

**Lee v Nejat**

2023 NY Slip Op 33899(U)

October 31, 2023

Supreme Court, New York County

Docket Number: Index No. 800296/2011

Judge: Erika M. Edwards

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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. ERIKA M. EDWARDS PART 10M**

*Justice*

-----X

SUSAN S. LEE,

Plaintiff,

- v -

MORRIS NEJAT, M.D., F.A.A.P., Individually, d/b/a NEW YORK ALLERGY & SINUS GROUP, PLLC., NEW YORK UNIVERSITY MEDICAL CENTER, and NEW YORK-PRESBYTERIAN WEILL CORNELL MEDICAL CENTER,

Defendants.

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INDEX NO. 800296/2011

MOTION DATE 08/10/2023

MOTION SEQ. NO. 012

**DECISION AND ORDER  
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 012) 95, 96, 97, 98, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for ATTORNEY - WITHDRAW.

Upon the foregoing documents, a review of the confidential submissions filed with the court from Plaintiff Susan Lee (“Plaintiff”) and outgoing counsel for Plaintiff Sal Spano, Esq. of Edelman, Krasin & Jaye, PLLC (“the Firm”), and after oral arguments held before the court on September 15, 2023, and September 26, 2023, the court grants the Firm’s motion to be relieved as Plaintiff’s counsel and the court stays the matter until January 4, 2024. Additionally, the court finds that Plaintiff’s discharge of the Firm’s representation was not for cause sufficient to preclude the Firm’s request for a charging lien and a retaining lien on its file regarding this matter. The court grants the Firm’s request for a charging lien in an amount to be determined at the completion of this matter should it result in a favorable outcome to Plaintiff and a retaining lien on Plaintiff’s file in the amount of \$20,961.62, which must be paid or secured prior to the Firm’s release of the file.

The Firm now moves under motion sequence 012 to be relieved as counsel for Plaintiff due to an irreconcilable breakdown of the attorney-client relationship after Plaintiff discharged the Firm and request that the Firm cease all work on her case. The Firm seeks a 90-day stay in the proceedings to permit Plaintiff an opportunity to retain new counsel. The Firm argues in substance that it is entitled to a charging lien and a retaining lien as it had a valid retainer agreement with Plaintiff, it conducted legal work on Plaintiff's behalf, and it spent \$20,961.62 to prosecute this matter. The Firm provided an itemized list of disbursements which supported its claim for reimbursement of \$15,516.07 for payment of the Firm's previous attorney's retaining lien, which was required for the Firm to obtain Plaintiff's file, plus an additional \$5,445.55 in disbursements. The Firm also noted in substance that Plaintiff has been represented by seven prior law firms, all of whom have similarly been discharged for cause or relieved by order of the court.

All three Defendants, Morris Nejat, M.D., F.A.A.P., Individually, d/b/a New York Allergy & Sinus Group, PLLC., New York University Medical Center, and New York-Presbyterian Weill Cornell Medical Center, all partially oppose the Firms motion and request a 30-day stay due to excessive, prejudicial delays caused in part by Plaintiff retaining eight law firms to represent her in this action. Defendants also request the court to require Plaintiff to provide an Affidavit or Certificate of Merit within thirty (30) days of the stay being lifted or for the case to be dismissed with prejudice. The Certificate of Merit that was initially filed with the complaint failed to include that the attorney consulted with an expert and that the case had merit, but instead, stated in substance that the attorney was awaiting medical records and would consult with an expert and amend the Certificate of Merit once the records were received. However, the Amended Certificate of Merit was never filed.

Plaintiff partially opposes the motion by consenting to the withdrawal, but she opposes the Firm's request for a charging lien and retaining lien on her file. Plaintiff argues in substance that her discharge of the Firm was for cause and that the Firm is not entitled to reimbursement of its disbursements prior to the release of her file. Plaintiff argues in substance that she provided the Firm with the majority of the papers in her file, that such papers include her personal property, like her medical books and medical records. Plaintiff also alleges that she is not required to reimburse the Firm for its disbursements because there was no contractual agreement as the Firm failed to email her a copy of the retainer agreement, it failed to file it with the Office of Court Administration and no one at the Firm read it to her which was required because of her disability. Plaintiff also argues in substance that she was unaware of her requirement to reimburse the Firm for its disbursements and that she did not understand the retainer.

The court notes that prior to Plaintiff's discharge of the Firm, she contacted the court ex parte on multiple occasions and requested a conference in substance to discuss her dissatisfaction with the Firm's representation and whether the Firm should be entitled to a retaining lien. The court repeatedly advised Plaintiff in substance that the court could not engage in any ex parte communication with her, that she would have to include her attorney and opposing counsel on all emails, that she has a right to terminate the Firm's services at any time, but that the court would not intervene with her attorney/client relationship while she is still represented by counsel.

