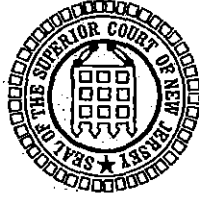


SUPERIOR COURT OF NEW JERSEY
ESSEX VICINAGE

PATRICIA K. COSTELLO
ASSIGNMENT JUDGE



50 W. MARKET STREET
ESSEX COUNTY COURTS BUILDING
NEWARK, NJ 07102
(973) 693-6470

December 3, 2009

Gerald Clark, Esq.
Keefe Bartels Clark, LLC
170 Monmouth Street
Red Bank, NJ 07701

Re: Charneski v. Classic Conservatories
Docket No. ESX-L-5610-06

Dear Counsel:

This matter comes before the court by way of a motion for an enhanced contingent counsel fee filed by Gerald Clark, Esq., of the law firm Keefe Bartels Clark, LLC ("Keefe"). He represents plaintiffs Luiz and Janette Charneski in this matter. Since the matter settled in excess of \$2,000,000, specifically \$2,520,000, counsel for the plaintiff requests the Court to approve an excess counsel fee and an enhanced contingency fee of a flat 33 1/3% of the entire net settlement. A certification in support of this motion was submitted by Gerald Clark, Esq. I have considered the papers submitted and arguments of counsel.

In October of 2004, the Garden State Exhibit Center in Somerset, New Jersey was hosting a weekend trade show that was to take place on October 23rd and 24th. Defendant Classic Conservatories, Inc. ("Classic"), a company which manufactures and installs prefabricated sunrooms, was scheduled to participate in the trade show. In preparation for the trade show, Classic hired one of its independent contractors, Isaac DaSilva, to erect a sunroom for display.

On Oct. 21, 2004, Isaac DaSilva and his employee, Luis Charneski, began assembly of the sunroom which consists primarily of metal framing and glass panels. Luiz Charneski was standing on the fourth or fifth rung of a ladder when he lost his balance, fell and struck his head on the floor. He suffered serious injuries which caused him to be in a coma for four months. He continues to suffer from the after-effects of this accident.

The Charneskis hired Ginarte O'Dwyer & Winograd, LLP ("Ginarte") to represent them in connection with the accident. Ginarte eventually concluded that there were no viable causes of action. There were no witnesses to the accident and there were varying versions of how it occurred. Additionally, there did not seem to be any product liability claims. Ginarte notified the Charneskis in July of 2006 that they would not be taking any further steps on the Charneskis' behalf.

On August 3, 2006, the Chameskis met with Gerald Clark and requested that Keefe pursue the matter. The impending expiration of the statute of limitations caused Keefe to quickly investigate the accident and possible causes of action. Keefe obtained an order for pre-action discovery which allowed them to issue subpoenas and obtain documents and testimony prior to filing any lawsuit. After pre-action discovery, Keefe determined that there was sufficient evidence to file a complaint. This matter was actively litigated for three years.

The matter was settled for \$2,520,000 on September 10, 2009. Keefe now seeks approval of 33 1/3% of the entire net recovery.

Contingent fees are governed by R.1:21-7(c), which provides

In any matter where a client's claim for damages is based upon the alleged tortious conduct of another ... an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

- (1) 33 1/3% on the first \$500,000 recovered;
- (2) 30% on the next \$500,000 recovered;
- (3) 25% on the next \$500,000 recovered;
- (4) 20% on the next \$500,000 recovered; and
- (5) on all amounts recovered in excess of the above application for reasonable fee in accordance with the provisions of paragraph (f) hereof.

Under R. 1:21-7(c), counsel would have received approximately \$714,966 if they received the fees allowed by Court Rule on the first \$2,000,000 and 33 1/3% on the excess over \$2,000,000. Counsel seeks 33 1/3% flat fee which would result in a recovery of approximately \$839,916. Plaintiffs consent to a flat fee of 30% which would result in a recovery of approximately \$756,000.

