DECISION AFTER TRIAL & ORDER

INDEX No. 20020-12

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/21/12
ADJ. DATES 5/2/13
Mot. Seq. # 001 - Mot D
Mot. Seq. # 002 - Mot D
Hearing Held: 5/2/13
CDISP Y x N ___

In the matter of the Application of BRACKEN, MARGOLIN, BESUNDER, LLP, Attorneys at Law pursuant to Judiciary Law § 475 to have a Charging Lien and Fee fixed by the Court Petitioner, -against- PAMELA RAYMOND, Respondent.	BRACKEN, MARGOLIN, BESUNDER Petitioner Pro Se 1050 Old Nichols Rd. Islandia, NY 11749 STEPHEN J. McGIFF, PC Atty. For Respondent 96 So. Ocean Ave. Patchogue, NY 11772 PAMELA RAYMOND Respondent 63 Browns River Rd. Sayville, NY 11782

DECISION AFTER HEARING

By prior order of this Court, dated March 22, 2013, the motion (#002) by the petitioner law firm for leave to reargue the petition served in this proceeding to fix a charging lien in favor of the petitioner was granted and upon reargument, the Court restored the petition (#001) to the motion calendar for May 2, 2013, at which time the Court conducted an evidentiary hearing on the issues raised in the petition and answer of the respondent. In the petition, petitioner seeks attorney's fees in the sum of $110,960.40 and a charging lien for that amount.

The petitioner law firm, on behalf of the respondent, Pamela Raymond (hereinafter Raymond) commenced a hybrid action, under INDEX No. 6591-11, entitled *Raymond v Richard J. Stafford, The Sayville Inn 1888, Inc. and Grace Peters*, to recover money damages by reason of the purported tortious conduct on the part of the individual defendants by which they allegedly converted monies belonging to the corporate defendant in which Raymond claimed a 50% ownership interest. Raymond further sought declaratory relief, a constructive trust, and a portion of certain real property owned by defendant, Richard J. Stafford (hereinafter Stafford) in which Raymond claimed a 50% ownership interest. Raymond asserted claims for partition and sale of the real property known as 199 and 203 Main Street, Sayville New York, from which the corporate respondent/defendant, Sayville Inn, operates its restaurant business. In the SEVENTH cause of action set forth in her amended petition/complaint, Raymond demanded the partition

and sale of residential real property in Sayville, New York, known as the Brown's River property, that was owned jointly with Stafford. She also demanded a judicial dissolution of the corporate defendant, an accounting of its assets and liabilities and the appointment of a temporary and permanent receiver.

The parties in the underlying action had a close working relationship for over 30 years operating a popular restaurant business, known as the Sayville Inn. During that time, the couple acquired various properties and investments, often titled singularly in Stafford's name. Personal strife between the parties led to a break down of the business relationship.

From the very first conference held before the Court, it was made clear that Stafford, who had assumed operational control of the restaurant, agreed that all property acquired during the relationship would be deemed to be a 50/50 ownership interest between the parties, no matter how titled over the years. In fact, as will be detailed below, no defenses were offered to contest Raymond's claim to a 50% ownership interest in the acquired real property. Settlement negotiations commenced almost immediately, once that concession was made. However, after the initial motions, the on-going negotiations did not stop the motion practice by Raymond and the petitioner law firm.

The initial motion (#001) and notice of petition (#002) by Raymond for provisional relief to recover money damages, title to real property and for dissolution of the corporate defendant, was considered under CPLR Article 6364 and BCL § 1104-a and denied, except for limited injunctive relief, as set forth in this Court's decision of May 11, 2011. Thereafter, a motion by Raymond (#003) for partial summary judgment on the SEVENTH cause of action set forth in the complaint for a partition of Brown's River residential real property, was considered under CPLR 3212 and RPAPL Article 9 and granted, by order dated October 17, 2011. The opposing papers submitted by Stafford failed to demonstrate any genuine questions of fact or equitable circumstances which would warrant a denial of the partial summary judgment demanded by the plaintiff and failed to offer serious opposition to the claim. Pursuant to RPAPL §§ 911 and 913, an attorney, Kenneth M. Seidell, Esq., was appointed Referee to the partition claim to ascertain and report on the rights, shares and interests of the parties in the subject premises.

