

S & F N.Y., LLC v Reed Elsevier, Inc.

2011 NY Slip Op 34327(U)

September 15, 2011

Supreme Court, New York County

Docket Number: 109031/09

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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S&F NEW YORK, LLC d/b/a PORCAO RIO'S LLC
and/or RIO'S CHURRASCARIA,

INDEX NO. 109031/09

Plaintiff,

-against-

REED ELSEVIER, INC. and 360 PARK
ASSOCIATES, LLC,

Defendants.
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JOAN A. MADDEN, J.:

Plaintiff moves for an order directing its former counsel, Darius A. Marzec to turn over all files pertaining to plaintiff in his possession, custody or control. Plaintiff's counsel asserts that despite attempts to obtain plaintiff's file from attorney Marzec, he has not responded, and as a direct result of Mr. Marzec's failure to provide a copy of the file, plaintiff's counsel is unable to properly prosecute a claim on plaintiff's behalf.

In opposing the motion, Mr. Marzec argues that the motion should be denied and the court should "recognize the charging and retaining liens" to which his firm is entitled. He states that "[e]ven before new counsel entered the case in 2010, the undersigned's office took upon itself, as a sign of good faith, to scan and email file documents to the new counsel, as requested by the principal of S&F," and that was "done about a year ago." He also states that "I am not aware of counsel telephoning my office and requesting any documents from the undersigned since the time all documents were provided about a year ago." He states that "[a]ll documents in

the file, currently in secure storage, have been provided to counsel or are part of the public record” in the files of the New York County Clerk and the Civil Court, New York County. He submits an invoice dated February 28, 2001 listing \$10,908.88 as the total due and payable, and asserts that since the requested documents have either been provided or are otherwise available in the public record, the court should order plaintiff or plaintiff’s counsel, to pay all legal fees and expenses with regard to any work done by his firm in opposing the instant motion and appearing in court.

When the parties appeared for oral argument, the court issued an interim order directing attorney Marzec, by to serve and file a copy of his retainer agreement with plaintiff for the instant action, and the invoices as to the work performed in connection with this action. In response to the interim order, attorney Marzec submitted a two-page “summary bill” dated May 20, 2011, which was prepared by his “billing company.”¹ He also submitted a copy of an unsigned retainer agreement for the “landlord/tenant matter” in Civil Court, and states that he has “not been able to locate a written retainer agreement in the instant case file.”

Where, as here, a law firm is discharged without cause, it has three separate and distinct remedies for recovering the value of its legal services: 1) a retaining lien which permits the attorney to retain the client’s papers and files until the fees are paid; 2) a Judiciary Law §475 charging lien which provides security against the proceeds of favorable recovery by the former client; and 3) a plenary action in quantum meruit for a judgment for the reasonable value of the services rendered, which is enforceable against all of the former client’s assets. See Schneider.

¹Although plaintiff’s new counsel objects that his copy of Mr. Marzec’s billing summary is incomplete and shows only the first three lines, the court’s copy of that document is complete.

Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 AD2d 183 (1st Dept 2002). These remedies are not exclusive, but cumulative, so a law firm need not elect one remedy to the exclusion of others, and does not waive its right to commence a plenary action against the client by commencing a proceeding pursuant to Judiciary Law § 475. Id.; Butler, Fitzgerald & Potter v. Gelmin, 235 AD2d 218 (1st Dept 1997).

Under the circumstances presented, the court finds that attorney Marzec is not entitled to a retaining lien. Since Mr. Marzec maintains that he and his firm have already turned over copies of the papers in their file to plaintiff's new counsel, he has lost whatever leverage a retaining lien affords a discharged attorney. See Zodkaevitch v. Feibush, 49 AD3d 424 (1st Dept 2008).

As to a charging lien, attorney Marzec has not produced the retainer agreement for the instant action or the invoices detailing the nature of the work performed. While he submits a "billing summary" from his billing company, that document alone is insufficient to establish the nature of the work performed. However, it is not disputed that Mr. Marzec and his firm did perform legal service for plaintiff, and plaintiff's new counsel concedes that they "should be entitled to legal fees for work reasonably performed in furtherance of the claims in this action," and has offered to stipulate to a charging lien in the amount of \$2,500. Since attorney Marzec is seeking a charging lien of at least \$10,908.88, he and his firm may commence a proceeding pursuant to Judiciary Law § 475 to fix the amount of their charging lien, in the event plaintiff obtains a favorable recovery in this action.

Thus, as Mr. Marzec and his firm do not have a retaining lien on the file, plaintiff's motion is granted and Mr. Marzec and his firm shall turn over the file to plaintiff's new counsel.

Accordingly, it is

ORDERED that plaintiff's motion is granted, and within fifteen days (15) days of the date of this decision and order, plaintiff's former counsel, Darius A. Marzec, Esq. of the Marzec Law Firm, P.C, shall turn over to plaintiff's counsel, all files pertaining to plaintiff, which are in his possession, custody or control; and it is further

ORDERED that the parties are directed to appear for a status conference on October 20, 2011 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

The court is mailing copies of this decision and order.


DATED: September 15, 2011

ENTER:

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