An attorney seeking additional fees pursuant to R. 1:21-7(c)(5) must make an application for a determination of a reasonable fee in light of all the circumstances. R. 1:21-7(f). In setting a reasonable fee, a court should consider the factors listed in RPC 1.5(a). See Ehrlich v. Kids of North Jersey, Inc., 338 N.J. Super. 442, 446 (App. Div. 2001). The factors are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent.

[RPC 1.5(a)]

While not dispositive, another factor to be considered is whether the client has consented to the additional fee request. Ehrlich, supra, 338 N.J. Super. at 446.

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly

According to Keefe's time records, Mr. Clark estimates that he has personally devoted approximately 900 hours on the litigation over the course of three years. Additionally, John E. Keefe, Jr., John E. Keefe, Sr., Sara Delahunt, and Richard Sciria, worked for approximately 100 hours on this matter. Also, paralegals and law clerks devoted approximately 100 hours of their time, for a total of 1100 hours. Counsel's request, therefore, equates to a \$763.56 overall hourly rate.

This case presented numerous hurdles and barriers to proving liability against any defendant. Both Ginarte and Liberty Mutual Insurance Company investigated the matter and concluded that there was no third party liability.

Keefe took immediate and aggressive action after initially meeting the clients by filing, over-objection, a pre-action discovery order for the purpose of identifying potentially responsible parties. Once Keefe accepted the Charnesk matter, it advanced nearly \$50,000 in costs. This case involved over 20 defendants grouped into 12 sets of related entities. Due to time constraints imposed by the statute of limitations, Keefe was forced to name parties without full knowledge of the facts. Full discovery was taken on a number of defendants who were eventually dismissed from the case. The only remaining defendant was Classic Conservatories.

The traditional liability scheme present when a general contractor fails to enforce safety on a multi-employer worksite was not applicable here. This situation involved an owner-renter of a trade show booth which hired an independent contractor to assemble its sunroom display model. Thus, it was extremely difficult for Keefe to prove that Classic even owed the plaintiff any duty. Keefe argued that despite having no involvement in the actual work at the trade show facility, a duty could be imposed on Classic if it was determined that to have interfered in the manner and means of the work. Additionally, though Classic was not a traditional general contractor in this case, Keefe proved Classic's business practice of serving as general contractor on other jobs. Keefe demonstrated that Classic did not comply with safety standards on other jobs, just as it had not maintained a safe environment in this situation. The plaintiffs were able to overcome summary judgment because of this argument.

The case was labor-intensive, requiring extensive pre-trial work including motion practice, substantial research, and discovery in the form of depositions and document requests. The case involved nine depositions, thirteen experts, and seventeen motions. Because of its zealous advocacy, Keefe obtain a substantial recovery for an injured worker where another large personal injury law firm and major insurance carrier concluded that there was no third party liability.

In addition to the legal hurdles faced by Keefe, it encountered several other substantial obstacles such as the fact that the Plaintiffs are non-English speaking,

undocumented aliens from South America. This led to a myriad of problems related to asserting economic loss claims such as income loss, future medical bills, and life care planning.

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer

Mr. Clark certified that counsel would have worked on other matters during the three year period if it did not accept the Charneski case. This certification does not state this was demonstratively apparent to the clients, but states that they were generally aware the firm was working hard on their behalf.

(3) the fee customarily charged in the locality for similar legal services

The Court Rules provide a graduated scale for the recovery of contingent fees under \$2,000,000. The Court Rules, however, do not permit a firm to charge for services performed on settlements in excess of \$2,000,000; all requests for fees on the amount of recovery in excess of \$2,000,000, as well as requests for enhanced or increased fees on the fixed schedule for the first \$2,000,000 of a recovery, are subject to court approval.

