

Silva v Orfao

2012 NY Slip Op 30378(U)

February 3, 2012

Sup Ct, Nassau County

Docket Number: 16427/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JOAO SILVA, as Executor of the Estate of LEONOR SILVA,
LEONOR SILVA, Individually and MARIA GOMES, as
Trustee for the JOAN SILVA TRUST,

TRIAL/IAS PART 31
NASSAU COUNTY

Plaintiffs,

Index No.: 16427/09
Motion Seq. No.: 05
Motion Date: 12/21/11

- against -

ALMIRA ORFAO a/k/a ALMIRA ROCHA,

Defendant.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation with Combined Memorandum of Law,	
Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs' current attorneys move for an order determining and extinguishing the fee claims of plaintiffs' former attorneys and for imposition of sanctions and attorneys fees incurred by plaintiffs. Plaintiff's former attorneys, Horowitz, Tannenbaum & Silver, PC ("HTS"), oppose the motion.

The mother of plaintiff Joao Silva was killed in a two vehicle automobile accident on April 8, 2008. The decedent was a passenger in a vehicle driven by an aunt, defendant Almira Orfao a/k/a Almira Rocha. Plaintiff Joao Silva signed a retainer agreement, dated April 10, 2008,

with HTS, “for all purposes in connection with injuries and damages” arising out of the accident. HTS had obtained offers of settlement from the two insurance carriers of the two drivers involved in the accident, when it discovered that plaintiff Joao Silva had retained Grunwald & Seman PC., plaintiffs’ current attorneys.

Plaintiff Joao Silva avers that, when HTS refused to commence a wrongful death action, he discharged them during a telephone conversation in late February or early March of 2009. HTS corresponded with plaintiff Joao Silva in March and April of 2009, advising him of the settlement offers in the total amount of \$57,500.00 and their attorneys’ lien on that amount.

Plaintiffs’ current attorneys commenced this action against plaintiff Joao Silva’s aunt, defendant Almira Orfao a/k/a Almira Rocha, in August, 2009, and, in March, 2010, commenced a second action against the other vehicle’s driver. Plaintiffs’ current attorneys filed and perfected a pre-judgment order of attachment herein, attaching defendant Almira Orfao a/k/a Almira Rocha’s bank account in the amount of \$15,052.06.

HTS sought leave to intervene herein, but this relief was denied by this Court’s order dated May 10, 2010. Plaintiffs’ current attorneys allege that the Court left open the question of the existence of an attorney fee lien in favor of HTS and they seek relief now on the grounds that the continued assertion by HTS of a fee lien hampers the receipt of the wrongful death settlement proceeds. They argue that HTS was discharged for cause and should be sanctioned for continuing to improperly assert their attorney fee lien.

HTS insists that they were not discharged for cause and that the offers of settlement for the proceeds of the two insurance policies were obtained solely through the efforts of their firm’s legal services. They further claim plaintiff Joao Silva was unrealistic about his expectations and that their advice to plaintiff Joao Silva was the “most appropriate.” *See* HTS’s Silver Affirmation in Opposition ¶ J. HTS retains possession of their file on the settlements. HTS was never the

attorney of record in either action.

Pursuant to New York law, a client may discharge an attorney at anytime, with or without cause. *See Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 541 N.Y.S.2d 742 (1989).

Where an attorney is discharged for cause, the attorney is not entitled to compensation or a lien, notwithstanding a specific retainer agreement. *See Campagnola v. Mulholland, Minion & Roe*, 76 N.Y.2d 38, 556 N.Y.S.2d 239 (1990); *Alami v. Volkswagen of America, Inc.*, 51 A.D.3d 952, 859 N.Y.S.2d 472 (2d Dept. 2008); *Callaghan v. Callaghan*, 48 A.D.3d 500, 852 N.Y.S.2d 273 (2d Dept. 2008).

Where the discharge is without cause, an attorney has three remedies: (1) a retaining lien against the client's papers and files until all outstanding fees are paid; (2) a charging lien against any judgment or settlement in favor of the client; (3) a plenary action in *quantum meruit*. *See Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York*, 302 A.D.2d 183, 754 N.Y.S.2d 220 (1st Dept. 2002). *See also Wankel v. Spodek*, 1 A.D.3d 260, 767 N.Y.S.2d 429 (1st Dept. 2003). These remedies are not exclusive, but cumulative. *See id.* A motion to resolve a fee dispute raises the issues of both a retaining lien and a charging lien. *See Costello v. Kiaer*, 278 A.D.2d 50, 717 N.Y.S.2d 560 (1st Dept. 2000).

The common-law retaining lien secures the attorney's right to the reasonable value of the services rendered based upon the attorney's retention of the file. *See Lai Ling Cheng v. Modansky Leasing Co.*, *supra* at 458; *Lelekakis v. Kamamis*, 8 A.D.3d 630, 778 N.Y.S.2d 904 (2d Dept. 2004); *Eighteen Associates, LLC v. Nanjim Leasing Corp.*, 297 A.D.2d 358, 746 N.Y.S.2d 599 (2d Dept. 2002). The statutory charging lien, pursuant to Judiciary Law 475, requires that the attorney establish that he was at some point the attorney of record. *See Rodriguez v. City of New York*, 66 N.Y.2d 825, 498 N.Y.S.2d 351 (1985); *Russell v. Zaccaria*, 8 A.D.3d 255, 777 N.Y.S.2d 325 (2d Dept. 2004). The filing of a retainer agreement with the

Office of Court Administration does not constitute an appearance in a legal proceeding sufficient to make him or her an attorney of record. *See Wahba v. Parmar*, 1 A.D.3d 507, 767 N.Y.S.2d 247 (2d Dept. 2003).

Where the attorney has been discharged before a lawsuit has been commenced, the attorney is limited to recovering in *quantum meruit* the reasonable value of the services rendered. *See Picciolo v. State*, 287 A.D.2d 721, 732 N.Y.S.2d 60 (2d Dept. 2001). In deciding the reasonable value of the services rendered, the Court should consider evidence of the time and skill required, the complexity of the matter, the attorney's experience, ability and reputation, the client's benefit from the services and the fee usually charged by other attorneys for similar services. *See Callaghan v. Callaghan*, *supra* at 501. Where the Court retains jurisdiction over a fee dispute, there is no need for a plenary action. *See Russo v. City of New York*, 48 A.D.3d 540, 853 N.Y.S.2d 87 (2d Dept. 2008).

A client's "dissatisfaction with reasonable strategic choices regarding litigation" does not "as a matter of law, constitute cause for the discharge of an attorney." *Doviak v. Finkelstein & Partners, LLP*, 90 A.D.3d 696, 934 N.Y.S.2d 467 (2d Dept. 2011); *Callaghan v. Callaghan*, *supra* at 501. A hearing is generally required to determine whether a client has cause to discharge an attorney. *See Matter of Callan & Byrnes LLP v. Ruth E. Bernstein Law Firm*, 48 A.D.3d 459, 853 N.Y.S.2d 560 (2d Dept. 2008), *lv app. den.* 10 N.Y.3d 711, 860 N.Y.S.2d 483 (2008); *Byrne v. Leblond*, 25 A.D.3d 640, 811 N.Y.S.2d 681 (2d Dept. 2006); *Andreiev v. Keller*, 168 A.D.2d 528, 563 N.Y.S.2d 88 (2d Dept. 1990); *Katsaros v. Katsaros*, 152 A.D.2d 539, 543 N.Y.S.2d 478 (2d Dept. 1989); *Doviak v. Finkelstein & Partners, LLP*, *supra*; *Alami v. Volkswagen of America, Inc.*, *supra*; *Costello v. Kiaer*, *supra*.

Application of the foregoing principles of law to the facts herein mandates the conclusion that a hearing is warranted to determine whether HTS was discharged with or without cause. If the discharge was with cause, attorneys' fees must be denied. If the discharge was without cause, the hearing shall continue on the issue of the *quantum meruit* value of the services rendered by

[* 5]
HTS prior to discharge in obtaining the settlement proceeds.


Based on the foregoing, the instant motion is hereby **GRANTED to the extent that a hearing is ordered** before a court attorney/referee in accordance with this decision. Said hearing is to be held before the Calendar Control Part (CCP) at 9:30 a.m. on the 3rd day of April, 2012.

Plaintiffs' current attorneys shall file a Note of Issue on or before March 19, 2012. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the Hearing. A copy of this Order shall be served upon plaintiff's former attorneys by March 19, 2012.

On this record, the Court finds no basis for sanctions and the portion of plaintiffs' current attorney's motion that requested such relief is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 3, 2012

ENTERED
FEB 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE