Georgitsi Realty, LLC v Armory Plaza, Inc.
2022 NY Slip Op 31975(U)
June 24, 2022
Supreme Court, Kings County
Docket Number: Index No. 45669/2007
Judge: Wayne Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of June 2022.

P R E S E N T:

HON. WAYNE SAITTA, Justice.

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GEORGITSI REALTY, LLC, 1504 REALTY LLC, ARTHUR STRIMLING, LISA SEGAL, TIMOTHY PIETRZAK, CATHERINE SHANNON, BORIS GILZON, MARTIN ZOLTOWSKI, MEMORIAL BAPTIST CHURCH OF BROOKLYN, and NEW HAMPSHIRE INSURANCE COMPANY a/s/o 1504 REALTY LLC,

Index No. 45669/2007

Plaintiff

-against-

MS #69 and #70

ARMORY PLAZA, INC., ARMORY HEIGHTS, LLC, JACK LOCICERO, LORENZO LOCICERO, BRICOLAGE DESIGNERS, INC., HENRY RADUSKY, DOUGLAS PULASKI, SANCHEZ ASSOCIATES P.C., LOUIS SANCHEZ, ABRAHAM HERTZBERG, WONGOOD CONSTRUCTION, XINGJIAN CONSTRUCTION, INC., IMMOBILIARIA BUILDERS CORP., DIAMOND POINT EXCAVATING CORP., d/b/a DIAMOND POINT EXCAVATION CORP., JAFCO GROUP INC., ABC INC./CORP./LLC/LP/ PARTNERS 1-9, and JOHN/JANE DOES 1-50,

Defendants

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The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	605-619
Cross-motions Affidavits (Affirmations) and Exhibits	628
Answering Affidavit (Affirmation)	627, 629-641, 656-661, 704-750
Reply Affidavit (Affirmation)	650-655 686-686
Supplemental Affidavit (Affirmation)	647-649

These two motions involve a fee dispute between Plaintiff 1504 REALTY LLC ("1504") and its former attorney Hiller PC. The Plaintiffs in this case are several property owners who claim their buildings were damaged by an excavation of an adjacent property. In 2007, five of the Plaintiffs were represented by Weiss & Hiller PC, a firm in which Michael Hiller, Esq was a partner. Plaintiff 1504 had originally filed its own action in New York County. Subsequently, Arnold Rosenshein, a principal of 1504, asked Michael Hiller to have Weiss & Hiller PC represent 1504. Weiss & Hiller PC substituted as counsel for 1504 in 2007. In 2014, Michael Hiller formed a new firm, Hiller PC, which took over representation of the Plaintiffs, including 1504.

In June of 2019, the Defendants sought to settle with 1504 separately from the other Plaintiffs. Hiller then told Rosenshein that if 1504 wanted to settle separately, Hiller PC would be faced with a conflict and would have to move to withdraw from representing 1504. Hiller told Rosenshein that he could only continue to represent 1504 if it declined to settle separately.

On June 24, 2019, Hiller PC filed a motion to withdraw as attorney for 1504. Rosenshein thereafter retained Fern Flomenhaft PLLC to represent 1504. The parties stipulated to allow Hiller PC to withdraw as counsel and to substitute Fern Flomenhaft PLLC as attorney for 1504. The stipulation provided that it was without prejudice to Hiller PC's retaining and charging liens, and without prejudice to 1504 moving to vacate the liens.

1504 then settled its claims with Defendants for $3.5 million. Thereafter, 1504 moved to vacate the charging lien and Hiller PC cross-moved to set the value of its charging lien.

Hiller asserts a lien for legal services for the period from 2014 until June 2019 when they withdrew as attorney for 1504. He seeks to value the lien at $663,566.65 based on a claim of an account stated.

Plaintiff 1504 argues that Hiller PC and Weiss & Hiller PC are entitled to no fees for the entire 14 years that both firms represented 1504 because Hiller PC was discharged for cause. 1504 asserts that the firms had a conflict in representing the Plaintiffs jointly from the beginning of the representation due to of the possibility that there would not be sufficient assets to satisfy the claims of all of the Plaintiffs.

Hiller PC argues that there was no actual conflict until the point that 1504 decided to settle separately from the other Plaintiffs and at that point Hiller PC moved to withdraw as counsel for 1504.

An attorney who violates a disciplinary rule may be discharged for cause and is not entitled to fees for any services rendered. (*Baugher v. Cullen & Dykman* 173 AD3d 959 [2d Dept 2019]; *Jay Deitz & Assoc. of Nassau County, Ltd. v. Breslow & Walker, LLP*, 153 AD3d 503 [2d Dept 2017]; *Saint Annes Dev. Co. v. Batista*, 165 AD3d 997 [2d Dept 2018]; *Doviak v. Finkelstein & Partners, LLP*, 90 AD3d 696,[2d Dept 2011]; *Quinn v. Walsh*, 18 AD3d 638 [2d Dept 2005].)

The Court of Appeals has ruled that an attorney's right to enforce a charging lien under Judiciary Law § 475 is not forfeited in the “myriad of cases in which the attorney's representation is discontinued by mutual consent for reasons not rising to the level of misconduct or ‘just cause' on either side’” (*Klein v. Eubank*, 87 NY2d 459, 463 [1996]), “poor client relations, differences of opinion, or personality conflicts do not amount to cause” (*id.*; *Callaghan v. Callaghan*, 48 AD3d 500 [2d Dept 2008]).

As a preliminary matter, Hiller PC was not discharged by 1504. After 1504 informed Hiller PC that it was interested in settling separately, Hiller PC filed an Order to Show Cause to be relieved as counsel. Before the return date of the Order to Show Cause, 1504 consented to Hiller PC's withdrawal and substituted Fern Flomenhaft PLLC as counsel.

Where an attorney moves to withdraw from representation because of a conflict that develops in the course of representation, there is not a discharge for cause and it does not disqualify him from a fee (*see Klein v. Eubank,* 87 NY2d 459).

In the case of *Schneider, Kleinick, Weitz & Damashek v. Suckle*, 80 AD3d 479 [1st Dept 2011], the Court held:

> ". . . it is undisputed that following the jury's verdict, the firm terminated its representation for just cause, based on a conflict of interest which compromised its ability to provide adequate representation. That termination decision was fully communicated through discussions with, and written notice to, the client's personal attorney. We reject defendant-appellant's contention that the firm waived its entitlement to a charging lien." (*id*. at 480).

There was not an actual conflict when Hiller PC began representing 1504 along with the other Plaintiffs. There was only a potential for a conflict to develop either if there were not enough assets to satisfy all the Plaintiffs' claims, or if one of the Plaintiffs wanted to settle separately.

Here, at the beginning of the representation, the interests of the Plaintiffs represented by Hiller PC were not adverse. All were adjacent property owners who suffered damage from the same acts of the Defendants. While each property suffered varying individual damages, none of the claims of damages conflicted with the claims of any other Plaintiff in the group. None of the Plaintiffs represented by Hiller PC asserted a claim against any of the other Plaintiffs in the group.

At the beginning of the representation there was no indication that there was not sufficient insurance money to cover the damages claimed. It was only later discovered that the Armory Defendants did not have insurance.

The lack of insurance only created a potential conflict, one that that might occur if the total of all the damages of the Plaintiffs exceeded the collective assets available to satisfy the claims.

The Hiller Plaintiffs had agreed to a procedure to apportion the available assets if there were insufficient assets to cover the claims or if there was a dispute among the Plaintiffs as to how to divide any recovery. The testimony of Michael Hiller, as well as co-Plaintiffs BORIS GILZON and ARTHUR STRIMLING, was that the Plaintiffs' damages would be evaluated by the experts they retained, and their damages, as evaluated by their experts, would be reduced by the percentage that the aggregate settlement was less than the total damages of all the Plaintiffs in the group. In the event that damages had gone to judgment, each Plaintiff would take a reduced amount based on the percentage that the total amount of the judgments exceeded the total assets.

Such an arrangement is not inherently a conflict but allows the Plaintiffs to retain control over how an insufficient amount of assets would be divided amongst themselves rather than having the issue decided by the Defendants or having to compete against each other to satisfy any judgments they may obtain.

The Court of Appeals decision in *Green v. Greene,* 47 NY2d 447 (1979), cited by 1504 for the proposition that dual representation will rarely be sanctioned, is misplaced. That case involved a situation where the Plaintiff's attorney was an adverse party to Plaintiff's claims. The Plaintiff in that case was suing a firm which the attorney had formerly been a member of. The attorney had informed the Plaintiff that he might be

potentially jointly and severally liable for the wrongdoing Plaintiff was alleging. The Court held that that was a conflict that could not be waived.