During the first oral argument on the motion, Plaintiff repeatedly asked the court to review her lengthy supplemental affidavit in camera, but the court refused to do so since she failed to serve the Firm with the supplemental affidavit and the motion had already been marked fully submitted. Therefore, the court would not accept any additional papers. That same day, Plaintiff filed for a reasonable accommodation for her alleged disability. The court granted

Plaintiff's request to have an assistant accompany her to court to assist her with carrying her court material and reading documents aloud if requested to do so by the court. The court scheduled an additional oral argument consistent with Plaintiff's request for a reasonable accommodation. The court permitted Plaintiff and the Firm to submit confidential affidavits to the court for in camera review regarding whether Plaintiff's discharge of the firm was for cause. The court indicated in substance that it would review the submissions and either decide the matter on the papers, or schedule a hearing, if necessary.

Plaintiff submitted a 21-page Supplemental Affidavit in Partial Opposition (For In Camera Examination Only), dated September 21, 2023, with exhibits, and Mr. Spano submitted a 6-page Confidential Affirmation in Response, dated September 25, 2023, with exhibits. The Firm provided the court with copies of Plaintiff's retainer agreement and its Retainer Statement filed with the Office of Court Administration, along with an Affirmation requesting that it be filed nunc pro tunc due to an oversight.

The court does not wish to disclose any attorney/client confidences, so the court will not include the specific factual details of Plaintiff's arguments in support of her claim that she discharged the Firm for cause and that the Firm is not entitled to either lien.

Because of the uniqueness of the attorney-client relationship, traditional contract principles are not always applied, so a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging his or her attorney (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43 [1990] [citations omitted]).

The three separate and distinct remedies of an attorney discharged without cause are a retaining lien, charging lien, and a plenary action in quantum meruit, and such remedies are not

exclusive, but cumulative (*Levy v Laing*, 43 AD3d 713, 715 [1<sup>st</sup> Dept 2007]; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 218-219 [1<sup>st</sup> Dept 1997]).

Judiciary Law § 475 provides that an attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to any favorable verdict, report, determination, decision, award, settlement, judgment or final order (NY Jud Law § 475).

An attorney of record who is discharged without cause possesses a charging lien, pursuant to Judiciary Law § 475, which constitutes an equitable ownership of the cause of action and attaches to any recovery (*see Mello v City of New York*, 303 AD2d 564, 565 [2d Dept 2003]). It ensures that the attorney can collect his or her fee from the fund he or she has created for that purpose on behalf of the client (*see LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467-468 [1995]).

Additionally, an attorney who is discharged without cause has a common-law retaining lien on the client's file in his or her possession and is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered, regardless of whether the amount is more or less than the amount provided in the contract or retainer agreement (*Sterling Corporate Tax Credit Fund XXV, L.P. v Youngblood Senior Hous. Assoc., LLC*, 115 AD3d 932, 932 [2d Dept 2014]). The retaining lien is extinguished only when the court, which controls the functioning of the lien, orders turnover of the file in exchange for payment of the lawyer's fee or the posting of an adequate security therefore following a hearing (*Cohen v Cohen*, 183 AD2d 802, 803 [2d Dept 1992]). Absent exigent circumstances, the attorney may generally not be compelled to surrender the papers and files until an expedited hearing has been held to ascertain the amount of the fees or reimbursement to which he or she may be entitled (*Mosiello v Velenzuela*, 84 AD3d 1188, 1189 [2d Dept 2011]). Although the court has the

discretion to secure an attorney's legal fees and to order the files to be returned to the client before the fees have been paid, a court may not order the return of a client's file before the client has fully paid the attorney's disbursements (*Cosgrove v Tops Mkts., Inc.*, 39 Fed Appx 661, 664 [2d Cir 2002], *Tuff & Rumble Mgmt. v Landmark Distribs.*, 254 AD2d 15, 15 [1<sup>st</sup> Dept 1998]).

However, when discharged for cause, an attorney has no right to compensation or a retaining lien (*Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]). A "for cause termination must be based on more than a client's general dissatisfaction with the attorney's performance and typically involves a significant breach of legal duty such that the client can establish that the attorney's conduct constituted a failure to properly represent the client's interests" (*Doviak v Lowe's Home Ctrs., Inc.*, 134 AD3d 1324, 1326 [1<sup>st</sup> Dept 2015] [internal quotation marks and citations omitted]).

Upon review of Plaintiff's detailed submission and the relevant case law, the court finds that Plaintiff failed to demonstrate that her discharge of the Firm was for cause. The court determines that no hearing is necessary at this time, as Plaintiff's allegations fail to demonstrate that her discharge was for cause and the Firm has sufficiently detailed the amount of its disbursements. At the conclusion of the case, should there be a favorable outcome, then the court may determine that a hearing is necessary to determine the amount of the Firm's charging lien.