Then, a motion (#004) was made by Raymond for an order granting her leave to amend the petition/complaint served in the special proceeding/action, under CPLR 3025. That motion was granted by order dated October 25, 2011, with limited opposition offered to the amendment. Next, by motion (#005), Raymond sought summary judgment under CPLR 3212, RPAPL §1501 and RPAPL Article 9 on her SEVENTH cause of action set forth in the amended petition/complaint, wherein she sought a declaration quieting the title in a one-half interest in the commercial real property, that is, the restaurant parcel, and for partition of the property, which was titled solely in Stafford's name. The application was granted, since the record reflected no opposition to the request for a declaration that Raymond was the owner of a one-half or 50% interest in the premises known as 199 and 203 Main Street, Sayville, New York and that title therein should reflect their co-equal tenancy in common. By order dated January 13, 2012, the Court declared Raymond to be a tenant in common with respondent/defendant Stafford and that each owned an equal but fractional, undivided 50% interest in the real property known as 199 and 203 Main Street, Sayville, New York. A referee, Robert Flynn, Esq., was appointed on the partition claim.

As the negotiations between the parties entered into a phase where the proposals from Raymond constantly shifted from conference to conference, there was a new motion (#006) by Raymond for an order adjudicating Stafford to be in contempt of the preliminary injunction that was granted by order dated May 11, 2011. By that motion, Raymond claimed that Stafford violated the limited provisions of the preliminary injunction and temporary restraining order of May 11, 2011, and sought to hold him in both criminal and civil contempt. The motion also, for the second time, sought the appointment of a temporary receiver. That motion was considered under the relevant provisions of the Judiciary Law and denied, by order dated December 20, 2011.

Then, a hearing was held on January 31, 2012 on an order to show cause (#007) by Stafford, seeking modification of the temporary restraining order to exclude Raymond from the business and a cross application for relief (#008) by Raymond from the temporary restraining order. The Court rendered a decision in open court, on the record, on January 31, 2012. Finally, for purposes of this application, by order to show cause (#009) under CPLR 321, petitioner law firm was granted an order, dated May 30, 2012, permitting the firm leave to withdraw as the attorney of record for Raymond.

At the May 2, 2013 hearing, the Court heard from the counsel of the petitioner law firm who handled the vast majority of the legal work and who billed the greatest number of hours. Documents were submitted to support the claim. Additionally, the Court heard from a partner of the firm, Harvey B. Besunder, Esq., who offered testimony in support of the hourly rate charged by the lead attorney, the quality of the work offered, and the claimed success obtained by that legal work.

The Engagement Letter, dated October 22, 2010 (Pl. Ex. 1), sets forth the following hourly rate for the attorney rendering service:

John P. Bracken	$475.
Linda U. Margolin -	$450.
Harvey B. Besunder -	$450.
William T. Ferris, III -	$375.
Jeffrey Powell -	$375.
Associate Attorneys -	$175 - 325.
Paralegals -	$ 75 - 150.

The letter also notes that "[a]ccounts with balances due our firm over thirty (30) days shall accrue interest at the rate of sixteen (16%) percent per annum." Under the heading "Firm's Rights in Event of Non-Payment," Raymond was advised that the plaintiff "*may assert a lien against* the files of your matter(s), and any documents belonging to you and in our possession, or *any amount which may become due to you as a result of the Firm's services*, in the event you doe (sic) not make payments of fees and expenses as required (emphasis added)." Here, the petitioner law firm released the files and documents to the incoming attorney.

The monthly invoices to Raymond (Pl. Ex. 2) disclose that the petitioner law firm's retention commenced on October 10, 2010 and that on November 16, 2010, three months before the filing of the action, opposing counsel agreed in a telephone call with John P. Bracken, Esq. to a 50/50 split of the interests between the parties.

A total compilation of hours expended by each attorney, expenses incurred, and amounts paid was not provided as an exhibit. The Court has examined each invoice, from the first dated November 8, 2010 to the final one offered at the hearing, dated August 6, 2012, three months after being relieved as counsel, and has found that during that time frame, Raymond paid $27,622.48 in fees and expenses. The total hours expended by each attorney is as follows:

John P. Bracken -	4.0
Linda U. Margolin -	1.1
William T. Ferris, III -	3.8
Marilyn Lord James -	1.0
Gerard McCreight -	2.9
Jeffrey Powell -	318.2

The invoices show that Marilyn Lord James was billed at $275 an hour and that Gerard McCreight was billed at $235 an hour on the March 7, 2011 invoice and at $325 an hour on the April 6, 2011 invoice. The invoices also reflect that the billing rate for William T. Ferris, III was actually $400 an hour and not $375 as set forth in the Retaining Letter (*see* Pl. Ex. 1). Additionally, a paralegal, Janice Sciabarra, billed 2.8 hours at a reduced rate of $40.18, for a total of $112.50.

