

**McKinney v Saul**

2023 NY Slip Op 32702(U)

August 3, 2023

Supreme Court, New York County

Docket Number: Index No. 805127/2014

Judge: Kathy J. King

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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. KATHY J. KING PART 06

*Justice*

-----X

JOSE MCKINNEY, as Administrator of the Estate of LILLIAN  
MCKINNEY, Deceased

Plaintiff,

INDEX NO. 805127/2014

MOTION DATE 08/29/2022

MOTION SEQ. NO. 008

- v -

TURANDOT SAUL, SEBASTIAN SIADECKI, M.D., MOUNT  
SINAI ST. LUKE'S HOSPITAL CENTER, AND ST. LUKE'S  
HOSPITAL CENTER,

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT.

Non-party petitioner The Fitzgerald Law Firm, P.C. ("FLF"), prior attorneys for the decedent Lillian McKinney in the underlying action herein, move by order to show cause for an order:

- 1) deeming the charging lien asserted by FLF to be valid;
- 2) amending the Revised Order of Compromise, dated October 28, 2019<sup>1</sup> to reflect FLF's charging lien and disbursements; and
- 3) directing respondent KRENTSEL & GUZMAN, LLP ("Krentsel"), to release to petitioner, FLF, the charging lien and disbursements due it by reason of its prior representation of the decedent in this matter and the agreement between petitioner and respondent; or in the alternative, directing defendant St. Luke's Roosevelt Hospital Center s/h/a Mount Sinai St. Luke's Hospital Center and St. Luke's Hospital Center, by its malpractice insurer, to release to petitioner the aforesaid charging lien and disbursements due it, or such greater sum as the Court

<sup>1</sup> The Court notes that the Revised Order of Compromise dated October 28, 2019, relied upon by FLF in its moving papers, was superseded and replaced by the Amended Order of Compromise dated February 26, 2020, issued by the Honorable Martin Schulman.

deems fit; and awarding FLF the costs of this motion, including reasonable attorneys' fees.

Respondent Krentsel cross-moves for an order releasing Krentsel from paying the charging lien and disbursements to FLF.

FLF asserts that it represented decedent, Lillian McKinney, in the underlying action prior to her death in May of 2015, and that subsequent to her death attempts were made to communicate with decedent's family in order to continue the action, however they failed to respond. Thereafter, FLF sought to be relieved of counsel, and in November of 2016, Krentsel accepted the case. On November 17, 2016, FLF sent incoming counsel a letter setting forth disbursements totaling \$ 739.25, and advising them that FLF was asserting a lien on this action to be determined as a percentage of the attorneys' fee rather than quantum meruit at resolution of the case. Upon discussion between petitioner and respondent about the case, it was agreed that FLF's charging lien should be 15% of the file. A fully executed Consent to Change Attorney was filed on November 22, 2016, and Krentsel was substituted for FLF as attorneys of record.

On or about August of 2019, the underlying action was settled in the sum of \$300,000.00, pursuant to the Amended Order of Compromise dated February 26, 2020. According to FLF, at the time of decedent's death it had commenced the action and engaged in extensive discovery. FLF contends that after learning that the case had settled its attempts to collect reimbursement of its disbursements and payment of its charging lien from Krentsel, have been fruitless.

It is well-settled that, under Judiciary Law § 475, an attorney's charging lien comes into existence, without notice or filing, upon commencement of the cause of action or proceeding (*Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 43 [2002]). The enforcement of a charging lien "is founded upon the equitable notion that the proceeds of a settlement are

ultimately ‘under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done to its own officers’” (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 187 [1st Dept 2002], quoting *Rooney v Second Ave R.R. Co.*, 18 NY 368 [1858]). Further, a defendant's payment of settlement proceeds, while on notice of a charging lien, is made at a defendant's peril (*id.* at 189). “The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of... reversal, modification or vacatur of a prior judgment or order upon which it is based (*see* CPLR § 5015[a][5]).

In support of its motion FLF submits, *inter alia*, the affirmation of John M. Daly, Esq., the attorney for FLF, and the affidavit of Sarah Donovan, an employee of FLF, attesting to the legal work performed by FLF as prior counsel for decedent, and the efforts made by FLF to track the disbursements and charging lien, and procure said payments. FLF also submits copies of pleadings, correspondence, discovery demands and responses and other court filings by FLF in the underlying action, and copies of communications had between FLF and Krentsel concerning FLF’s asserted charging lien and request for reimbursement of its disbursements.

