

New York Law Journal



Web address: <http://www.nylj.com>

VOLUME 233—NO. 30

NEW YORK, TUESDAY, FEBRUARY 15, 2005

©2005 ALM Properties, Inc.

PRICE \$3.00

ALM

Firm Denied Fees For Failure to Get Written Retainer

BY MARK FASS

A LAW FIRM that failed to provide its client a written letter of engagement is not entitled to fees for successfully representing the client before the federal September 11th Victims Compensation Fund, a Bronx judge has ruled.

"Plaintiff's failure to provide a letter of engagement or a signed retainer was deliberate, and not a result of being 'impracticable,'" wrote Supreme Court Justice Yvonne Gonzalez in *Klein, Calderoni & Santucci v. Bazerjian*, 22351/04. "Clearly, plaintiff has not complied with [the New York Codes, Rules and Regulations]."

Klein, Calderoni & Santucci, which has offices in Queens and the Bronx, represented Thomas A. Bazerjian at a victims' fund appellate hearing. Mr. Bazerjian, a Department of Transportation worker, developed "fairly serious" asthma while working at the World Trade Center site after the terror attacks, according to his current attorney, Daniel Bright of Kennedy, Schwartz & Cure, a Manhattan-based labor law firm.

Mr. Bazerjian was assigned to the site on Sept. 12, 2001, "for about three months, at first looking

The decision will be published Friday.

Continued on page 5

Fees Denied for Failure to Get Retainer

Continued from page 1

for bodies, survivors," said Mr. Bright. "What these guys were doing was filling up trucks with debris and rubble, and at the same time what they call 'search and recovery' work."

In April 2004, the victims fund awarded \$65,000 to Mr. Bazerjian. Mr. Bazerjian personally filed an appeal, believing the seriousness of his asthma merited greater compensation.

On May 12, 2004, based on a colleague's recommendation, Mr. Bazerjian called Fred T. Santucci Jr., a partner at Klein Calderoni.

One week later, Mr. Santucci represented Mr. Bazerjian at the appellate hearing.

The fund subsequently increased the award to \$204,451.

Klein Calderoni billed Mr. Bazerjian for 25 percent of the increase, nearly \$35,000.

Mr. Bazerjian refused to pay and the law firm filed suit, contending that the two sides had agreed to the contingency fee, the lack of a written agreement notwithstanding.

"[I do] not know an attorney who would put extensive work into a file and travel to Manhattan to appear at and conduct a hearing without being hired by the client and agreeing on a fee for services," wrote Jeffrey D. Klein in a cross motion for summary judgment. Mr. Klein, a partner at Klein Calderoni, won Guy Vellella's state Senate seat in November.

The firm asserted three grounds for recovery: breach of contract, quantum meruit and account stated.

Mr. Bazerjian's asserted three affirmative defenses, improper service, illegality and unconscionability.

"I never actually retained Mr. Santucci or his firm to represent me," Mr. Bazerjian stated in his answer. "Although he appeared with me at my Fund hearing, I was uncomfortable with and confused by his presence because he did not want to sign a retainer agreement and we had not agreed on a fee. The entire hearing lasted no more than an hour, including the half an hour we waited before my hearing actually started. I had no idea that Mr. Santucci was going to send me a bill afterward, demanding thousands of dollars as a fee."

In deciding whether the lack of an agreement precluded the firm from collecting for its services, Justice Gonzalez relied on 22 NYCRR §1215.1. The rule requires a written letter of engagement before commencing representation or, "if other-

wise impracticable," within a reasonable time thereafter.

Domestic Relations Law

The law firm argued that, because the defendant initially contacted the firm only one week before the hearing, the failure to provide the letter fell under the "otherwise impracticable" exception.

But Justice Gonzalez ruled that the failure was "deliberate," and not the result of impracticability, citing an affidavit signed by Mr. Santucci. According to his affidavit, Mr. Santucci told Mr. Bazerjian that Mr. Bazerjian did not need to sign an

This case is "exactly the reason" every attorney should always have a written fee arrangement, said Robert S. Kelner, co-chairman of the New York County Lawyers Civil Trial Practice Course.

agreement because of Mr. Santucci's "past dealings with his co-worker clients" and his "belief that he would honor [the] bill."

Having determined that the firm did not comply with the written-letter requirement, Justice Gonzalez stated that a lack of precedent compelled her to rely on domestic relations law to formulate a remedy.

"While 22 NYCRR §1215.1 is a relatively recent rule with no appellate gloss," she wrote, "it has been held to be similar to 22 NYCRR §1400.3, which governs retainers in domestic relations law."

In domestic relations matters, she noted, an attorney is precluded from recovering fees when the attorney fails to execute and file a retainer agreement, citing *Mulcahy v. Mulcahy*, 285 AD 2d 587. She applied the same penalty to Klein Calderoni.

"They should certainly have had a written fee arrangement," said Robert S. Kelner, co-chairman of the New York County Lawyers Civil Trial Practice Course and a New York Law Journal columnist.

This case is "exactly the reason" every attorney should always have a written fee arrangement, he added.

"The court has given zero to the attorneys that worked on this case, despite the fact that they obviously spent time on the case," he said.

Mr. Santucci said his firm is considering an appeal.

"The reason why there was no letter of agreement was because of the short time span," he said in an interview. He added that there were three days from the time the firm was hired and given medical records to the date of the hearing.

"I rearranged my schedule and did all the work on his case," he added. "To do it in that short of a period of time and to get him \$140,000, I think my firm did a pretty good job."

Mr. Bazerjian's new attorney, Mr. Bright, does not expect Mr. Bazerjian to contest the hourly fee charged by Mr. Bright's firm.

"He paid me out of his pocket," said Mr. Bright, declining to specify the amount. "And we have a retainer agreement."

— Mark Fass can be reached at mfass@amlaw.com.