Mr. Clark certifies that based on his knowledge and his law firm's experience working on complex matters, he is familiar with the hourly rates charged by attorneys and law firms in New Jersey in similar litigation. These rates were instructive as to a reasonable hourly rate for lodestar purposes. Below are the rates Keefe utilizes for fee shifting and class action litigation:

John E. Keefe, Jr., Member - \$600/hr.
John E. Keefe, Sr., Of Counsel - \$650/hr.
Gerald E. Clark, Member - \$525/hr.
Sarah Delahant, Associate - \$350/hr.
Richard Sciria (former associate) - \$300/hr.
Paralegals- \$175/hr.
Law Clerks - \$168/hr.

The Supreme Court has held that the risk associated with contingency fee litigation is a factor to be considered in addition to the hourly lodestar when determining the reasonableness of counsel fees: Rendine v. Pantzer, 141 N.J. 292, 324 (1995). An enhanced fee is appropriate when the case is especially complex and likelihood of recovery is uncertain. A large personal injury law firm and a major insurance company concluded that third party liability did not exist and Keefe accepted this matter at great risk that no fee would be collected.

(4) the amount involved and the results obtained

The total settlement for plaintiffs was \$2,520,000 as indicated above. During mediation, the Charneskis expressed that their "bottom line" number was \$1,000,000. Mr. Clark certified that after payment of costs, liens, and enhanced counsel fees, plaintiffs would be entitled to \$1,130,000. The Charneskis only consented to the 30%

flat fee.

(5) the time limitations imposed by the client or by the circumstances

Mr. Clark certified that this matter required intensive work and inherent time limitations. The Charneskis approached Keefe with very little time left on the statute of limitations. Additionally, extensive time was spent with the plaintiffs assisting them with their concerns about unpaid medical bills, medical treatment, and related concerns about the future. The Charneskis' gratitude and satisfaction with Keefe is reflected in their certification.

(6) the nature and length of the professional relationship with the client

The attorney-client relationship began in August of 2006. The Charneskis' certification reflects their disappointment with their relationship with Ginarte after its failure to keep them apprised of the matter and their gratitude to Keefe for keeping them informed of all developments.

During mediation, Keefe specifically advised the Charneskis that it would be making this fee application. In anticipation of the waiting period associated with the fee application, Keefe has disbursed \$1,130,552.92 to the clients so they would not have to await the decision regarding fees to receive the bulk of their award. Keefe has also paid the workers' compensation lien and litigation funding loan that the clients took out.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services

Review of the record demonstrates the substantial skill and time which were devoted to this matter. Mr. Clark certified that he has served as lead counsel in numerous catastrophic loss and wrongful death cases. Additionally, he regularly represents severely disabled accident and injury clients in many cases including workplace accidents involving defective industrial machines, and construction accidents arising from safety violations, automobile and aviation accidents. The New Jersey Law Journal listed Mr. Clark as a lawyer who has distinguished himself in its "40 Under 40" category.

(8) whether the fee is fixed or contingent

The fee was contingent. There was a definable risk in taking this case because of its low probability of recovery. As set forth in the record, intensive labor was devoted to this case over a period of three years.

Conclusion

The initial \$2,000,000, covered as it is by both court rule and retainer, is an area in which the court feels compelled to give the clients' wishes a higher deference. In accordance with their consent to allow a fee of 30%, the caps imposed by the court Rule after the first \$500,000 will be raised to 30%.

The fee on the excess requires a slightly different analysis. The fee in that category was never the subject of a retainer agreement, and this court exercises its discretion to award the full 33 1/3% sought on the award over \$2,000,000. In light of all of the factors discussed supra, that amount is fair to both counsel and the clients.

1. 33 1/3% of the first \$500,000 =	\$166,650
2. 30% of the next \$500,000 =	\$150,000
3. 30% of the next \$500,000 =	\$150,000
4. 30% of the next \$500,000 =	\$150,000
5. 33 1/3% of the remaining \$520,000=	\$173,316

TOTAL = \$789,966

An Order is attached.

Very truly yours,

Patricia K Costello
PATRICIA K. COSTELLO, A.J.S.C.