In opposition and in support of its cross-motion, Krentsel contends that Michael Noonan, Esq., agreed that FLF’s charging lien should be 15%, however, Mr. Noonan was hired by plaintiff and was not an associate at Krentsel in October and November, 2016, at the time the agreement was made. Krentsel contends that Mr. Noonan had no authority to commit Krentsel to any fee agreement, and that he did not sign the consent to change attorney form. Further, Krentsel contends that it accepted the case without a referral fee and without any signed fee agreement, and that Mr. Noonan should be required to pay the charging lien, and not Krentsel.

The Court finds that FLF's submissions demonstrate that it is indeed entitled to a charging lien representing attorneys' fees in the underlying action, and reimbursement of its disbursements since Krentsel was put on notice regarding the charging lien by email and first class mail, as early as November of 2016, and there was no objection thereto.

Respondent Krentsel's submissions, in opposition, are conclusory and of no probative value since Krentsel fails to submit an affidavit of Mr. Noonan, attesting to the fact that he was not its employee at the time, or that he was not acting on behalf of Krentsel when agreeing to the charging lien.

The Court also finds that FLF is entitled to fees and costs associated with the making of this motion and responding to Krentsel's cross-motion. Uniform Rule 130-1.1 provides that "the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court...costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part." Further, in determining whether the conduct was frivolous, 22 NYCRR § 130-1.1 (c) provides that:

...the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Under the facts and circumstances presented here, Krentsel's failure to respond to FLF's repeated requests for more than five years for payment of its charging lien and disbursements, necessitated the filing of the instant motion by FLF. As such, the Court finds that Krentsel's conduct was frivolous, as defined by Uniform Rule 130-1.1, and Krentsel is directed to pay to FLF all costs and reasonable attorneys' fees associated with the making of this motion.

Accordingly, it is hereby,

**ORDERED**, that within fifteen (15 days) of the entry of this order, petitioner, The Fitzgerald Law Firm, shall file and serve a copy of this decision and order with notice of entry on all parties; and it is further

**ORDERED**, that the motion of petitioner, The Fitzgerald Law Firm, is granted to the extent that it is entitled to a charging lien as prior attorneys for plaintiff's decedent in the underlying action, pursuant to the Amended Order of Compromise dated February 26, 2020, issued by the Honorable Martin Schulman, and an award of disbursements as prior counsel to decedent, Lillian McKinney, and in all other respects, the motion is denied; and it is further

**ORDERED**, that the Court having determined that respondent, Krentsel Guzman Herbert, LLP, has engaged in frivolous conduct as defined in Section 130-1.1(c) of the Rules of the Chief Administrative Judge as set forth above, the petitioner, The Fitzgerald Law Firm, is awarded the costs and attorneys' fees associated with making this motion and responding to the respondent's cross-motion; and it is further

**ORDERED**, that The Fitzgerald Law Firm shall prepare an affirmation detailing the costs and reasonable attorneys' fees associated with making this motion, and responding to the cross-motion of Krentsel, Guzman Herbert LLP. Said affirmation shall be provided to respondent's counsel within twenty (20) days of notice of entry of this order; and it is further

**ORDERED**, that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine, as specified above, the amount of the charging lien and disbursements

payable to petitioner, The Fitzgerald Law Firm, as well as the costs and reasonable attorneys' fees associated with the making of this motion and responding to the cross-motion; and it is further

**ORDERED**, that counsel shall immediately consult one another and counsel for petitioner shall, within fifteen (15) days from the date of this order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

**ORDERED**, that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

**ORDERED**, that the parties shall appear for the Reference Hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

**ORDERED**, that the hearing shall be conducted in the same manner as a trial before a justice without a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further

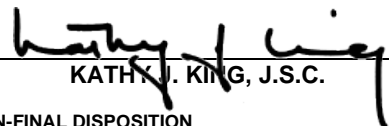
**ORDERED**, that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing

Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

**ORDERED**, that the cross-motion of respondent, Krentsel Guzman Herbert, LLP, is denied in its entirety.

This constitutes the decision and order of the Court.

8/3/2023  
DATE

  
KATHY J. KING, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE