

De Jesus v Terence Cardinal Cooke Health Ctr.

2025 NY Slip Op 33506(U)

September 17, 2025

Supreme Court, New York County

Docket Number: Index No. 158717/2020

Judge: Denis Reo

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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. DENIS REO PART 65
Acting Justice of the Supreme Court

ROXANE DE JESUS, as Guardian-Ad-Litem of ROSE VARGAS,

Plaintiff,

- v -

TERENCE CARDINAL COOKE HEALTH CENTER, CATHOLIC HEALTH CARE SYSTEM D/B/A ARCHCARE, PATIENT CARE ASSOCIATES, INC., INTEGRATED HEALTH ADMINISTRATIVE SERVICES, INC., SONOGRAPHIC IMAGING, INC., GUY NEGOUE

Defendants.

DECISION + ORDER ON MOTION

INDEX NO. 158717/2020
MOTION DATE 08/07/2025
MOTION SEQ. NO. 006

The following e-filed documents, listed by NYSCEF document number (Motion 006) 104, 105, 106, 108, 109

were read on this motion to/for MISCELLANEOUS

Upon the foregoing documents,

Roxane De Jesus as Guardian-Ad-Litem of Rose Vargas (Plaintiff), through her incoming attorneys Leitner, Varughese Warywoda, PLLC (LVW), moves to compel Plaintiff's prior counsel, Silver & Kelmachter, LLP (S&K) to turn over Plaintiff's file to LVW. In addition, Plaintiff also seeks to terminate and vacate S&K's retaining and charging liens on the matter. For the reasons set forth below, Plaintiff's motion is GRANTED in part.

Background

Plaintiff was previously represented by S&K; however, on or about December 13, 2024, she executed a Consent to Change Attorney whereby she changed representation to LVW. Concurrently with the execution of the Consent to Change Attorney, Plaintiff signed a letter to S&K terminating the attorney client relationship and demanding that S&K turn the file over to LVW (December 13th Letter).

By letter dated March 18, 2025, LVW forwarded the Consent to Change Attorney and the December 13th Letter to S&K (March 18th Letter). The March 18th Letter acknowledged S&K's charging lien and demanded that it turn the file over to LVW's office. While LVW demanded the file, it was never exchanged.

LVW's affirmation in support of the instant order to show cause demonstrates that it made numerous attempts to obtain the file. By telephone call on March 24, 2025, e-mail on March 28, 2025, e-mail on April 3, 2025, e-mail on April 21, 2025, e-mail on May 29, 2025, and telephone on June 30, 2025, LVW demanded that S&K turn over the file. All of LVW's requests for the file were unsuccessful.

In light of LVW's unsuccessful attempts to obtain the file, Plaintiff filed the instant motion demanding that S&K turn over the physical file to LVW. Again, S&K did not respond and the motion was submitted to the court unopposed.

Discussion

A discharged attorney is required to provide its former client with "all papers and property to which the client is entitled..." (Rules of Prof. Con., Rule 1.16[e]). Notwithstanding, a discharged attorney may assert both a retaining lien and charging lien on a file in order to secure payment of outstanding invoices and expenses. It is well established that "[a] retaining lien is confined to the property in the possession of the attorney." (*In re Cooper*, 291 NY 255 [1943]). In this case, the property consists of Plaintiff's physical file. With regards to a statutory charging lien, "[f]rom the commencement of an action, ... the attorney who appears for a party has a lien upon his or her client's cause of action ... and the proceeds thereof" (Judiciary Law § 475; *see Tangredi v Warsop*, 110 AD3d 788 [2d Dept. 2013]). This lien is created by operation of law and does not require notice to bring it into existence (*see Matter of City of New York [United States*

of Am.–Coblentz], 5 NY2d 300, 307 [1959]). The lien attaches at the time the action is commenced (see *Matter of Cohen v. Grainger, Tesoriero & Bell*, 81 NY2d 655, 657 [1993]; *Tangredi v. Warsop*, 110 AD3d at 788,; *Matter of Dresner v. State of New York*, 242 AD2d 627, 628, [2d Dept. 1997]).

The facts surrounding the attorney's discharge dictate whether an outgoing attorney may recover on a statutory charging lien. "Where an attorney's representation terminates upon mutual consent, and there has been no misconduct, no discharge for just cause, and no unjustified abandonment by the attorney, the attorney maintains his or her right to enforce the statutory lien" (*Tangredi v. Warsop*, 110 A.D.3d at 788 [internal quotation marks omitted]). However, an attorney who is discharged for cause is not entitled to compensation or a lien (see *Maher v Quality Bus Serv., LLC*, 144 AD3d 990, 992 [2d Dept. 2016]; *CPMI, Inc. v Kolaj*, 137 AD3d 953, 955–956 [2d Dept. 2016]; *Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699[2d Dept 2011]). If there are conflicting claims regarding whether an attorney was discharged with or without cause, a hearing is required (see *CPMI, Inc. v Kolaj*, 137 AD3d at 956 [2d Dept. 2016]; *Byrne v Leblond*, 25 AD3d 640, 642, [2d Dept. 2006]).

There is no evidence suggesting why S&K was discharged from this matter. As there is no evidence regarding whether S&K's discharge was with or without cause, a hearing must be held at the appropriate time to determine S&K's right to a fee in this matter. The charging lien in this matter is statutory and there is no evidence that demonstrates that S&K intended to waive its right. Based upon the foregoing, S&K's charging lien was not waived and Plaintiff's motion to terminate the charging lien is DENIED.

However, S&K's inaction demonstrates that it intends to waive its right to retain the physical file. A retaining lien may be waived by an outgoing attorney. (*Corby v Citibank, N.A.*,

143 AD2d 587, 588-89 [1st Dept. 1988] [[a]n attorney's waiver or the establishment of exigent circumstances is the exception to the general rule that a court may not direct the release of papers without a hearing]). Additionally, an attorney's inaction may constitute a waiver of a lien. (*See Kaplan v Reuss*, 113 AD2d 184, 187 [2d Dept 1985] ["[t]he waiver rule is intended to prevent other parties from being misled by the attorney's actions or inaction. Therefore, if the attorney knowingly allows the proceeds to pass into the hands of the client or another party without asserting his or her rights or if the attorney fails to enforce the lien within a reasonable time, the lien will be deemed waived and the attorney relegated to a plenary action against the client for any fees."]) [citations omitted]).

The evidence demonstrates that S&K waived its right to a retaining lien. LVW has made seven (7) attempts to secure the file; however, it still has not been exchanged. In addition, LVW brought the instant order to show cause seeking to discharge S&K's liens and to compel S&K to turn over the file. Despite being served with the order to show cause, S&K has not submitted opposition to the motion or has exchanged the file with LVW and has not affirmatively asserted a retaining lien on the file. S&K's inaction can only be viewed as a waiver of its retaining lien on the file as all attempts to secure the file or to obtain information about the existence of a lien have gone unanswered.

LVW's motion to vacate the retaining lien is GRANTED.

Accordingly it is:

ORDERED that Silver & Kelmacher, LLP is directed to turn over Plaintiff's file to Leitner Varughese Warywoda, PLLC within fifteen (15) days of the date this order is served with notice of entry; and it is further

ORDERED that Silver & Kelmachter, LLP's retaining lien is hereby vacated; and it is further

ORDERED that the extent of Silver & Kelmachter, LLP's charging lien on the proceeds of this litigation, if any, shall be determined at a hearing at the conclusion of the matter; and it is further

ORDERED that the parties are to appear for a status conference on November 20, 2025 at 10 a.m. in Part 65;

Denis Reo

<u>9/17/2025</u>			<u>DENIS REO, A.J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE