EXHIBIT O

At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York on the 2nd day of April, 2012

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

CELLINO & BARNES, P.C., formerly known as THE BARNES FIRM, P.C. and CELLINO & BARNES, P.C.

Plaintiffs,

v.

BROWN CHIARI LLP, formerly known as BROWN CHIARI, LLP and BROWN, CHIARI CAPIZZI & FRASCOGNA LLP,

Defendants.

DECISION and ORDER

INDEX NO. 2011/121

APPEARANCES: MARK R. UBA, ESQ., for Plaintiffs
JAMES M. MUCKLEWEE, ESQ., for Defendants

PAPERS CONSIDERED: The AFFIRMATION OF MARK R. UBA[, ESQ.,] with annexed exhibits;

the AFFIDAVIT OF STEPHEN C. CIOCCA[, ESQ.], with annexed exhibits;

the AFFIDAVIT OF PATRICK J. BROWN[, ESQ.], with annexed exhibits;

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR ALLOCATION OF ATTORNEY FEES;

Plaintiff's computer disk;

the AFFIDAVIT of James M. Mucklewee, Esq., with annexed exhibits;

the AFFIDAVIT of James E. Brown, Esq., with annexed exhibits;

the AFFIDAVIT of Donald P. Chiari, Esq., with annexed exhibits;

the MEMORANDUM OF LAW of Defendant;

Defendant's computer disk;

the March 26, 2012 letter of James M. Mucklewee, Esq., with

attachment; and

the March 27, 2012 letter of Mark R. Uba, Esq.

Plaintiff, a law firm, commenced this action in January 2011 against defendant, another law firm, seeking a judicial determination of plaintiff's rightful share of the attorney fee portion ($450,000) of a settlement ($1.45 million) obtained on behalf of a personal injury claimant named Brian Brooks (Brooks or the client). Brooks was represented by defendant at the time of the May 2006 settlement of his claim but previously had been represented by plaintiff, which the then 37-year-old Brooks had retained in April 2003 to represent him on his claim, which arose out of an automobile accident that occurred in March 2003. That retainer agreement, like the one subsequently entered into between Brooks and defendant in late December 2003, provided for the standard contingency fee of 33⅓ percent of any ultimate net recovery by the client.[1] At the time of the change in representation, it was at least tacitly agreed between the parties that they would await until the resolution of the personal injury claim to determine the amount of plaintiff's entitlement, if any, to a portion of the fee generated by any recovery or settlement. Although plaintiff apparently was not immediately apprised of the settlement by defendant, plaintiff got wind of it anyway and subsequently communicated with defendant in an unsuccessful effort to resolve the fee allocation dispute without litigation. Some four years later, plaintiff brought this action. Although defendant initially took the position in the litigation that plaintiff had been discharged "for cause" and thus was entitled to no portion of the fee, defendant has since abandoned that position, and thus the sole substantive issue before the Court is the appropriate allocation of the fee, an issue that the parties have agreed to submit to the Court on papers alone -- indeed simultaneous submissions.

[1]The Court notes, however, that one third of the client's net recovery in the case would approach $483,000, not the $450,000 now in contest.

Before addressing the substantive issue, however, the Court is asked to decide the appropriateness of its considering the affidavit of Patrick J. Brown, Esq., an attorney employed by neither party but retained by plaintiff to set forth certain matters thought to be of possible "assistance" to this Court in deciding the fee allocation issue. Defendant objects to such consideration on the ground that Patrick Brown is a non-disclosed expert. As the plaintiff points out, however, its obligation to make expert disclosure explicitly hinges on its expectation of calling such expert as a witness at trial (*see* CPLR 3101 [d] [1] [i]), which is not the situation at bar. In any event, we are not talking about a jury trial, and it is obvious to the Court, at least, that the Court must consider the Patrick Brown affidavit in order to determine whether to consider it. Upon doing so, the Court sees nothing in the affidavit of a purportedly factual nature that is not competently presented to the Court by other means. Moreover, the Court sees little in it that purports to be in the nature of expert legal opinion that is not already fully addressed in the parties' respective memoranda of law. Indeed, to the extent that the Patrick Brown affidavit purports to set forth such legal opinion, the Court assures the parties that is well accustomed to sorting through litigants' respective legal presentations and assuming for itself the role of ultimate legal expert in a given case. Moreover, to the extent that the object of the Patrick Brown affidavit is to generally inform the Court concerning what transpires upon the intake and development of a personal injury claim by a plaintiff's counsel, the Court notes its familiarity with that process after 35 years of conducting pre-trial conferences as a law clerk and judge and defending personal injury claims on behalf of governmental defendants. The Court thus will consider the Patrick J. Brown affidavit for whatever it is worth in the utter confidence that nothing in it will prove prejudicial to defendant.

Turning to the merits of the dispute, the Court observes that, as the outgoing law firm discharged by the client without cause, plaintiff would be entitled to recover on a theory of quantum meruit the fair and reasonable value of its services to the client (*see Lai Ling Cheng v*

Mondansky Leasing Co., 72 NY2d 454, 457-458 [1980]; *Kennedy v Point Dedicated Servs., LLC*, 31 AD3d 1117, 1119 [4th Dept 2006]). Moreover, to the extent that the fee dispute is between the outgoing and incoming attorneys as opposed to between the outgoing attorney and the client, plaintiff was entitled, at its own election, to have the amount of its fee fixed as of the time of the discharge in a given dollar amount computed on the basis of quantum meruit (*see Cohen v Granger, Tesoriero & Bell*, 81 NY2d 655, 658 [1993]; *Lai Ling Cheng*, 72 NY2d at 458), or to take its share of the fee based on a contingent percentage of the ultimate settlement or recovery and further based on its proportionate share of all of the legal work performed on the case -- in other words, taking into account the amount of the recovery and the relative contributions of the lawyers to such recovery (*see Lai Ling Cheng*, 72 NY2d at 458-459). Indeed, "[t]he percentage may be fixed at the time of substitution but . . . is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed and the amount of recovery can be ascertained" (*id.* at 458). If the outgoing attorney specifies at the time of discharge that it will seek its fee at the time of disposition of the case but does not at that time elect the method of payment, it will be presumed that the contingent fee/proportion of responsibility method of calculating the fee has been chosen rather than a quantum-meruit-based recovery (*see Cohen*, 81 NY2d at 659-660; see also *Lai Ling Cheng*, 72 NY2d at 459-460; *Jones v Birnie Bus Serv., Inc.*, 15 AD3d 951, 951-952 [4th Dept 2005]). In determining the value of the outgoing attorney's services to the client, "the court should consider the terms of the percentage agreement, the nature and complexity of the litigation, the time spent, the results achieved, the attorney's experience, ability and reputation, and the fee typically charged by other attorneys in the same locality for similar services (*see Padilla v Sansivieri*, 31 AD3d 64 [2006]; *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 188-189 [2002]; *Rosenzweig v Gomez*, 250 AD2d 664 [1998]; *Smith v Boscov's Dept. Store*, 192 AD2d 949, 950-951 [1993]; *see also*

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