Therefore, for the services performed, combining fees paid to what is sought as a charging lien, plaintiff billed for a total sum of $138,582.88.

Here, petitioner has moved this court to fix its charging lien, pursuant to Judiciary Law § 475, at $110,960.40. It has long been recognized that courts have traditional authority to supervise the charging of fees for professional services under the court's inherent and statutory power to regulate the practice of law (*see* ***Greenwald v Scheinman***, 94 AD2d 842, 463 NYS2d 303 [3d Dept 1983]; ***Hom v Hom***, 210 AD2d 296, 622 NYS2d 282 [2d Dept 1994]). The attorney's obligations transcend those prevailing in the commercial marketplace (*see* ***Matter of Cooperman***, 83 NY2d 465, 633 NYS2d 1069 [1994]).

When an attorney's withdrawal from a case is justifiable, the attorney is entitled to recover for services rendered on the basis of quantum meruit and to impose a retaining lien on the file or a charging lien on the proceeds of the judgment (*see* ***Kahn v Kahn***, 186 AD2d 719, 588 NYS2d 658 [2d Dept 1992]; ***Matter of Ehmer***, 272 AD2d 541, 708 NYS2d 436 [2d Dept 2000]; ***Allen v Rivera***, 125 AD2d 278, 509 NYS2d 48 [2d Dept 1986]; *see also* ***Lai Ling Cheng v Modansky Leasing Co., Inc.***, 73 NY2d 454, 541 NYS2d 742 [1989]). After cancellation, the terms of a retainer agreement no longer serves to establish the sole standard for the attorney's compensation (*see* ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010]). The amount of the lien must be fixed not alone upon the basis of a rescinded contract "but also upon a foundation built of the volume and quality of the professional services actually and necessarily performed" (***Tillman v Komar***, 259 NY 133, 136 [1932]). Fair and reasonable value is determined at the time of the discharge (*see* ***Matter of Cohn v Grainger, Tesoriero & Bell***, 81 NY2d 655, 602 NYS2d 788 [1993]). The charging lien, by its terms, "attaches to a verdict, report, determination, decision, judgment or final order in his client's favor" (Judiciary Law §475).

New York Courts have broad discretion in determining what constitutes reasonable compensation for legal services. For instance, "[t]he determination of what constitutes reasonable fees is a matter 'within the sound discretion of the Surrogate, who is in a superior position to judge factors such as the time, effort and skills required'"(***Matter of McCann***, 236 AD2d 405, 654 NYS2d 578 [2d Dept 1997], *citing* ***Matter of Papadogiannis***, 196 AD2d 871, 872, 602 NYS2d 68 [2d Dept 1993]). A court may consider its own knowledge and experience and may form an independent judgment from the facts and evidence before it as to the nature and extent of the services rendered (*see* ***Jordan v Freeman***, 40 AD2d 656, 336 NYS2d 671 [1st Dept 1972]).

As noted by the Second Circuit in ***Sutton v NY City Tr. Auth.***, 462 F3d 157, 161 (2d Cir 2006):

> [a] charging lien, although originating at common law, is equitable in nature, and the overriding criterion for determining the amount of a charging lien is that it be "fair[.]" (internal citations omitted).

In assessing the amount of a charging lien on a quantum meruit basis, a court should consider: (1) "the difficulty of the matter"; (2) "the nature and extent of the services rendered"; (3) "the time reasonably expended on those services"; (4) "the quality of performance by counsel"; (5) "the qualifications of counsel"; (6) "the amount at issue"; and (7) "the results obtained (to the extent known)" (***Sequa Corp. v GBJ Corp.***, 156 F3d 136, 148 [2d Cir 1998]). In calculating a reasonable attorney's fee, courts should also apply

