

**Cadichon v Ryntz**

2014 NY Slip Op 32759(U)

October 20, 2014

Sup Ct, New York County

Docket Number: 805084/12

Judge: Martin Shulman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 1

-----X  
MICHAELLE CADICHON and CHAMPAGNE  
CADICHON,

Index No. 805084/12

Plaintiffs,

**Decision and Order**

-against-

DR. TIMOTHY RYNTZ, NEW YORK  
PRESBYTERIAN HOSPITAL, DR.  
SOOYOUNG CHUNG HWANG, DR. ANNA  
BURGANSKY and DR. KETAN BADANI,

Defendants.

-----X  
Hon. Martin Shulman, J.S.C.:

In this action alleging medical malpractice, plaintiffs' counsel, John M. O'Dowd, Jr., Esq., moves by order to show cause ("OSC") for an order: 1) relieving him as counsel in this action; 2) staying the action for 60 days to enable plaintiffs to retain new counsel; 3) directing that a statutory lien pursuant to Judiciary Law ("JL") §475 be determined at this case's conclusion; and 4) directing that he be reimbursed for disbursements expended to date upon transfer of the file to incoming counsel. Plaintiffs, who reside in Haiti, did not appear or otherwise oppose counsel's application.

Defendants partially oppose the OSC to the extent that a 60 day stay is sought, instead requesting a 30 day stay, and cross-move for an order: 1) striking the complaint pursuant to CPLR §3126 based upon plaintiffs' alleged discovery defaults; or 2) alternatively; directing that this action be dismissed in the event plaintiffs fail to appear by new counsel or *pro se* within 30 days. Plaintiffs' counsel submits written opposition to the cross-motion.

### OSC to Withdraw as Counsel

Plaintiffs' counsel's OSC is granted to the extent that he is relieved as counsel for plaintiffs Michaelle Cadichon and Champagne Cadichon upon compliance with the terms and conditions set forth below. In light of the age of the case and plaintiffs' delay and/or default in complying with defendants' discovery demands this court declines to stay the action for 60 days as plaintiffs' counsel requests. The action is stayed through and including December 5, 2014 (approximately 45 days).

The portion of outgoing counsel's OSC requesting a lien pursuant to JL §475, commonly known as a charging lien, is similarly granted. A charging lien is a security interest in the favorable result of the litigation. *Chadbourn & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 (1<sup>st</sup> Dept 2005). It gives an attorney an equitable ownership interest in the client's cause of action and ensures that the attorney can collect his fee from the fund that he or she has created and obtained on behalf of his or her client. *Id.* The lien comes into existence, without notice or filing, upon commencement of the action or proceeding. *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 43 (2002). As outgoing counsel was retained on a contingent fee basis, the amount of his charging lien on the proceeds of this action shall be determined after a hearing at the conclusion of the action.

Plaintiffs' counsel also seeks payment for the disbursements he has incurred to date prior to turning over plaintiffs' file in this action to new counsel or plaintiffs. It is well settled that:

An attorney's rendition of services and expenditure of disbursements on behalf of a client entitles him to a common-law retaining lien on any of the

client's books, papers, money and securities which are in the attorney's possession." A retaining lien remains in force until the client's account is paid in full and is dependent only upon the attorney's continued possession of the papers, irrespective of the outcome of the litigation involved. (Citations omitted).

*Steves v Serlin*, 125 AD2d 780, 781 (3d Dept 1986).

Here, outgoing counsel is entitled to retain the client file until he is reimbursed for disbursements expended to date. Where, as in the instant matter, counsel was retained on a contingency basis, until plaintiffs recover an award, the amount owed to the departing attorney is limited to the sum expended on disbursements without prejudice to departing counsel's right to a charging lien against the proceeds of the action (see discussion above). *Id.*

With respect to the amount of the retaining lien, counsel's supporting affirmation requests disbursements totaling \$1,615.79 and attaches a list of the disbursements incurred at Exhibit 7. However, the supporting affirmation provides no explanation for the itemized disbursements nor is any supporting proof of expenditures attached to substantiate charges for medical/hospital records, investigator, court fees, process server, Federal Express, travel and court service. Accordingly, plaintiffs' counsel's retaining lien shall be granted in an amount to be determined upon submission of supporting proof substantiating the claimed disbursements. Moving counsel should submit a detailed affirmation directly to chambers explaining the disbursements incurred and the reasons therefor, which should include supporting proof in the form of invoices, receipts, canceled checks, etc. This further submission should be made on notice to the former clients and shall be submitted to this court on or before the next conference date (see directives below).

**Defendants' Cross-Motion**

Defendants' cross-motion is granted to the extent that this action shall be dismissed upon plaintiffs' failure to appoint substitute counsel or appear in this action *pro se* in accordance with the directives set forth below. The cross-motion is denied without prejudice to the extent it seeks dismissal of this action based upon plaintiffs' alleged discovery defaults. In the event that plaintiffs ultimately comply with the directives below, Defendants may renew their request for such relief.

Based upon all of the foregoing, it is hereby

ORDERED that plaintiffs' counsel's OSC is granted to the extent set forth herein upon his electronic filing of proof of compliance with the conditions set forth below; and it is further

ORDERED that John M. O'Dowd, Jr., Esq. is hereby relieved as counsel for plaintiffs Michaëlle Cadichon and Champagne Cadichon; and it is further

ORDERED that, on or before October 22, 2014, said attorney shall serve a copy of this order upon the former clients at their last known address by overnight delivery, and upon defense counsel by regular first class mail; and it is further

ORDERED that, together with the copy of this order to be served upon the former clients, moving counsel shall forward a notice directing the former clients, Michaëlle Cadichon and Champagne Cadichon, to appear *pro se* or appoint a substitute attorney, on or before December 5, 2014, and the clients shall comply therewith; and it is further

ORDERED that plaintiffs Michaele Cadichon and Champagne Cadichon, *pro se*, or any new attorneys retained by them shall serve and file a notice of appearance on or before December 5, 2014, and appear on the next scheduled conference date, which is hereby scheduled for December 10, 2014 at 9:30 a.m., to be held at 60 Centre Street, Room 325, New York, New York, and the failure to so appear shall result in the dismissal of the complaint; and it is further

ORDERED that no further proceedings may be taken against the former clients without leave of this court for the period through and including December 5, 2014; and it is further

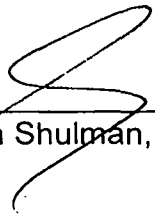
ORDERED that John M. O'Dowd, Jr., Esq. is granted a charging lien in an amount to be determined at the conclusion of this litigation, and is further entitled to a retaining lien in an amount to be determined upon counsel's submission of further supporting proof as set forth above, which shall be submitted on or before December 10, 2014; and it is further

ORDERED that outgoing counsel shall electronically file proof of his compliance with all of the foregoing directives on or before December 10, 2014; and it is further

ORDERED that defendants' cross-motion is granted to the extent set forth herein, and is otherwise denied without prejudice.

The foregoing constitutes this court's decision and order.

Dated: New York, New York  
October 20, 2014

  
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Hon. Martin Shulman, J.S.C.