

Zhardonovskaya v NYU Langone Med. Ctr.
2017 NY Slip Op 32056(U)
September 27, 2017
Supreme Court, New York County
Docket Number: 805294/2012
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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ANZHELA ZHARDONOVSKAYA, as Administratrix of the
Estate of BORYS CHIKIVICHUK and ANZHELA
ZHARDONOVSKAYA, Individually,

Plaintiff,

Index No.
805294/2012

**DECISION and
ORDER**

- against -

Mot. Seq. #001

NYU LANGONE MEDICAL CENTER; NYU HOSPITAL
CENTER; NYU COLUMBUS MEDICAL; and YELENA
OGNEVA, D.P.M.

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Anzhela Zhardonovskaya (“Anzhela”) commenced this medical malpractice action by filing the summons and complaint on October 10, 2012. Anzhela commenced this action on behalf of herself and the estate of her deceased husband Borys Chikivichuk (“Borys”). Anzhela alleges that the Defendants NYU Langone Medical Center, NYU Hospital Center, NYU Columbus Medical and Yelena Ogneva, D.P.M. negligently treated Borys when he presented to them. Because of their alleged failure to diagnose Borys methadone overdose on October 11, 2010, Borys died on October 12, 2010. Originally, Anzhela retained The Berkman Law Office LLC (“Berkman Law”).

Pursuant to CPLR 321, David S. Steigbigel, Esq. (“Steigbigel”) on behalf of Berkman Law moves by Order to Show Cause to withdraw as counsel for Anzhela. Steigbigel also moves for an Order that: sets down a hearing to determine the amount of Berkman Law’s disbursements and legal fees; preserves Berkman Law’s retaining lien; preserves Berkman Law’s charging lien and directs defendants to include Berkman Law as a payee on any check issued in settlement.

Steigbigel avers that Berkman Law is unable to continue representing Anzhela because she “has essentially discharged” Berkman Law. (affirmation of Steigbigel at 3) Steigbigel claims that the attorney client relationship has “deteriorated to a point beyond repair” because Anzhela “will no longer listen to any advice . . . and has become uncooperative.” (affirmation of Steigbigel at 3, 6) Steigbigel asserts that Anzhela has discharged Berkman Law *without cause* because depositions have been completed, pre-trial discovery is completed, this case was placed on the trial calendar, and Berkman Law did not engage in any misconduct. (affirmation of Steigbigel 3) Steigbigel does not submit any information with respect to disbursements owed by Anzhela.

Anzhela does not oppose.

Attorney Withdrawal

CPLR 321 (2) provides, “An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.” The First Department has stated, “[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client.” (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]).

Charging and Retaining Liens

Judiciary Law § 475 provides in relevant part,

“From the commencement of an action, special or other proceeding in any court . . . or the initiation of any means of alternative dispute resolution including . . . mediation . . . the attorney who appears for a party has a lien upon his client’s cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client’s favor, and the proceeds thereof in whatever hands they may come . . .”

“Under Judiciary Law § 475, a charging lien automatically comes into existence, without notice or filing, upon commencement of the action, and is measured by the reasonable value of the attorney’s services in the action, unless fixed by agreement.” (*Resnick v Resnick*, 24 AD3d 238, 239 [1st Dept 2005]) “A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client’s cause of action . . .” (*Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005]) “[A] charging lien is waived by an attorney who *without just cause* neglects or refuses to proceed with the prosecution of the case.” (*Klein v Eubank*, 87 NY2d 459, 463 [1996]) “[W]here an attorney’s representation terminates and there has been no misconduct, no discharge for just cause and no unjustified abandonment by the attorney, the attorney’s right to enforce the statutory charging lien is preserved . . .” (*id.* at 1996) “Generally, however, if any attorney is discharged without cause he will be allowed a charging lien upon the proceeds of the lawsuit, the amount to be determined on a *quantum meruit* basis at the conclusion of the case . . . and his fees will be made a charge included within the fees to which the incoming attorney will be entitled.” (*People v Keeffe*, 50 NY2d 149, 157 [1980])

A retaining lien “gives an attorney the right to keep, with certain exceptions, all of the papers, documents and other personal property of the client which have come into the lawyer’s possession in his or her professional capacity as long as those items are related to the subject representation.” (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 [1st Dept 2002]) “[A]n attorney’s retaining lien generally lasts ‘until [the attorney’s] disbursements have been fully paid and, as a general rule, his fees have been determined.’” (*id.* at 187) “[A] court has discretion to ‘secure the fees and to order the files to be returned to the client before the fees have been paid . . .’” (*id.* at 187 n 1) However, “absent proof of discharge for cause, [an attorney] cannot be compelled to give up plaintiff’s file before such disbursements are paid or secured.” (*Tuff & Rumble Management, Inc. v Landmark Distributors, Inc.*, 254 AD2d 15, 15 [1st Dept 1998]) Accordingly, in *Warsop v Novik* (50 AD3d 608, 609 [1st Dept 2008]), the First Department of the Appellate Division modified the trial court’s order to provide “that the subject file be turned over only after plaintiff pays disbursements . . . or provides security therefor . . .”

“With respect to either lien, a hearing may be required to determine the amount of compensation due and owing to the discharged attorney.” (*Roe v Roe*, 117 AD3d 1217, 1219 [3d Dept 2014]) The Court, in its discretion, may substitute the statutory charging lien for the retaining lien with respect to an attorney’s fee. (*Security Credit Systems, Inc. v Perfetto*, 242 AD2d 871, 872 [4th Dept 1997])

Discussion

Because Anzehla allegedly “will no longer listen to any advice,” and “essentially discharged” Berkman Law, the attorney client relationship between Anzehla and Berkman Law has deteriorated. Therefore, good and sufficient cause exists for Berkman Law to withdraw as counsel. (*see Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]). Although Berkman Law has not provided the Court with any information regarding disbursements, the Court will accord Berkman Law one final opportunity to submit disbursements to Anzehla.

Wherefore it is hereby

ORDERED that the motion of The Berkman Law Office LLC to be relieved as attorneys for plaintiff Anzhela Zhardonovskaya is granted without opposition; and it is further

ORDERED that no further proceedings may be taken in this matter without leave of this court for a period of 30 days from the date of this order within which time plaintiff Anzhela Zhardonovskaya must appoint a substitute attorney by October 26, 2017 or shall be deemed to be proceeding *pro se*; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the The Berkman Law Office LLC serve a copy of this order with notice of entry upon Audrea Starr and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the The Berkman Law Office LLC serve a copy of the disbursements, costs and expenses upon Anzhela Zhardonovskaya; and it is further

ORDERED that, WITHIN 5 DAYS OF THE DATE OF THIS DECISION, Anzhela Zhardonovskaya pay the disbursements, costs and expenses or provide security therefor should she dispute them; and it is further

ORDERED that, The Berkman Law Office LLC’s charging lien on plaintiffs’ causes of action is substituted for the retaining lien and preserved until such time as a Court, upon settlement or judgment, may hear and determine


The Berkman Law Office LLC's representation terminated for cause; and it is further

ORDERED that any new attorney retained by plaintiff Anzhela Zhardonovskaya shall file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part; and it is further

ORDERED that all parties are directed to appear for a compliance conference on October 31, 2017, at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D. Failure of plaintiff Anzhela Zhardonovskaya to appear may result in dismissal of this case.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 27 2017



HON. EILEEN A. RAKOWER