what was formerly referred to as the "lodestar" method, but more recently called "the presumptively reasonable fee" (*see* ***Arbor Hill Concerned Citizens Neighborhood Assn. v County of Albany***, 522 F3d 182, 190 [2d Cir 2008]). To reach a specific dollar figure for the value of the services rendered, the presumptively reasonable fee is comprised of a reasonable hourly rate multiplied by a reasonable number of expended hours (*see* ***Finkel v Omega Communication Servs., Inc.***, 543 FSupp2d 156, 164 [EDNY 2008]; *see also* ***Arbor Hill***, 522 F3d *at* 189, *supra*; ***Melnick v Press***, 2009 WL 2824586 [EDNY 2009] [a charging lien case that applied New York law]). The court should assess the case-specific considerations at the outset and factor them into its determination of a reasonable hourly rate, which is then multiplied by a reasonable number of hours expended to reach the presumptively reasonable fee (*see* ***McDaniel v City of Schenectady***, 595 F3d 411, 420 [2d Cir 2010]). In summary, the hours actually expended and the rates actually charged are not dispositive of the amount at which a charging lien should be fixed.

The burden is on the party seeking attorney's fees to submit sufficient evidence to support the hours worked and the rates claimed (*see* ***Hensley v Eckerhart***, 461 US 424, 453, 103 SCt 1933, 76 LEd2d 40 [1983]). Finally, as instructed by the Supreme Court in ***Fox v Vice***, – US – , 131 SCt 2205, 2216, 180 LEd2d 45 (2011), when trial courts examine a fee application, they "need not, and indeed should not, become green-eyeshade accountants."

In light of the Court's familiarity with this two-year long litigation and the nature and quality of the work performed, including the numerous settlement conferences conducted, the Court feels particularly qualified to determine this application.

Before turning to the issue of the hourly rate, there are some initial observations. First, is the deduction for hours expended on issues that do not emanate from the client's cause of action. A charging lien under Judiciary Law § 475 attaches from the commencement of the action and the attorney "has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor..." A review of the monthly invoices to Raymond (Pl. Ex. 2) reveals that the 3.8 hours expended by William T. Ferris, III, did not deal with the client's cause of action before this Court, but instead involved a Family Court proceeding. Accordingly, these hours are deducted from the charging lien.

Secondly, it is noted that numerous entries by Jeffrey Powell contain notations of telephone conferences with the client concerning an order of protection (*see e.g.* 4/17/12; 3/20/12; 1/3/12; 3/14/11; 2/8/11; 2/25/11; 1/25/11; 12/1/10; 11/4/10; 11/6/10; 11/7/10; 11/8/10; 11/11/10; 11/12/10; 11/19/10); or the status of a criminal action (*see* 2/22/12; 1/12/12); or conversations about the District Attorney's Office (*see* 6/20/11); or child support (*see* 4/8/11); or "androgel abuse (effect on child)" (*see* 1/4/12). However, instead of parsing out these hours and notations individually, the Court will address the issue below.

Next, the Court must deduct the time spent on the motion to withdraw, since such activities are not in furtherance of obtaining a favorable judgment on behalf of Raymond and are not the subject of a charging lien (*see* ***Cass & Sons, Inc. v Stag's Fuel Oil Co., Inc.***, 148 Misc2d 640, 643, 561 NYS2d 519 [Sup Ct New York County 1990]; ***Trendi v Sportswear, Inc. v Air France***, 146 Misc2d 111, 113, 549 NYS2d 561 [New York Civ Ct 1989]). Therefore, the Court will not count those hours billed for Jeffrey Powell after May 10, 2012, when the determination was made to withdraw as counsel. The total deducted from hours billed is 5.3 hours.

Additionally, current case law supports the preposition that the lien should be fixed to account for services rendered beginning at the time of the action's commencement and not at the time that the firm was retained (*see* ***Melnick v Press***, 2009 WL 2824586 at *6 [EDNY 2009]; ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010]; ***Winkfield v Kirschenbaum & Phillips, P.C.***, 2013 WL 371673 at *3 [SDNY 2013]), since, pursuant to the explicit terms of Section 475, an attorney has a lien against his client's cause of action upon

commencement of the action. Here, since the action was commenced on February 25, 2011, the hours from October 28, 2010 to February 25, 2011, should be deducted. However, in light of the Court's determination as set forth below, the Court does not see the need to address this issue directly.

