Buffalo Law Review

Volume 7 | Number 1 Article 116

10-1-1957

Miscellaneous—Substitution of Attorneys

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that nothing shall be construed to affect, alter or repeal any provision of the Workmen's Compensation Law. The intent of the statute is clearly stated; therefore, the exclusiveness of the remedy under the Workmen's Compensation Law is not altered by the Court of Claims Act.

Substitution Of Attorneys

By virtue of the peculiar relationship existing between attorneys and their clients, the latter are accorded the privilege of discharging the former for any reason whatsoever, in which event any existing agreement of retainer is terminated and the attorney may recover only on a quantum meruit basis, for services rendered,[5] unless, without objection, the discharged attorney elects to take a percentage of the final judgment or settlement, where a substitution of attorneys takes place.[6] The substitution of attorneys by a client is generally governed by Rule 56 of the Rules of Civil Practice, and may be done either by stipulation or by order,[7] an order directing substitution being without prejudice to a charging lien of the first attorney.[8]

The problem most intimately connected with the discharge or substitution of attorneys is that of establishing the compensation due for services rendered by the attorney being discharged. By statute, an attorney's compensation is made subject to agreement "express or implied, which is not restrained by law."[9] There is no general power on the part of the courts to limit the amount of the fees charged by an attorney[10] in the absence of facts indicating that the charge was "extortionate or excessive, or out of proportion to the value of the services"[11] or that the agreement "was induced by fraud, or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a

5. Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916).

6. Podbielski v. Conrad, 286 App. Div. 1040, 145 N.Y.S.2d 321 (2d Dep't 1955).

7. N.Y.R. CIV. PRAC. 56:

> An attorney of record for an adult party or corporation may be changed by the filing with the clerk of the court in which action or proceeding may be pending of a stipulation in writing for such change of attorney, signed by the attorney and signed and acknowledged by the party. The making and filing of such a stipulation shall have the same effect as an order of substitution. An attorney may also be changed by order.

See also N.Y. CIV. PRAC. ACT §240 which pertains generally when an attorney has been discharged or otherwise incapacitated.

8. Re Lydig, 262 N.Y. 408, 187 N.E. 298 (1933). The attorney's charging lien is established under authority of N.Y. JUDICIARY LAW §475.

9. N.Y. JUDICIARY LAW §474.

10. Murray v. Waring Hat Mfg. Co., 142 App. Div. 514, 127 N.Y. Supp. 78 (2d Dep't 1911); Werner v. Knowlton, 107 App. Div. 158, 94 N.Y. Supp. 1054 (4th Dep't 1905).

11. Ward v. Orsini, 243 N.Y. 123, 127, 152 N.E. 696, 698 (1926).

purpose on the part of the attorney to obtain an improper or undue advantage over his client."[12]

In *Wojcik v. Miller Bakeries Corporation*[13] the client in a personal injury action discharged his former attorney and retained a second attorney to complete the prosecution of the action. The question involved was whether the stipulation entered into by the two attorneys and the client after the discharge of the first attorney was binding, even though it called for compensation of the first attorney for his services in an amount considered exorbitant by the court.

The majority of the Court of Appeals ruled that the Supreme Court had no power to fix the original attorney's lien at a figure other than that agreed to in the stipulation of substitution. The stipulation was entered into in accordance with Rule 56 and was as effective as an order of substitution.[14] Pointing out that the attorney-client relationship had terminated, and that there was no basis for a finding of fraud or undue influence, especially in light of the fact that the second attorney negotiated with the first for the stipulation and advised the client to accept the same, the Court held that a valid contract between parties at arms length had been made which could not be changed by judicial fiat.[15]

Judges Dye, Van Voorhis, and Fuld dissented, arguing that insofar as a stipulation is "in respect and in place of a contingent fee retainer"[16] for services rendered, it is open to judicial scrutiny. In the view of the minority the agreement of stipulation, having been found as a matter of fact by Special Term to be unconscionable and affirmed by the Appellate Division,[17] was excessive and out of proportion to the services rendered, and the technical fact that the first attorney was no longer retained by the client at the time of the stipulation of substitution should not remove the actions of the said attorney from the court's scrutiny where he was occupying the strategic position of attorney of record and stood in the way of further progress of the personal injury action until he was removed as such.[18]

The majority holding would appear to be in accord with existing law. The client and the second attorney voluntarily entered into an agreement with the appellant; no fraud or undue influence was in any way charged. Considering that there was an expeditious method available for determining the prior

12. Morehouse v. Brooklyn Heights R.R., 185 N.Y. 520, 526, 78 N.E. 179, 181 (1906).
13. 2 N.Y.2d 631, 162 N.Y.S.2d 337 (1957).
14. N.Y. R. Civ. Prac. 56.
15. Wojcik v. Miller Bakeries Corp., 2 N.Y.2d 631, 640, 162 N.Y.S.2d 337, 343 (1957).
16. *Ibid.*
17. *Id.* at 646, 162 N.Y.S.2d at 347.
18. *Id.* at 648, 162 N.Y.S.2d at 349.

attorney's lien,[19] as well as provision for substitution by order under Rule 56, there appears to be little merit in the argument of the dissenting justices that the first attorney stood in the way of further progress and that the stipulation was therefore not in any real sense voluntary. The interests of both attorneys and clients appear to be adequately protected, and there should have been no need for a stipulation for substitution in this case if either the second attorney or the client was dissatisfied with the provisions urged by the original attorney.

Reduced to its simplest terms, this case reaffirms the position of *Matter of Peters*[20] that a court is without power "to remake or change a contract of retainer validly made"[21] or, as here, a stipulation of substitution providing for compensation for an attorney's services.

Sovereign Power Of State

The state as quasi-sovereign and representative of the interests of the public has standing in court to protect the navigable and public bodies of water within its territory.[22] The ends of such protection must be for the best interest of the public.[23]

In *People v. System Properties*[24] the people sought to have the state declared owner of the bed of an outlet from Lake George. Their object was to place in the state, control over a dam which lay in that outlet and affects the water level of Lake George. The plaintiff alleged that the Lake and the outlet are navigable waters and the state has title to their beds and therefore power to control the dam and its interference with the public enjoyment of Lake George. The defendant countered that the outlet was nonnavigable and that it owned the bed of the outlet at the dam site.

The Court seemed to go out of its way to place ownership of the dam site in defendant by adverse possession when it appeared that their deed would not include the bed of the outlet. Next it in effect deemed the outlet nonnavigable and

19. Judge Van Voorhis in his dissent in the principal case at 650, 162 N.Y.S.2d at 351:

> The object of section 475 of the Judiciary Law is to supply swift and expeditious mode of trying disputes of this nature . . . . N.Y.R. CIV. PRAC. 56, *supra* note 3, provides for changing attorney by order.

20. 271 App. Div. 518, 67 N.Y.S.2d 305 (3d Dep't 1946), *mod. on other grounds*, 296 N.Y. 974, 73 N.E. 2d 560 (1947).

21. *Id.* at 523, 67 N.Y.S.2d at 310.

22. Hudson Water Co. v. McCarter, 209 U.S. 349 (1908); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Kansas v. Colorado, 185 U.S. 125 (1902).

23. Niagara Falls Power Co. v. Water P. & C. Commission, 267 N.Y. 265, 196 N.E. 51 (1935); Roth v. State, 262 App. Div. 370, 29 N.Y.S.2d 442 (4th Dep't 1941).

24. 2 N.Y.2d 330, 160 N.Y.S.2d 859 (1957).