

**Curtis v 13 East 128th St., LLC**

2014 NY Slip Op 30189(U)

January 2, 2014

Sup Ct, New York County

Docket Number: 810278/11

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:HON. JOAN A. MADDEN PART 11  
*Justice*

ERIC CURTIS

Index No. 810278/11

Motion seq. No. 002

Plaintiff,

- v -

13 EAST 128<sup>TH</sup> STREET, LLC.

Defendant,

**FILED**

JAN 24 2014

MOTION DATE: 12-5-13

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NEW YORK

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JAN 23 2014  
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NYS SUPREME COURT - CIVIL

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Becker Meisel LLC (hereinafter “the Becker firm”) moves, by order to show cause, to withdraw as counsel for plaintiff in the above-captioned action and for an order fixing the amount of the lien for legal services performed, before requiring Becker firm to turn over the file. While this motion was pending, plaintiff retained new counsel and consents to the withdrawal of Becker firm as his counsel. However, plaintiff opposes that aspect of the motion seeking an attorneys’ lien.

A client may discharge an attorney at any time. Lai Ling Cheng v. Modansky Leasing

Co., 73 N.Y.2d 454, 457 (1989). “If the discharge is with cause, the attorney has no right to compensation or to a retaining lien.” Teichner v. W & J Holsteins, 64 NY2d 977, 979 (1985). However, when the discharge is without cause before completion of services, the attorney may recover the fair and reasonable value of the legal services rendered. Cohen v. Grainger, Tesoriero & Bell, 81 NY2d 655, 658 (1993).

When a discharged attorney is seeking to recover the value of his legal services there are three separate and distinct remedies that are available.” Butler, Fitzgerald & Potter v. Gelmi, 235 AD2d 218, 219-220 (1<sup>st</sup> Dept 1997). The first remedy is to bring a plenary action in quantum meruit seeking a judgment for the reasonable value of the services, which would be enforceable against all of the client's assets. Id.

Next, the attorney may bring “a charging lien against any judgment or settlement in favor of the client in an action in which the discharged attorney formerly was the attorney of record for the client.” Id. “A charging lien is a security interest in a favorable result of litigation...giving the attorney equitable ownership interest in the client’s cause of action and ensuring the attorney can collect a fee from the fund he has created for that purpose on behalf of the client.” Chadbourne & Parke, LLP v. AB Recur Finans, 18 AD3d 222, 223 (1<sup>st</sup> Dept 2005)(citations omitted). “The charging lien is a statutory remedy codified in Judiciary Law § 475. The amount of the charging lien may be determined and fixed prior to the outcome of the underlying suit. While the eventual payment of the lien is contingent on a favorable outcome for the client the amount of the lien is not dependent on the result reached in the underlying suit.” Butler, Fitzgerald & Potter v. Gelmin, 235 AD2d at 219.

“The third remedy is the retaining lien, which permits the attorney to retain all of the client's papers and files until all fees are paid.” Id. The retaining lien “secures the attorney’s

right to the reasonable value of services performed ... and in the absence of exigent circumstances, the attorney should not be compelled to surrender the client's file until an expedited hearing has been held to ascertain the amount of attorney's fees." Eighteen Assocs. LLC v. Nanjam Leasing Corp., 297 AD2d 358, 359 (2d Dept 2002). "The remedies are not exclusive but are cumulative." Butler, Fitzgerald & Potter v. Gelmin, 235 AD2d at 219

Here, plaintiff in his affidavit in opposition states that James McCarrick, Esq., of counsel to the Becker firm agreed to represent him for a flat fee of \$17,000, that he never signed a retainer agreement, that the Becker firm did not send him any invoices for two years, and that the invoice he received was for "the sum of \$89,044.44." Shortly thereafter, when Mr. McCarrick and plaintiff were unable to agree on the amount for legal services, plaintiff terminated the Becker firm. Plaintiff also alleges that Mr. McCarrick failed to follow instructions, that he should not pursue settlement negotiations. Based on the foregoing, issues of fact exist as to whether the Becker firm was terminated for cause including, but not limited to, whether the firm failed to comply with the flat fee arrangement, and failed to comply with plaintiff's instructions.

While plaintiff's affidavit raises factual issues as to whether the Becker firm was terminated for cause, the court finds that the other objections raised by plaintiff are without merit. As for plaintiff's argument that under Judiciary Law § 475 an application for a charging lien must be made via a special proceeding, the court notes that while Judiciary Law § 475 states that a court "may upon petition determine and enforce [an Attorney's] lien," it does not provide that a special proceeding is the only means by which an attorney can recover on its lien. Next, plaintiff's argument that the Becker firm is not entitled to recover its fees as plaintiff never signed a retaining agreement as required under 22 NYCRR 1215.1 is unavailing. Even assuming *arguendo*, that Curtis did not sign the retainer agreement, the Becker firm would nonetheless

have the right to recovery in quantum meruit for the fair and reasonable value of the services rendered on behalf of plaintiff. Nabi v. Sells, 70 AD3d 252, 253 (1<sup>st</sup> Dept 2009); Seth Rubenstein, P.C. v. Ganea, 41 AD3d 54, 64 (2d Dept 2007).

In view of the above, it is

ORDERED that the Becker firm's request for an order determining and fixing its lien is for legal services performed for plaintiff is granted only to the extent of referring the matter to a JHO and/or Special Referee to hear and report as to (1) whether the Becker firm was terminated for cause by plaintiff and, if not, (2) the fair and reasonable value of the services rendered on behalf of plaintiff; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or [spref@court.state.ny.us](mailto:spref@court.state.ny.us)) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the References link under Courthouse procedures), shall assign this matter to an available Special Referee to hear and report as specified above; and it is further

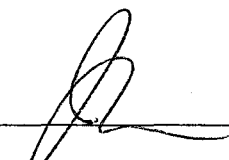
ORDERED that counsel for ECBA shall, within 45 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the JHO/Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: ~~December 17, 2013~~ *January 2, 2014*

  
\_\_\_\_\_  
J.S.C.

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION

**FILED**  
JAN 24 2014  
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NEW YORK