The possibility that there may not be sufficient assets for all of the Plaintiffs' claims remains only a potential conflict, as it is still uncertain whether or not there will be enough assets to cover any settlement or judgements.

In this case, the conflict that actually arose was when Rosenshein told Hiller that he wanted to pursue Defendants' offer of a separate settlement. At that point, Hiller informed him that there was an actual conflict and moved to withdraw as 1504's attorney.

Also, the fact that the other Plaintiffs had a hybrid contingency hourly fee arrangement did not constitute a conflict. There is no rule barring different fee arraignments among Plaintiffs being represented as a group. All the Plaintiffs were originally billed on an hourly basis. Subsequently, the Plaintiffs, except for 1504, switched to a hybrid contingency fee and reduced hourly rate fee. Hiller offered the same billing arrangement to 1504 but 1504 declined.

Also, any actions taken by Hiller after his withdrawal as counsel are not a basis to vacate a lien for work performed before the withdrawal.

A second prong of 1504's argument is that Hiller PC is not entitled to any legal fees because Hiller violated rule 1.7 and 1.8 of the attorney Rules of Professional Conduct by failing to advise 1504 of the potential conflicts involved in group representation and not getting 1504's informed waiver of the potential conflicts.

Neither the 2007 retainer agreement between Weiss & Hiller PC and 1504, or the 2014 retainer between Hiller PC and 1504, contain a written waiver of any potential conflict from the group representation. Nor were a waiver of conflicts or an agreement not to settle separately contained in any other written agreement.

Disciplinary Rule D.R. 5-105(c), as it existed in 2007 when the Plaintiffs first retained Weiss & Hiller PC, did not require the wavier of conflicts to be in writing.

The Court held a framed issued hearing to determine, among other issues, whether Hiller advised the Plaintiffs of the potential conflicts in group representation and whether he violated the Rules of Professional Conduct.

In 2009, Rule 1.7 of the Rules of Professional Conduct was adopted which provides that a lawyer shall not represent a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests, unless the clients give informed consent confirmed in writing.

Rule 1.0(j) of the Rules of Professional Conduct defines informed consent as: "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives".

The evidence presented at the hearing demonstrated that Hiller did get informed consent of the Plaintiffs orally.

Hiller testified at the hearing that in 2007, prior to being formally retained, he discussed the risks and advantages of joint representation as well as possible conflicts of interest with the initial Plaintiffs, ARTHUR STRIMLING, LISA SEGAL, BORIS GILZON, TIMOTHY PIETRZAK, and CATHERINE SHANNON. He testified that he discussed a "litany" of scenarios in which potential conflicts could arise, including how there might be insufficient assets to fund a settlement or judgment.

Hiller testified that the initial Plaintiffs agreed to pursue a joint settlement strategy with the understanding that if anyone wanted to settle alone and ahead of the other

Plaintiffs, they could do so, but that Hiller could not continue to represent them.

Hiller testified that subsequently in 2007, MARTIN ZOLTOWSKI and Pastor Steven Christopher of the MEMORIAL BAPTIST CHURCH OF BROOKLYN (the "Church") asked him to represent them in connection with the damage caused by Defendants' excavation.

Hiller testified that before agreeing to represent ZOLTOWSKI and the CHURCH, he discussed with them and the initial Plaintiffs the risks and advantages of joint representation and pursuing a joint settlement. The initial Plaintiffs, ZOLTOWSKI, and the CHURCH all orally waived the potential conflicts and agreed to pursue a joint strategy. They also agreed on a method to resolve any disagreements over how damages should be allocated.

Hiller testified that subsequent to Weiss & Hiller PC commencing this action, Rosenshein approached Hiller at a meeting at then Councilmember Bill DeBlasio's office and asked Hiller to represent 1504.

Hiller told Rosenshein that he could not discuss the prospect of representing 1504 until after speaking with the other Plaintiffs and obtaining their waivers following an additional disclosure of potential conflicts.

Hiller testified that prior to agreeing to represent 1504, Hiller discussed with the other Plaintiffs the risks and potential conflicts in permitting 1504 to join the group and specifically how 1504's damages were greater than the other Plaintiffs'. Hiller testified that he also discussed with the other Plaintiffs how potential conflicts of interest would be resolved should they arise, including if a Plaintiff wanted to settle separately from the group.

Hiller testified that the other Plaintiffs waived the potential conflicts of interest and agreed to allow 1504 to join their group.

Hiller testified that he told Rosenshein about the potential conflicts of interest and risks inherent in joint representation. He testified that he also explained to Rosenshein that the group had agreed to pursue a joint settlement and that if a Plaintiff wanted to settle separately, they would have to obtain other counsel. He testified that he also explained to Rosenshein how any disputes between the Plaintiffs as to their share of any damages would be resolved.

Hiller testified that subsequently Rosenshein signed a retainer and thereafter a meeting was held with Rosenshein and the other Plaintiffs. At that meeting Hiller discussed with them the risks and potential conflicts of interest of group representation, including how disputes among the Plaintiffs concerning settlement would be resolved, and explained that a Plaintiff seeking to settle separately would have to obtain other counsel.

Rosenshein testified that while Hiller did tell him that he could not take on 1504's case without first getting the agreement of the other Plaintiffs, Hiller never discussed potential conflicts with him or obtained his waiver. He testified that Hiller never discussed what would occur if there were not sufficient assets to cover all of the Plaintiffs damages, but merely downplayed the possibility, stating that parties in construction projects like the Defendants' are required to be insured and that the Defendants' property could be taken to cover the damages. He testified that Hiller did not explain to him that if a party wanted to settle separately Hiller could not continue to represent them.

Rosenshein's testimony that Hiller never discussed potential conflicts is contradicted by a text he sent to Hiller on June 10, 2019, in which he wrote "I understand

there is a conflict. You made that very clear to me was probably a conflict from day one. What is your question?"

Rosenshein argues that what he meant was that Hiller had told him that an actual conflict existed from the beginning of the representation. However, this interpretation is belied by the fact that there was not an actual conflict at the beginning of the representation only the potential for a conflict. That conflict only became manifest when Rosenshein decided to pursue Defendants' offer of a separate settlement.

Rosenshein was not a credible witness. During his testimony he was combative, and quarrelsome. Much of his testimony was argumentative and not responsive to the questions being asked.

Rosenshein also gave several answers that were demonstrably false.

Rosenshein testified "I fired Hiller. I sent him a letter I no longer needed his services". No such letter was produced. In fact, Hiller moved to be relieved after telling Rosenshein that if Rosenshein wanted to settle separately with the Defendants he would have to withdraw as 1504's counsel.

On June 3, 2019, at a conference in Court, the Defendants indicated that they wanted to settle separately with 1504. Hiller informed the Court that the separate offer created a conflict, and he could not proceed with a separate settlement.

On June 24th, Hiller submitted for signature an Order to Show Cause to be relieved as 1504's counsel and he sent an email to Rosenshein on June 26, 2019, informing him that he was moving to withdraw as counsel. After that, Rosenshein retained Flomenhaft PLLC to represent him and stipulated to allow Hiller to withdraw as his counsel and substitute Flomenhaft PLLC.

Rosenshein also testified at the hearing that he first learned that Hiller was billing him for 50% of the hours from the motion papers filed in 2019. However, in an email dated September 9, 2014, Rosenshein complained to Hiller that he was being billed for 50% of the fees. Also, Rosenshein received an email on January 5, 2016, from Hiller's office explaining that his share of a bill for reporting services was 50%, and Rosenshein paid that bill.

Rosenshein also testified at the hearing that he signed a stipulation to withdraw an application for an injunction against the Defendants made by his prior attorney. When he was later shown the stipulation, which in fact did not contain his signature, he falsely insisted that he had not previously testified that he signed the stipulation.

Further, Hiller's testimony that the potential for conflicts was discussed and waived by the Plaintiffs was corroborated by co-Plaintiffs GILZON and STRIMLING. They both testified that at their first meeting, Hiller explained the potential conflicts in group representation and the advantages and disadvantages of litigating as a group in the event there were insufficient assets to cover all of their damages. They testified that Hiller explained that there could be conflicts if one Plaintiff wanted to settle separately from the group and that Hiller would not be able to represent someone who wanted to settle separately.

GILZON and STRIMLING testified that the Plaintiffs agreed to waive the potential conflicts and to proceed as a group and that they agreed upon a method of apportioning the proceeds of any recovery if there were insufficient assets to cover their damages. They testified that they agreed that if there were insufficient funds to cover a verdict or a settlement, then each Plaintiff would receive a proportionate share based on their engineer's evaluation of their damages.

