

Alberico v Log Bldrs. LLC

2020 NY Slip Op 31064(U)

April 27, 2020

Supreme Court, New York County

Docket Number: Index No. 154621/2016

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 154621/2016

AMANDA ALBERICO,

Plaintiff,

MOTION SEQ. NO. 006

- v -

LDG BUILDERS LLC, ATC PLUMBING & MECHANIC INC.,
ATC CONSTRUCTION GROUP, RIVERSIDE UNIT C, LLC,
AE DESIGN INC. D/B/A ANDRES ESCOBAR &
ASSOCIATES, NEST SEEKERS INTERNATIONAL LLC,
HALSTEAD MANAGEMENT COMPANY, LLC, LEV ASSET
MANAGEMENT, LLC, A.T.C. CONSTRUCTION GROUP
CORP.

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 161, 162, 163, 164, 165, 166, 167, 173, 174, 175, 176

were read on this motion to/for MISCELLANEOUS.

In this personal injury action, the law firm of Bernstein & Bernstein, outgoing counsel for plaintiff Amanda Alberico, moves, by order to show cause, for an order: 1) adjudging that Bernstein & Bernstein has a retaining lien on all of the papers, documents and other personal property of the plaintiff in possession of Bernstein & Bernstein as a result of its representation of plaintiff; 2) adjudging that Bernstein & Bernstein has a retaining lien on said papers, documents, and other personal property which shall continue until such time as the said firm's disbursements in the amount of \$4,323.79 incurred in connection with the representation of plaintiff have been fully paid and its legal fee has been

determined; and 3) pursuant to Judiciary Law section 475, directing that a hearing be held to determine the amount of Bernstein & Bernstein's charging lien or, in the alternative, the apportionment of the legal fee to be earned by Bernstein & Bernstein and Siegel & Coonerty, LLP, incoming counsel for plaintiff.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from an incident on November 19, 2015 in which plaintiff was allegedly injured due to the negligence of the defendants. Plaintiff, by its counsel, Bernstein & Bernstein, commenced the captioned action on June 1, 2016 and discovery was subsequently conducted.

On or about October 21, 2019, Bernstein & Bernstein received a letter, dated October 14, 2019, from the firm of Siegel & Coonerty, LLP representing that Siegel & Coonerty had been retained as counsel for plaintiff and requesting that Bernstein & Bernstein cease work on this matter, as well on the related matter of *Amanda Alberico v Anthony Thomas Chau Construction Group Corp., et. al.*, pending under New York County Index Number 159987/18 ("the 2018 action"). Annexed to the letter from Siegel & Coonerty was a letter written by plaintiff in which she claimed that she was discharging Bernstein & Bernstein "for cause". Specifically, plaintiff claimed that Bernstein & Bernstein communicated with her in "an unprofessional manner", "resorted to name calling", was "down right [sic]

rude and insulting”, violated the Rules of Professional Conduct, and failed to keep her apprised of the status of her case.

By order entered October 30, 2019, this Court consolidated the captioned action with the 2018 action for the purpose of joint discovery and trial on the ground that the actions involved common issues of fact and law.

Bernstein & Bernstein now moves for the relief set forth above. It also seeks the identical relief in the 2018 action. In an affirmation in opposition to the motion, Siegel & Coonerty argues that the application is premature because, as of this time, plaintiff has not had any recovery, and there is this no contingency fee to be apportioned. Further, argues Siegel & Coonerty, since any apportionment would be based on the amount of work done throughout the entire matter, and such work is still in progress, a fee hearing should not be held until the resolution of plaintiff’s actions. Siegel & Coonerty also asserts that a fee hearing conducted during the pendency of the litigation could result in the disclosure of confidential communications between plaintiff and Bernstein & Bernstein.

Siegel & Coonerty acknowledges in its affirmation that Bernstein & Bernstein is entitled to reimbursement for its disbursements to date in the amount of \$4,323.79 and agrees to pay Bernstein & Bernstein this amount in exchange for the complete file maintained by that firm in connection with the captioned action. Pursuant to a so-ordered stipulation entered January 22, 2020, Bernstein &

Bernstein agreed to provide Siegel & Coonerty with plaintiff's file in exchange for the payment of said disbursements.

LEGAL CONCLUSIONS:

The Retaining Lien

Given the so-ordered stipulation pursuant to which Bernstein & Bernstein agreed to provide plaintiff's file to Siegel & Coonerty in exchange for the payment of its disbursements, those branches of Bernstein & Bernstein's motion seeking a retaining lien are denied as moot.

The 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 y 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 y 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 464). “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 y 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 N.Y. Misc. LEXIS 4638, 2014 WL 5390560 [Sup. Ct., New York County 2014]).

Rosenfeld v Su, 2018 NY Slip Op 33140(U), *2-3 (Sup Ct, NY County 2018).

Since Bernstein & Bernstein was retained on a contingency basis, it is entitled to hearing at the conclusion of this action to determine the amount of its charging lien, unless plaintiff can establish at such hearing that she discharged the said firm for cause. Bernstein & Bernstein denies the plaintiff's claim that it was discharged for cause and submits emails reflecting that it was responsive to plaintiff's inquiries regarding the instant litigation. Thus, the issue of whether Bernstein & Bernstein was discharged for cause must be determined at a hearing at the conclusion of this matter and, if it is determined that the discharge was not for cause, then the hearing shall proceed on the issue of calculating the said firm's charging lien. *See Teichner v W & J Holsteins*, 64 NY2d 977, 979 (1985); *see also Matter of Mason v City of New York*, 67 AD3d 475, 475 (1st Dept 2009) (“[a]

hearing is required to determine if respondent [attorney] was discharged for cause, and, if not, the amount of his fee on a quantum meruit basis").

Therefore, in light of the foregoing, it is hereby:

ORDERED that those branches of the motion by the law firm of Bernstein & Bernstein seeking a retaining lien are denied as moot: and it is further

ORDERED that within 10 days after entry of this order, the law firm of Bernstein & Bernstein shall serve this order, with notice of entry, on Siegel & Coonerty, LLP, as well as on all parties to this action; and it is further

ORDERED that all parties are directed to appear for a compliance conference on July 7, 2020, at 2:30 p.m. at 80 Centre Street, Room 280, unless notified of a different date by this Court; and it is further

ORDERED that, at the conclusion of this action, a hearing will be held to determine whether the law firm of Bernstein & Bernstein was discharged by plaintiff for cause and, if it was not discharged for cause, then the hearing shall continue for the purpose of determining the amount of said firm's charging lien on the plaintiff's recovery; and it is further

ORDERED that the hearing in this action shall be held simultaneously with the hearing conducted in connection with the related action of *Amanda Alberico v Anthony Thomas Chau Construction Group Corp., et. al.*, pending under New York County Index Number 159987/18; and it is further

ORDERED that this constitutes the decision and order of the court.

4/27/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE