

<b>Pihskiold v Jane St. Hotel, LLC</b>
2020 NY Slip Op 33760(U)
November 12, 2020
Supreme Court, New York County
Docket Number: 150236/2019
Judge: Kathryn E. Freed
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**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.** 150236/2019

PAULINA PANAGIOTA PIHSKIOLD,

Plaintiff,

**MOTION SEQ. NO.** 002

- v -

JANE STREET HOTEL, LLC, THE JANE HOTEL, JANE  
STREET HOSPITALITY, LLC, ACUMEN SECURITY, INC.,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 58, 60 were read on this motion to/for CHARGING LIEN.

In this personal injury action commenced by plaintiff Paulina Panagiota Pihskiold, The Yankowitz Law Firm, P.C.,<sup>1</sup> outgoing counsel for plaintiff, moves, by order to show cause (“OSC”), for an order: (1) directing that Yankowitz has a charging lien in this action on a contingency basis and directing that all attorneys’ fees generated upon a resolution of this action, by settlement or by verdict, remain in escrow pending a fee hearing and determination of the lien of Yankowitz based on the work performed by the said firm, as well as any work to be performed in the future by incoming counsel for plaintiff, Greg Garber, Esq. (“Garber”) or by any other attorney retained by plaintiff, and directing payment of attorneys’ fees accordingly; (2) setting this matter down for a hearing to determine the facts and circumstances of the interference, manipulation and solicitation of the plaintiff herein by Garber, including whether his conduct

<sup>1</sup> The firm and its principal, Jack A. Yankowitz, Esq. will hereinafter be referred to individually and collectively as “Yankowitz.”

violated the New York Rules of Professional Conduct; and (3) for such other and further relief as this Court deems just and proper. Garber opposes the application. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the OSC is decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

On October 7, 2017, plaintiff was allegedly injured in a ballroom inside a hotel owned, operated, controlled, and/or managed by defendants. Doc. 1. She thereafter retained Yankowitz as counsel, and, on January 9, 2019, the latter commenced the captioned action by filing a summons and complaint alleging that plaintiff was injured due to the negligence of defendants. Doc. 1.

Yankowitz thereafter performed a significant amount of additional work in connection with plaintiff's case including, but not limited to: 1) drafting, filing, and serving pleadings and a bill of particulars; 2) conducting an investigation and gathering evidence, including attempting to obtain witness statements; 3) obtaining and reviewing plaintiff's voluminous medical records; 4) preparing plaintiff's discovery demands and reviewing defendants' responses thereto; 5) reviewing defendants' discovery demands and preparing responses to the same; 5) preparing correspondence to defendants' attorneys and reviewing correspondence from defendants' attorneys and responding thereto; 6) conducting telephone conferences with counsel for the defendants; 7) meeting with plaintiff on at least 6 occasions to discuss the case and to have plaintiff execute authorizations; 8) corresponding electronically with plaintiff regarding her case by WhatsApp and text on approximately 2000 occasions; 9) communicating with plaintiff regarding her case by email on approximately 200 occasions; 10) speaking with plaintiff regarding her case by telephone or WhatsApp on approximately 100 occasions; 11) communicating with plaintiff's health care

providers on over 100 occasions in order to schedule appointments and to obtain paperwork relevant to plaintiff's case; and 12) communicating with multiple funding/loan companies and underwriters on over 50 occasions in order to secure loans for plaintiff.

Although plaintiff asked to borrow money from Yankowitz on more than one occasion, Yankowitz refused her request, explaining that it was improper and illegal for a law firm to make such a loan.

On March 2nd, 2020, Yankowitz unexpectedly received hand delivered papers from Garber discharging his firm as counsel for plaintiff. Doc. 27 at par. 4; Doc. 29. The change of attorney form was dated February 24, 2020. Doc. 29. Although Yankowitz was not in the office the day Garber delivered the consent to change attorney to his office, the affidavit of Yankowitz's paralegal, Gricel Burgos, reflects that he (Garber) acted in a threatening and unprofessional manner while at Yankowitz's office. Doc. 28. On March 4, 2020, following Garber's visit, Yankowitz prepared a standard disbursement letter and stipulation reflecting that his firm had a charging lien. Doc. 30.

On March 12th, 2020, Yankowitz received a letter from Garber demanding plaintiff's file and advising Yankowitz that he had been discharged "for cause" and, therefore, was not entitled to a charging lien. Doc. 31. By correspondence to Garber dated March 12, 2020, Yankowitz responded to what he characterized as Garber's "false" and "defamatory" contentions and advised Garber that, as a result of his refusal to acknowledge Yankowitz's charging lien, he had no alternative but to seek judicial intervention. Doc. 32. Yankowitz also directed Garber not to return to his office. Doc. 32.

Despite the fact that Yankowitz advised Garber that he would be seeking judicial intervention, Garber nevertheless wrote to Yankowitz once again, this time on March 13, 2020,<sup>2</sup> representing that Yankowitz had been discharged for cause and warning Yankowitz that his firm “should not make matters worse for [itself].” Doc. 33.<sup>3</sup>

In order to prevent the situation with Garber from escalating, Yankowitz did not respond to the March 13, 2020 letter but instead prepared the instant OSC. However, by the time Yankowitz was ready to file the OSC, it was prevented from doing so by the filing restrictions imposed as a result of the Coronavirus pandemic.

On April 10th, 2020 Garber again wrote to Yankowitz representing, inter alia, that the latter had been discharged for cause. Doc. 37. Garber also threatened that he was going to report Yankowitz to the Disciplinary Committee and that plaintiff was going to report him (Yankowitz) to the “Bar Association”. Doc. 37. In response, Yankowitz advised Garber that, although it had prepared an OSC, the application could not be filed due to the pandemic. Doc. 38. Yankowitz also advised Garber that his conduct, including his threats, violated the New York State Rules of Professional Conduct, asked Garber to put in writing the reasons he claimed that Yankowitz was discharged for cause, and asked Garber for an affidavit by the plaintiff setting forth the circumstances under which she retained Garber. Doc. 38.

In his letter, Yankowitz also asked Garber to send him a disbursement check, to sign the stipulation acknowledging the charging lien, to agree that the amount of the charging lien would be determined by written agreement or by this Court following a fee hearing, and that there would be no disbursement of any attorneys’ fees until Yankowitz’s lien was determined and satisfied.

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<sup>2</sup> The letter was incorrectly dated March 12, 2020. Doc. 33.

<sup>3</sup> Yankowitz notes that it had a prior history with Garber, having previously been substituted as counsel for Garber in a different case, in which the latter was discharged for cause.

Doc. 38. The letter included as attachments a disbursement letter and a proposed stipulation regarding the charging lien. Doc. 38. Yankowitz also advised Garber that, upon receiving the disbursement check and the signed stipulation, he would make a copy of plaintiff's legal file available for pickup at his office. Doc. 38.

Approximately two weeks later, on April 25th, 2020, Yankowitz received a letter sent to his Great Neck office, which, he claimed, Garber knew was closed due to the pandemic. Doc. 39. In the letter, which included a disbursement check but not an executed stipulation, Garber again represented that Yankowitz had been discharged for cause. Doc. 39. Garber also demanded that Yankowitz deliver plaintiff's file to his Manhattan office despite the fact that New York City was in the throes of the pandemic. Doc. 39.

On April 27, 2020, Yankowitz acknowledged Garber's letter, advised Garber that he would send him a copy of plaintiff's file by Federal Express, and asked Garber for a Federal Express account number so that the file could be shipped. Doc. 40. Garber refused to provide a Federal Express number but rather insisted that Yankowitz scan and email the entire file to him, which the latter refused to do. Docs. 41-42. Garber eventually provided Yankowitz with a Federal Express account number and Federal Express picked up the file on or about May 2, 2020. Doc. 27 at par. 22; Doc. 43.

Yankowitz now moves, by OSC, for the relief set forth above, arguing, inter alia, that he is entitled to a charging lien on plaintiff's recovery on a contingency basis as a result of the great deal of work he did on her case; that all attorneys' fees generated upon a resolution of this action, by settlement or by verdict, remain in escrow pending a fee hearing and determination of the amount of the charging lien; and that a hearing be conducted regarding Garber's solicitation of the

plaintiff, including whether his conduct violated the New York Rules of Professional Conduct. Docs. 26-43, 45.

In response, Garber agrees that a hearing should be held to determine whether Yankowitz was discharged for cause. Doc. 50. Garber maintains that such a hearing must be held at the conclusion of plaintiff's case, since Yankowitz was to be paid on a contingency basis and plaintiff is not guaranteed to recover. Doc. 50. He further states that plaintiff discharged Yankowitz for cause because the attorney handling her case sexually harassed her. Doc. 50. Garber also insists that he did not commit any misconduct while at Yankowitz's office and that, if anyone committed misconduct, it was Yankowitz, who makes misrepresentations to this Court in his affirmation in support of the OSC. Doc. 50.

#### **LEGAL CONCLUSIONS:**

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, 794 N.Y.S.2d 349 [1st Dept 2005]).

"[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 ... " *Klein v Eubank*, 87 NY2d 459 at 464 (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 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. *See Rosenfeld v Su*, 2018 NY Slip Op 33140 (U), \*2-3 (Sup Ct, NY County 2018).

Since Yankowitz was retained on a contingency basis, it is entitled to a 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. Yankowitz denies plaintiff's claim that it was discharged for cause and submits documentation purporting to establish that it capably and responsibly represented plaintiff's interests. Thus, the issue of whether Yankowitz 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 regarding the amount of 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"). Any monies recovered by plaintiff in this action must be

placed in escrow until the conclusion of the hearing to determine whether Yankowitz was discharged for cause and, if it was not discharged for cause, the hearing to determine the amount of the said firm's charging lien.

The branch of Yankowitz's application seeking a hearing regarding Garber's conduct is denied since the Appellate Division, not this Court, "has exclusive jurisdiction to say what constitutes professional misconduct." *Soares v State of NY*, 68 Misc 3d 249 (Sup Ct, Albany County 2020) (citations omitted).

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

ORDERED that the application is granted to the extent that, at the conclusion of this action, a hearing will be held to determine whether The Yankowitz Law Firm, P.C. 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 the application is otherwise denied; and it is further

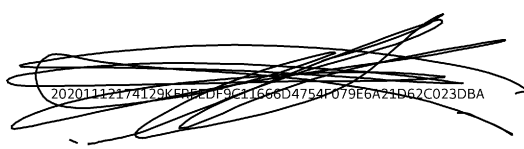
ORDERED that any monies recovered by plaintiff in this action are to be placed in escrow by plaintiff's counsel until the outcome of the hearing to determine whether The Yankowitz Law Firm, P.C. was discharged for cause and, if said firm was not discharged for cause, the hearing to determine the amount of the said firm's charging lien on plaintiff's recovery; and it is further

ORDERED that within 10 days after entry of this order, The Yankowitz Law Firm, P.C. shall serve this order, with notice of entry, on Greg Garber, Esq., as well as on all parties to this action; and it is further

ORDERED that, since the undersigned will be leaving the bench as of December 31, 2020, this action will be transferred to another Justice, who will schedule a compliance conference upon reassignment of the case; and it is further

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

11/12/2020  
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 checked="" type="checkbox"/> GRANTED IN PART <input 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