GILZON and STRIMLING also testified that Hiller discussed the various potential conflicts and mechanisms for settling before they agreed to allow ZOLTOWSKI and the CHURCH to join the group; and that ZOLTOWSKI and the CHURCH agreed to join after being advised of the potential conflicts.

They also testified that Hiller went over the potential advantages and disadvantages of allowing 1504 to join the group before the Plaintiffs agreed to let 1504 join. GILZON testified that Rosenshein was at a meeting where the potential for conflicts was discussed and that Rosenshein told the group that if there was not enough money to cover the claims, the Plaintiffs could take the Armory Defendants' building.

STRIMLING also testified that the Plaintiffs met with Hiller and Rosenshein in the Church and the same potential conflicts were discussed in Rosenshein's presence and that Rosenshein said that the Plaintiffs could take the building if necessary.

Based on the credible testimony adduced at the framed issued hearing, the Court finds that Hiller disclosed and obtained oral waivers of the potential conflicts inherent in representing the Plaintiffs as a group, including the possibility of insufficient funds to cover all claims; that the Plaintiffs agreed to a mechanism on how to allocate the proceeds of a settlement or verdict in case of a shortfall; and that Hiller disclosed that if a Plaintiff wanted to settle separately from the group then Hiller could no longer represent that Plaintiff. It is not contested that Disciplinary Rule D.R. 5-105(c) as it existed in 2007 did not require the wavier of conflicts to be in writing. Thus, the oral waivers obtained from the Plaintiffs in 2007 were sufficient to meet the requirements of the disciplinary rule.

In 2009 D.R. 5-105(c) was replaced by Rule 1.7 of the Rules of Professional Conduct which requires that a client's informed consent to a conflict must be confirmed in writing. This change did not invalidate the original oral waivers.

The New York State Bar Ethics Opinion 829 of 2009 advised that "The requirements in the new Rules of Professional Conduct that govern obtaining consents to conflicts, including the new requirement that consents be 'confirmed in writing', do not apply to consents validly given before the effective date of those Rules", and that "there is no need to re-confirm or re-obtain the consent solely on account of the adoption of the new Rules" (N.Y.S.B.A. Op. 829).

The Opinion states "With respect to the particular inquiry before us, the inquirer states that the consent was contained in a retainer agreement. It thus already satisfied the new requirement that the consent be confirmed in writing, the same conclusion would apply to oral consents that were validly given prior to the effective date of the new Rules" (*id.*). Thus, the oral waivers of conflict obtained by Hiller in 2007 remained valid after the enactment of Rule 1.7.

Based on the credible testimony at the framed issued hearing that Hiller did obtain oral waivers, the Court finds that Hiller did not violate DR 5-105 or Rule 1.7 of the Rules of Professional Responsibility.

Rosenshein also argues that the Plaintiffs' agreement to settle jointly violates Rule 1.8(g) of the Rules of Professional Responsibility.

Rule 1.8(g) is not applicable to the situation here because no aggregate settlement has been reached and the Plaintiffs' agreement with Hiller did not bind them to settle jointly.

Rule 1.8(g) states:

> "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client."

This rule bars advance waivers of the right to approve aggregate settlements or delegating complete authority to the lawyer to negotiate and bind them collectively to a settlement (*see* Formal Opinions 06-438 and 2009-06). However, the agreement among the Plaintiffs did not require them to waive objections to any future settlement or grant Hiller the authority to bind them to any future settlement. Their oral agreement provided, in the event consensus could not be reached on a settlement, several mechanisms for resolution of disputes regarding an aggregate settlement, including evaluation by Plaintiffs' retained expert, mediation, or arbitration. Most importantly, the Plaintiffs, like 1504, were free to leave the group if they wanted to settle separately from the group.

By reason of the foregoing and the credible testimony adduced at the framed issue hearing, the Court finds that Hiller was not discharged for cause and that he did not violate the Disciplinary Rules or Rules of Professional Responsibility. Therefore, Hiller PC's charging lien should not be vacated.

Having determined that Hiller PC should not be vacated, the Court must consider Hiller PC's cross motion to set the value of the lien. An attorney's charging lien pursuant to Judiciary Law § 475 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]).

