

Montero v Schottenstein
2018 NY Slip Op 30901(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 805373/2013
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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Maura Montero,

Index No.
805373/2013

Plaintiff,

**DECISION
and ORDER**

- v -

Mot. Seq. 002

Edwin M. Schottenstein, M.D., and The New York
Eye and Ear Infirmary,

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

Plaintiff Maura Montero (“Montero”) commenced this medical malpractice action by filing a Summons and Complaint on October 21, 2013. The action arises out of medical procedure performed by defendant Edwin M. Schottenstein (“Schottenstein”) on Montero on April 22, 2011.

The law firm of Marder, Eskesen & Nass, attorneys for Montero, moves by Order to Show Cause seeking leave to withdraw as attorney for Montero. Leonard J. Wiener, Esq. (“Wiener Aff.”), submits an affirmation in support of the motion. Schottenstein submits partial opposition.

On December 16, 2016, Montero died. (Wiener Aff. at ¶3) On January 27, 2017, Montero’s counsel advised the court of Montero’s death and requested that the case be marked stayed. (*Id.* at ¶4) Montero is survived by three adult children named Berenice Baez Montero, Pedro Garcia Montero and Andromede Baez Montero (collectively, “Potential Distributees”). (*Id.* at ¶8) Wiener avers that he “has spoken with Potential Distributees and explained the status of the case as well as the steps that must be taken to continue prosecuting the action.” (*Id.* at ¶9) Wiener avers that he “has been advised that the decedent died without a will,” and “there have been no petitions filed with the Surrogate’s Court for Letters of Administration.” (*Id.* at ¶10) Wiener avers:

The Potential Distributees and this firm have come to a disagreement as to how to proceed with the litigation, which disagreement cannot be resolved and that in light of the above irreconcilable differences concerning the manner in which to proceed. As a result, the attorney-client relationship between the deceased Plaintiff's estate and the office of the undersigned has been irreparably compromised and it is no longer possible for this office to proceed as attorneys for the plaintiff in this matter.

(*Id.* at ¶11-12)

Wiener requests that Movant Law Firm therefore be permitted to withdraw as attorneys of record for Montero, and that any Order issued as a result of this application preserve Movant Law Firm's retaining lien on the file until such time as disbursements are paid. Wiener also requests that Movant Law Firm's "charging lien be preserved and that no settlement monies, if any, be disbursed until such time as that lien, if any, is resolved." (*Id.* at ¶14-16)

Schottenstein submits partial opposition to the Order to Show Cause, by way of his attorney Hillary C. Agins' attorney affirmation. Schottenstein does not oppose Movant Law Firm's motion to withdraw as counsel, but requests "that the decedent's family be given thirty (30) days to appear with an attorney and [give] proof that they have filed the relevant Petition with the Surrogate's Court should they wish to proceed with this action on behalf of decedent." (Agins Aff. at ¶7). Schottenstein further requests that "should the decedent's family fail to appear ... this Court dismiss the action against Dr. Schottenstein with prejudice in its entirety." (*Id.* at ¶8). Defendant New York Eye and Ear Infirmary also submits partial opposition.

Standards

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]). In addition, Rule 1.16(c) (4) provides that “a lawyer may withdraw from representing a client when . . . the client insists upon taking action with which the lawyer has a fundamental disagreement.” (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][4])

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]) Where the withdrawing counsel was retained on a contingent fee basis, the amount of the counsel’s charging lien on the proceeds of the action are determined after a hearing at the conclusion of the case. (*Cadichon v. Ryntz*, 2014 WL 5390560, [Sup. Ct., New York County 2014]).

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).

Discussion

Upon Movant Law firm's application, good and sufficient cause exists for Marder, Eskesen & Nass to withdraw as counsel for plaintiff Maura Montero. (*Mason v MTA New York City Transit*, 832 N.Y.S 2d 153, 154 [1st Dept 2017]). Marder, Eskesen & Nass and the Potential Distributees have irreconcilable differences as to how to proceed with the litigation. (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.16[c][4]) The Potential Distributees do not oppose Movant Law firm's application to withdraw as counsel.

Wherefore, it is hereby

ORDERED that the motion of the law firm of Marder, Eskesen & Nass, to be relieved as attorneys for plaintiff Maura Montero is granted; 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 Potential Distributees must appoint a substitute attorney; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Marder, Eskesen & Nass serve a copy of this order with notice of entry upon the Potential Distributees and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that any new attorney retained by Potential Distributees 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, including Potential Distributees, are directed to appear for a compliance conference on July 24, 2018, at 9:30 AM in Part 6, 71 Thomas Street, Room 205. Potential Distributees shall provide proof that they have filed the relevant Petition with the Surrogate's Court at the compliance conference; and it is further

ORDERED that Marder, Eskesen & Nass's retaining lien and charging lien are preserved.

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

Dated: MAY 10, 2018



Eileen A. Rakower, J.S.C.