loss of services resulting from personal injuries, or . . . accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in such action, claim or proceeding, whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof, shall, within 30 days from the date of any such retainer or agreement of compensation, sign personally and file with the Office of Court Administration of the State of New York a written statement of such retainer or agreement of compensation, containing the information hereinafter set forth . . . .

(2) A statement of retainer must be filed in connection with each action, claim or proceeding for which the attorney has been retained.

(3) An attorney retained by another attorney, on a contingent fee basis, as trial or appeal counsel or to assist in the preparation, investigation, adjustment or settlement of any such action, claim or proceeding shall, within 15 days from the date of such retainer, sign personally and file with the Office of Court Administration a written statement of such retainer in the manner and form as above set forth, which statement shall also contain particulars as to the fee arrangement, the type of services to be rendered in the matter . . .

(4) No attorney shall accept or act under any written retainer or agreement of compensation in which the name of the attorney was left blank at the time of its execution by the client.

(b) Closing Statement; Statement Where No Recovery.

(1) A closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required, as follows: every attorney upon receiving, retaining or sharing any sum in connection with a claim, action or proceeding subject to this section shall, within 15 days after such receipt, retention or sharing, sign personally and file with the Office of Court Administration and serve upon the client a closing statement as hereinafter provided.

Amongst the items required to disclose on the closing statement are:

9. Net amounts: to client $ . . . . . .; compensation to undersigned $ . . . . . .; names and addresses and amounts paid to attorneys participating in the contingent compensation.

10. Compensation fixed by: retainer agreement

14. Date on which a copy of this closing statement has been forwarded to the client . . . Dated . . . . . .Signature of Attorney.

Case Law

The New York Supreme Court Appellate Division, Third Department in Ford v. Albany Medical Center and Spada v. Harding,[5] has been most instructive in interpreting the rules governing attorney fee splits in New York State. The plaintiff, in Ford, consulted with Spada, a New York attorney, regarding a

possible medical malpractice action against the Albany Medical Center. Spada obtained an expert medical opinion that a viable medical malpractice case existed.

However, two months later, Harding, another New York attorney, advised attorney Spada in writing that his law firm was retained to proceed with the medical malpractice action. Harding requested that Spada sign a consent to change attorney form and advised that they would split the counsel fee in "an equitable manner." Thereafter, Spada had a telephone conversation with Harding wherein they agreed that Spada would receive 33.33 percent of any counsel fee. On the same day, Spada wrote Harding asking for confirmation of the agreement in writing. However, Harding only sent Spada a check to reimburse Spada's disbursement expenses without mentioning an agreement to split counsel fees. Later, however, a letter on Harding's letterhead indicating a 2/3 - 1/3 split of the legal fees was sent to Spada.

After the case was settled, a legal fee of $99,701.48 was awarded, wherein Spada sought court approval for 33.33 percent which Harding opposed. The trial court stated that Spada had an attorney-client relationship for which he was entitled to a legal fee based upon "quantum meruit" to be determined at a hearing. The court found that the letter sent from Harding's law office was without his consent and awarded him only 3 percent of the fee, to wit $2,991.00, based upon the value of the work Spada performed.

On appeal the Appellate Division ruled that even though the client as the personal representative of her deceased daughter's estate did visit with attorney Spada on more than one occasion, that an attorney-client relationship did exist, notwithstanding the fact that no written retainer was executed because no authority to act on behalf of the estate had been issued when Spada was discharged. However, the Appellate Division found that there was no enforceable agreement to share legal fees because there was a violation of DR 2-107 which requires a written agreement to assume joint responsibility for the client's representation. Therefore, the division of any fee must be in proportion to the services performed by each lawyer. Accordingly, the Appellate Division upheld the finding of the trial court of a 3 percent fee based upon quantum meruit.

In the case before this court, it is undisputed that Aidman, the Pennsylvania attorney, was never retained by the client. Rather than recommending Willow Rossi to a New York attorney, Aidman instead recommended that she consult

a New Jersey attorney who had a partner licensed to practice in New York. Aidman did not investigate the case, nor did he ever meet with the client. He did not obtain any documents or medical records, nor did he find any expert witnesses. Aidman did not draft any pleadings, answer bills of particulars, prepare for or attend any depositions. He did not assist in the settlement discussions with the insurance claims representatives, nor did he ever appear in any court proceedings. Under quantum meruit, he is entitled to nothing because he did not render any legal services to the client.[6]

Aidman's sole action of recommending the name of an attorney to an injured New Yorker, who found his name on the internet, in no way amounts to a valid fee splitting arrangement under New York law. Aidman has acted as a broker for legal services or a middle man, and not as an attorney. Indeed, Aidman advertises on his website that he monitors his referrals, indicating that perhaps he has brokered other cases to other attorneys without performing any real legal services to those referred persons.

Aidman, as a Pennsylvania and New Jersey attorney, could not have represented the injured New Yorker, who was injured in New York by other New Yorkers. Aidman seeks to enforce a fee split agreement made by a New Jersey partner who could not bind the law firm to that agreement, which is in contravention of the New York Disciplinary Rules. Hence, the fee split agreement is void and by operation of law is unenforceable because it would violate DR 2-107.[7]

While this court cannot rule on plaintiffs' arguments that the Pennsylvania Court of Common Pleas lacks personal and subject matter jurisdiction, New York courts have primary jurisdiction over New York attorneys and their compliance or violation of the New York Code of Professional Responsibility and the Disciplinary Rules.[8]

Accordingly, it is hereby:

ORDERED, that the plaintiffs' motion seeking a declaratory judgment that the defendant is not entitled to share in an attorney fee split is granted for all of the reasons outlined above; and it is further

ORDERED, that the plaintiff may not violate the New York Code of Professional Responsibility, specifically Disciplinary Rule (DR) 2-107 by splitting any lawyer's fee that he recovered in connection with the action

commenced and settled on behalf of Willow Rossi; and it is further

ORDERED, that all other applications are denied.

1. DR 2-107, 22 New York Code of Rules & Regulations (NYCRR) Part 1200.12.

2. DR 1-102, 22 NYCRR 1200.3.

3. DR 1-102, 22 NYCRR 1200.3.

4. DR 2-107, 22 NYCRR 1200.12.

5. 283 AD2d 843, 724 NYS2d 795 (2001).

6. See, Nicholson v. Nason & Cohen, P.C., 597 NYS2d 23 [1st Dept., 1993].

7. Raphael v. Shapiro, 587 NYS2d 68 [S.Ct. N.Y. County, 1992].

8. See, In re Peltz, 259 NYS2d 522 [4th Dept. 1965]; Greenwald v. Zyvith, 259 NYS2d 387 [2nd Dept, 1965].