In general, without disclosing any attorney-client confidences, the court finds that Plaintiff's complaints about Mr. Spano and the Firm involve her dissatisfaction with their representation including, but not necessarily limited to, her complaints about the attorneys' communication with each other and with her, their decisions regarding choice of legal strategies, her desire for a more active role in assisting with the preparation for depositions, her perception of their level of preparation and knowledge of her case, their failure to attend a court appearance

and other delays. Such dissatisfaction does not rise to the level of misconduct or a significant breach of legal duty where Plaintiff established that the Firm's conduct constituted a failure to properly represent her interests. Additionally, there is no evidence that Mr. Spano or anyone at the Firm violated Judiciary Law § 487 or that they engaged in any misconduct.

Conversely, Mr. Spano demonstrated that he has extensive experience successfully handling various types of medical malpractice cases in several state and federal courts and that he has practiced law for over thirty (30) years. He demonstrated that his discharge was not for cause and that the Firm is entitled to the charging lien should the case result in a favorable outcome and a retaining lien in the amount of \$20,961.62 prior to the release of Plaintiff's file.

Additionally, the court finds that another extensive delay for Plaintiff to retain her ninth attorney would be unduly prejudicial to Defendants. Therefore, the court stays the matter to January 4, 2024. Once the stay is lifted, the court intends to set a deadline for Plaintiff to file a sufficient Certificate of Merit, or risk having this matter dismissed with prejudice.

Thus, the court grants the Firm's motion as set forth below.

The court finds Plaintiff's arguments to the contrary to be unpersuasive. The court has considered any additional arguments raised by the parties which were not specifically discussed herein and the court denies any additional requests for relief which were not expressly granted herein.

As such, it is hereby

ORDERED that the court grants the motion of Edelman, Krasin & Jaye, PLLC to be relieved as counsel for Plaintiff Susan Lee and for their request for a charging lien and retaining lien upon filing of proof of compliance with the following conditions; and it is further

ORDERED and ADJUDGED that the court determines that Plaintiff failed to demonstrate that she discharged the movant for cause and the court grants the movant's request for a charging lien in an amount to be determined should the case result in a favorable outcome to Plaintiff and a retaining lien in the amount of \$20,961.62, to be paid in full, or for adequate security to be posted, prior to the movant's release of Plaintiff's file, unless otherwise consented to by the movant; and it is further

ORDERED that, within ten (10) days from the date of entry of this order, moving counsel shall serve a copy of this order with notice of entry upon the former client at her last known address by certified mail, return receipt requested, or by overnight delivery; and it is further

ORDERED that service of this order upon the other parties is satisfied by the court's posting to the New York State Courts Electronic Filing System (NYSCEF); and it is further

ORDERED that, together with the copy of this order with notice of entry served upon Plaintiff, moving counsel shall forward a notice directing the former client to appoint a substitute attorney by on or before January 3, 2024, and Plaintiff shall comply therewith, except that, in the event Plaintiff intends instead to represent herself or to discontinue the action against Defendants, then she shall notify the Clerk of Part 10, Ms. Bing Zhao, by emailing Ms. Zhao at SFC-Part10-Clerk@nycourts.gov, while including all parties on said email or by letter with copies to all parties, by on or before January 3, 2024; and it is further

ORDERED that this matter is stayed and no further proceedings may be taken against Plaintiff without leave of this court until January 4, 2024; and it is further

ORDERED that any new attorney retained by Plaintiff shall file a notice of appearance with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and provide the email

of an attorney who will appear for the conferences to the Part Clerk, Ms. Bing Zhao, by emailing her at SFC-Part10-Clerk@nycourts.gov by on or before January 3, 2024; and it is further

ORDERED that such service upon the Clerk of the General Clerk’s Office, the filing of a notice of appearance as provided herein, and the filing of papers as aforesaid shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties must appear for a status conference on January 11, 2024, at 9:30 a.m., in Part 10, located in Room #412 at 60 Centre Street, New York, New York; and it is further

ORDERED that if Plaintiff fails to retain new counsel prior to the date of the conference, then Plaintiff must appear at the conference and advise the court as to how she wishes to proceed with this matter, including whether she retained new counsel, whether she wishes to represent herself, or whether she wishes to discontinue the action against Defendants. Failure to appear at a court-ordered conference may result in a default judgment against the non-appearing party and dismissal of the complaint or claims.

This constitutes the decision and order of the court.

10/31/2023  
DATE

  
ERIKA M. EDWARDS, J.S.C.

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