Both sides concur that the amount of the lien should not be determined on a quantum meruit basis. Hiller PC contends that it has a valid claim on an account stated based on invoices sent to 1504. Rosenshein contends that the lien should not be set on a quantum meruit basis because Rosenshein never agreed to a percentage fee. Rosenshein states that the fee should be set based on the agreement set forth in the retainers.

The retainers listed the hourly rates that 1504 would be billed but did not specify what percentage of the hours would be billed to 1504.

The retainer with Hiller PC states: "For legal services to be rendered by us on your behalf, you have agreed to pay the Firm's hourly charges, from time to time in effect, for all attorneys and other staff who devote time to your claims". The retainer with Weiss & Hiller PC was substantially the same.

However, this formulation is of little assistance in determining how the fees would be divided among the Plaintiffs. The nature of this case was such that outside of some preliminary work to join 1504's Manhattan action with this action, the bulk of the hours spent were to advance the claims of all of the Plaintiffs jointly and there is no basis to attribute the time spent to an individual Plaintiff's claims.

As the retainers are silent as to the allocation of fees among the Plaintiffs, they did not constitute the complete agreement of the parties. Therefore, recourse must be had to parole evidence.

At the framed issue hearing, Hiller testified that there was an oral agreement at the time of his engagement as 1504's attorney that 1504 would pay one half of the hours expended on the case.

Hiller testified that the 50% split was based on the fact that 1504 suffered more extensive damage than the other Plaintiffs and its claims were more complicated. 1504 was an apartment building rather than a single-family townhouse. It was vacated by the Department of Buildings and had to have exterior shoring installed. 1504 also had claims for lost income that the other Plaintiffs did not have.

Hiller's testimony was confirmed by the testimony of co-Plaintiffs STRIMLING and GILZON who both testified that 1504 would be paying half of the hours. GILZON

testified at the framed issue hearing that "Michael [Hiller] told us that Mr. Rosenshein would be footing half the bill so that was a big factor for us". GILZON also testified that on more than one occasion Rosenshein complained that he was paying half the bills. Several other of the Plaintiffs also submitted affidavits confirming the 50/50 split.

Rosenshein's testimony was that there was never any agreement as to what percentage of the hours billed that 1504 would be responsible for. He testified that he had "assumed" his share would be 1/6, 1/7 or 1/8 of the hours.

It is not credible that Rosenshein, an experienced businessman, would have consolidated his separate lawsuit to join a group representation without an agreement of what his share of the expenses would be.

Further, Rosenshein's conduct corroborates that he agreed to pay 50% of the bills.

On January 5, 2016, Irene Moy of Hiller PC sent Rosenshein an invoice for a stenographer's charges for a deposition. In reply, Rosenshein asked what his share of the bill was. Moy responded that his share was half, which was $4,145.96. Rosenshein then paid the $4,145.96. Rosenshein made two other payments in June of 2016, after Moy's email which stated his share was 50%.

Further, on several occasions Rosenshein reaffirmed the debt. In an email dated September 9, 2014, Rosenshein acknowledged that he was being billed 50%, although he complained about his share being 50%. On September 12, 2014, Rosenshein sent an email to Hiller in which he stated "I don't want to fight with you. Although I am pressed for cash, I can offer you $5000 a month going forward and if I miss a month, I will expect you to withdraw from representing me".

Rosenshein subsequently agreed to pay off the arrears at $6,000 a month and on November 6, 2014, sent an email to Hiller promising to make the first payment on the

arrears in December. On December 11, 2014, Rosenshein sent an email to Hiller telling him that a check would be forthcoming.

On April 16, 2015, he stated in an email to Hiller that he would put together money to make a payment in May once the heating season ended.

In none of these written promises to pay the arrears did Rosenshein assert that he had not agreed to pay 50% of the hours billed. In reliance on Rosenshein's promises to pay, Hiller PC did not move to withdraw as 1504's counsel for non-payment of the fees.

Based on the above, and on the testimony adduced at the framed issued hearing, the Court finds that there were agreements between Weiss & Hiller PC and 1504, and between Hiller PC and 1504, that 1504 would pay 50% of the hours spent on this action.

Having found, based on the framed issue hearing, 1504 had agreed to pay for 50% of the hours spent on this action, the Court must set the value of the lien.

As discussed above, the position of both sides is that the amount of the lien should not be determined on a quantum meruit basis.

Plaintiff 1504 asserts that the amount of the lien should be based on the hourly rates set forth in the retainer. Hiller PC contends that they have a valid claim for an account stated based on invoices they sent to Rosenshein over the course of the representation.

An attorney who withdraws as counsel, or who is discharged other than for cause may maintain an action on an account stated for unpaid legal fees (*Darby & Darby PC v. VSI International Inc.,* 95 NY 2d 308 [2000]; *Holtzman v. Griffith,* 162 AD3d 874 [2d Dept 2018]; *Langione, Catterson & Lofrumento LLP v. Schael,* 148 AD3d 797 [2d Dept 2017].)

As a preliminary matter, the only charging lien at issue is the lien filed by Hiller PC which covers fees from 2014 onward. Although 1504 seeks to disgorge fees it paid to its prior counsel, the unpaid balance to Weiss & Hiller PC are not part of Hiller PC's lien. No action has been commenced against Weiss & Hiller PC, and the firm was dissolved several years ago.

Hiller PC sent regular invoices to 1504 over 5 years, usually monthly, although the invoice of May 31, 2016, covered approximately 8 months, and the invoice of March 6, 2017 covered approximately 10 months. The invoices detailed each date of service, the hours or fractions of hours spent, and a description of the services rendered. The invoices did not contain an indication of an allocation between 1504 and the other Plaintiffs.

As discussed above, based on the credible evidence adduced at the framed issue hearing, the Court finds that Rosenshein had agreed that he would pay 50% of the hours billed at the hourly rates set forth in his retainers.

The only complaints made by Rosenshein were general complaints about the amount of time and overall cost of the litigation and that he was being billed for one half of the litigation. General complaints are not sufficient to raise a defense to a claim of an account stated (see *Gassman & Keidel PC v. Alderstein,* 63 AD3d 784 [2d Dept 2009]; *Zanani v Schvimmer,* 50 AD3d 445 [1st Dept 2008]). Although Rosenshein asked to review the bills with Hiller, he declined the opportunity to review the bills with Hiller PC's billing personnel.

Rosenshein did not make any specific objections to the accuracy of any individual invoice, or question any specific hourly entry. Rosenshein's complaints about his share of the costs appear to have been more an attempt to renegotiate his fee agreement, similar to his extraordinary instruction that Hiller direct any settlements monies that were

awarded to his insurer, to him, so he could use those monies as leverage to negotiate with his insurer to pay a portion of his legal fees.

In addition to not making any specific complaints about the accuracy of the invoices, Rosenshein made frequent promises to pay off the outstanding balance and did in fact make some partial payments (see *Citibank NA v. Brown-Serulovic,* 97 AD3d 522 [2d Dept 2012]; *American Exp Centurion Bank v. Cutler,* 81 AD3d 761 [2d Dept 2011]).

However, while Hiller PC has demonstrated entitlement to a judgment based on an account stated, Hiller has admitted that the allocation of hours on several of the invoices are incorrect.

Hiller admits that Hiller PC mistakenly billed 1504 for 100% of the hours spent instead of the 50%, starting with the invoice dated May 31, 2016, which was for the period September 2015 through April 2016. Hiller states that this error involved only the allocation of the hours among 1504 and the other Plaintiffs, not the number of hours spent.

Hiller PC submitted a revised spreadsheet purporting to correct for the error. However, the spreadsheet still indicates, without explanation, that several invoices were billed to 1504 at 100% of the hours.

In cases in which a valid claim for an account stated has been made out but there is a dispute over the calculation of the amount owed based on the invoices, there should be a hearing on the issue of damages on the account stated (*see Bashian & Farber LLP v. Syms,* 147 AD3d 714 [2d Dept 2017]; *Stephanie R Cooper PC v. Robert,* 78 AD3d 572 [1st Dept 2010]).

Therefore, the Court will refer the matter to a referee to determine the amount owed based on 50% of the hours invoiced. The Court will notify the parties of the date of the hearing before the referee.

WHEREFORE, it is hereby ORDERED that 1504's motion to vacate HILER PC's charging lien is DENIED; and it is further

ORDERED that decision on Hiller PC's cross-motion to set a value on its charging lien is reserved and the matter is referred to a referee to hear and report on the amount of fees and disbursements owed by 1504, based on 50% of the hours listed on the invoices sent to 1504, at the hourly rates set forth in the retainers, and on 50% of the disbursements, plus the applicable interest set forth in the retainers.

E N T E R:

JSC