

Rosenfeld v Su
2018 NY Slip Op 33140(U)
December 4, 2018
Supreme Court, New York County
Docket Number: 805143/2017
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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ILENE ROSENFELD and GADI ROSENFELD,
Plaintiffs,

Index No.
805143/2017

**DECISION and
ORDER**

- against -

Mot. Seq. 004

EDWIN P. SU, M.D., HOSPITAL FOR SPECIAL SURGERY,
and EDWIN P. SU, M.D., P.C.,
Defendants.
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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs Ilene Rosenfeld ("Ilene") commenced this medical malpractice action by summons and complaint on April 17, 2017 against Edwin P. Su, M.D., ("Dr. Su") Hospital For Special Surgery, and Edwin P. Su, M.D., P.C. ("Defendants"). Ilene alleges that Defendants departed from accepted standards of medical practice in connection with Dr. Su's performance of a right total knee arthroplasty to total knee arthroplasty. Ilene also claims that Defendant's failed to procure her informed consent. Ilene's husband, Gadi Rosenfeld ("Gadi"), alleges loss of Ilene's services and society.

Presently before the Court is Marc J. Bern & Partners, LLP's ("Movant Law Firm") Order to Show Cause to withdraw as Plaintiffs' counsel, stay the proceedings, and to recover a lien for disbursements incurred in the amount of \$4,888.55. Plaintiffs submit the attorney affirmation of Elliot M. Shaktman, Esq., in support of the motion. Mr. Shaktman states that due to disagreements concerning the prosecution of this action between Plaintiffs and Movant Law Firm, Plaintiffs have advised Movant Law Firm that they no longer want the firm representing them.

Defendants do not oppose Movant Law Firm's application to be relieved. However, Defendants request that a conditional Order of dismissal be issued

directing Plaintiffs to appear on a date certain ready to proceed by counsel or *pro se*. Defendants ask that in the event that Plaintiffs fail to appear with new counsel or *pro se* on a date certain, the case be dismissed.

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 Lien

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 . . .” (*Chadbourn & 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]). 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]).

Discussion

The Court finds that good and sufficient cause exists in this case for Marc J. Bern & Partners, LLP’s to withdraw as counsel for plaintiffs.

Wherefore it is hereby

ORDERED that the motion of the law firm of Marc J. Bern & Partners, LLP to be relieved as attorneys for plaintiffs Ilene and Gadi Rosenfeld 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 plaintiffs Ilene and Gadi Rosenfeld must appoint a substitute attorney by January 3, 2019 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 law firm of Marc J. Bern & Partners, LLP shall serve a copy of this order with notice of entry upon Ilene and Gadi Rosenfeld and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 6 DAYS OF THE DATE OF THIS DECISION, the law firm of Marc J. Bern & Partners, LLP serve Ilene and Gadi Rosenfeld's client file upon Ilene and Gadi Rosenfeld; and it is further

ORDERED that any new attorney retained by plaintiffs Ilene and Gadi Rosenfeld 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 January 8, 2019, at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D; and it is further

ORDERED that the law firm of Marc J. Bern & Partners, LLP, reserves a right to recover a lien for disbursements incurred to be determined at the conclusion of the case.

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

Dated: DECEMBER 4, 2018



Eileen A. Rakower, J.S.C.