Reasonable Hourly Rate

In determining a reasonable hourly rate, courts consider whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation" (***Blum v Stenson***, 465 US 886, 895 n. 11, 104 SCt 1541, 79 LEd2d 891 [1984]; *see* ***Savino v Computer Credit, Inc.***, 164 F3d 81, 87 [2d Cir 1998]). Here, the relevant community is Suffolk County, or by extension, the Eastern District of the Federal Court. The reasonable hourly rate should take into account all of the case-specific factors as set forth above.

The burden is on the applicant to establish the prevailing hourly rate for the work performed (*see* ***Gutierrez Direct Mktg. Credit Servs., Inc.***, 267 AD2d 427, 701 NYS2d 116 [2d Dept 1999]). At the hearing, a partner of the firm, Harvey B. Besunder, Esq., testified as to the experience of the attorney who expended the most hours on this matter, Jeffrey Powell, Esq., and spoke to the reasonableness of the charging lien requested. Aside from this partner affirmatively supporting the firm's fee schedule and the experience of the counsel who handled the matter, no other evidence was offered to demonstrate the prevailing market rates in Suffolk County. Moreover, without in any way detracting from the firm's reputation in the legal community, which is of the highest caliber, the Court was troubled by the testimony on this important issue from one who has a self-interest in the outcome. The partner will benefit from the ruling of the Court, as will his firm. Such casts doubt on the opinion offered to support the claim that the requested rates are in line with those prevailing in the community.

Since the partner's testimony was of little help to the "case-specific inquiry" that must be conducted to determine the prevailing market rates for counsel of similar experience and skill, and no other evidence of the prevailing market rates in Suffolk County was forthcoming, the Court is required to turn to case law to guide its determination. The Court has researched the prevailing market rates in the Eastern District of New York. In ***Melnick v Press***, 2009 WL 2824586 at *9 (collecting cases), *supra*, Judge Bianco performed an exhaustive review of the case law discussing the "prevailing market rates in the Eastern District of New York for lawyers in comparable cases involving real property disputes." That case, like the instant one, involved a partition action. Judge Bianco concluded that "the range of appropriate billing rates is $200-$375 per hour for partners and $100- $295 per hour for associates" (*id.*). Numerous courts have followed Judge Bianco's conclusions in ascertaining a reasonable hourly rate (*see* ***Barney v Con Edison***, 2010 WL 8497627 [EDNY 2010]; ***4B's Realty 1530 CR39, LLC v Toscano***, 818 FSupp2d 654 [EDNY 2011]; ***Gesualdi v Diacomelli Tile Inc.***, 2010 WL 1049262 [EDNY 2010]; ***Penberg v HealthBridge Mgt.***, 2011 WL 1100103, at *6 [EDNY 2011]).

With regard to the hourly rate of the partners, John P. Bracken and Linda U. Margolin, this Court certainly believes that they have an outstanding amount of experience and can be expected to command hourly rates near the top of the scale. However, in light of their limited involvement, as reflected in the billing, their experience does not support an hourly rate in excess of the prevailing rate for attorneys in this community involved in real property disputes. The Court finds that the hourly rate of $375 takes into account their legal experience but their limited expenditure of time and oversight in this litigation.

With regard to the hourly rate of Jeffrey Powell, and upon an examination of the seven factors listed above, the Court must express serious reservations. First, he is not a partner of the firm and, therefore, does not command partner rates. At the hearing, his position was described as "of counsel." As such, the Court will consider his status as a senior associate. As more detailed later in this decision, on occasion, not all of the actions undertaken by Mr. Powell were reasonable or productive. Upon detailed examination by this

Court of the factor that reviews "the quality of performance by counsel," and the record in its entirety, one can not expect the legal services provided herein to command hourly rates near the top of the scale.

Therefore, the Court will reduce his rate to $250, the average current rate for senior associates in the Eastern District ($200- $295). Since no biographical information was offered to support the reasonableness of the rates of Marilyn Lord James and Gerard McCreight, the Court may use its discretion to award fees at a lower rate than requested. Based upon their limited involvement with this matter, the Court will similarly set their rate at $200. Upon consideration of the case-specific factors, the Court finds that any rate higher than these are not warranted. The firm has submitted no evidence to justify departure from these market rates.

Hours Expended

In determining the presumptively reasonable fee, a court may adjust the hours actually billed to a number the court determines to have been "reasonably expended on the litigation" (***Hensley v Eckerhart***, 461 US at 433, *supra*). The number of hours claimed must not be excessive or duplicative and courts can exclude hours not "reasonably expended" (*id.* at 434). In reviewing fee applications, it is unrealistic to expect courts to "evaluate and rule on every entry in an application" (***New York State Assn. For Retarded Children, Inc. v Carey***, 711 F2d 1136, 1146 [2d Cir 1983]). Where a court finds the claim to be excessive, or that the time spent was wasteful or otherwise unnecessary, it may decrease or disallow certain hours or order an across-the-board percentage reduction in compensable hours (*see* ***Gierlinger v Gleason***, 160 F3d 858, 882 [2d Cir 1998]; ***Kirsch v Fleet Street, Ltd.***, 148 F3d 149, 173 [2d Cir 1998]; ***Stair v Calhoun***, 722 FSupp2d 258 [EDNY 2010]). Hours that reflect inefficiency (*see* ***Seigel v Merrick***, 619 F2d 160, 164, n. 9 [2d Cir 1980]) or padding, that is, hours that are excessive or otherwise unnecessary, are disallowed (*see* ***Matter of Rahmey v Blum***, 95 AD2d 294, 300-01, 466 NYS2d 350 [2d Dept 1983]; *see also* ***Quarantino v Tiffany & Co.***, 166 F3d 422, 425 [2d Cir 2009]).

As recently noted in an article entitled, "Does hourly billing encourage padding of legal bills?," in the Suffolk Lawyer, May 2013 edition, (Allison C. Shields, p 17 col 1):

> "Padding" legal bills, even unintentionally, is an inherent problem when hours are used as the basis for fees. It is human nature to want to make more money, and hourly billing encourages making more money by putting in more hours, whether those hours are valuable to the client and the ultimate result or not. Instead of emphasizing results, service and outcomes, hourly billing rewards expenditure of time - and that is always going to result in some level of 'padding.'

In arriving at a determination of whether the claimed hours were reasonably expended, the Court must examine the case-specific factors noted above. With regard to the factor concerning the results obtained, it is noted that the instant litigation remains pending, preventing the Court from knowing what the final award may be on the outstanding claims. However, where, as here, a party achieved, at the time of counsel's withdrawal of representation, only limited success in the litigation, the award of fees should be reasonable in relation to the results obtained. As set forth above, the defendant Stafford, conceded to the 50% ownership split of the assets before the commencement of the litigation. An inordinate amount of time was spent by Raymond and her counsel renegotiating proposed settlements. There was a constant changing of positions, by Raymond and her counsel, as to whether or not they wanted ownership of the main asset, that is, the restaurant. At the hearing, Mr. Powell testified that Raymond was a difficult client to work with. He also stated that he did not believe it was his role to advise her as to a particular settlement and that his role was to simply act as her voice in the negotiations. While the Court agrees with counsel that Raymond may have been demanding, the Court does not believe that an attorney's role is so limited.

As noted by the Court of Appeals, when people hire "attorneys to exercise professional judgment on a client's behalf–"giving counsel"–is imbued with ultimate trust and confidence" (*see* ***Matter of Cooperman***, 83 NY2d at 472, *supra*). An experienced attorney 'gives counsel' to a client based upon his or her professional judgment; he or she is more than just a megaphone for a client's ever-changing wishes or desires. Such a posture may explain the many hours set forth in the billing records that consist of nothing more that listening to voice messages, telephone calls with the client, and telephone calls between counsel and friends or relatives of the client. For instance, the monthly invoices (Pl. Ex. 2) are replete with notations such as "[r]etrieve 6 extended voicemail messages" (7/11/11 on August 4, 2011 invoice) or "retrieve numerous extended VMMs from client" (1/23/12 on February 2, 2012 invoice). Since it was conceded that subject properties were to be either transferred or sold, there existed a certainty of compensation. Knowing that hourly billing rewards expenditure of time, it is left to this Court to determine whether those hours are valuable to the client and the ultimate result. Here, the Court is not persuaded that such activities added value to the plaintiff's case and they should be substantially discounted.

Moreover, the services rendered were often routine, straightforward, and relatively simple. This was not a difficult case, since, as set forth above, there was an immediate concession by Stafford that the properties would be deemed to have been held in a 50/50 ownership basis, despite the then-existing legal title. During the retention, the action did not involved extensive discovery, depositions, or expert witnesses. The motion practice is detailed above. Once the percentage of ownership of the assets was conceded, the case did not raise any novel or complex issues. The Court finds that the time spent by Mr. Powell was not entirely reasonable or productive. As set forth above, time was spend on various motions that had little merit.

A review of the record and the case-specific factors, leads to the conclusion that the nature, extent, and quality of the work was not reasonable. The court can look to its own familiarity with the case and notes that the initial hybrid pleading, that was filed with the Suffolk County Clerk on February 25, 2011, did not contain a notice of petition and without same could not be scheduled before the Court. Thereafter, the notice of petition seeking immediate dissolution was denied, since it failed to comply with BCL § 1106 (*see* Short Form Order dated May 11, 2011). Time and effort was spent just attempting to get the matter before the Court. Repeated requests were made for the appointment of a temporary receiver, without the factual predicate to support such drastic relief. Finally, the firm did not obtain "high quality results" (***Skylon Corp. v Greenberg***, 164 F3d 619 [2d Cir 1998]). In fact, to the contrary, at the time of withdrawal by counsel, aside from the service of the pleadings and failed motion practice seeking contempt, very little had been achieved (*see* ***Pilitz v Incorporated Vil. of Freeport***, 762 FSupp2d 580, 584-584 [EDNY 2011] [where the outgoing law firm played no part in the achievement of the settlement reached, it was not entitled to any charging lien for the reasonable value of the legal service rendered up to the date of discharge]).

Additionally, in reviewing the billing records, the Court notes block-billed entries in the billing statements. Block billing - the "lumping together of discrete tasks" - "makes it difficult for the court to allocate time to individual activities in order to gauge the reasonableness of time expended on each activity" (***Penberg v Healthbridge Mgt.***, 2011 WL 1100103 at *9 [EDNY 2011]). There exists a substantial and repeated use of block-billing in the hours of Mr. Powell. Under such circumstances, courts have utilized percentage reductions "as a practical means of trimming fat from a fee application" (***New York State Assn. For Retarded Children, Inc. v Carey***, 711 F2d at 1146, *supra*). Just on the single issue of substantial use of block-billing, courts have ordered a 15% reduction to billed hours (*see* ***Melnick v Press***, 2009 WL 2824586 at *6 [EDNY 2009] [compilation of cases]), or even a 25% reduction (*see* ***Penberg v Healthbridge Mgt.***, 2011 WL 1100103 at *9 [EDNY 2011]).

An additional factor supports a reduction of the hours expended. The Court notes entries that warrant additional deductions, that is, hours expended in traveling to the numerous court dates (*see e.g.*, 1/9/12; 10/28/11; 7/1/11; 7/12/11; 6/17/11). Presumably, some amount of the time billed was for travel time from counsel's Islandia office to Riverhead. "Travel time is appropriately compensated at half of the counsel's

normal billing rate" (***Rozell v Ross-Holst***, 576 FSupp2d 537, 540 [SDNY 2008]; ***Barfield v NY Health & Hospitals Corp***., 537 F3d 132, 139 [2d Cir 2008]; ***Riverhead Sanitation & Carting Corp. v Hampton Hills Golf & Country Club***, 2013 WL 1401263 [Sup Ct Suffolk County 2013]).

Moreover, as previously noted, numerous entries by Jeffrey Powell contain notations of telephone conferences concerning an order of protection; or the status of a criminal action; or conversations about the District Attorney's Office; or child support; or other non-relevant issues. These hours must be deducted from the charging lien request.

For the reasons discussed above, the Court directs an across-the-board percentage reduction in the hours expended of 35%, on account of the excessive and unnecessary billings and other deductions, as set forth above (*see* ***Antonmarchi v Consolidated Edison Co. of New York, Inc***., 2010 WL 3359477 [SDNY 2010] [35% reduction in hours allowed for lead counsel]; ***McDonald v Pension Plan***, 450 F3d 91, 96-97 [2d Cir 2006] [35% reduction in hours billed]; ***L.I. Head Start Child Dev. Servs., Inc. v Economic Opportunity Commn. of Nassau County, Inc.***, 865 FSupp2d 284 [EDNY 2012] [35% reduction in fees requested]; *see also* ***Cho v Koam Med. Serv***., 524 FSupp2d 202, 207-208 [EDNY 2007] [40% reduction in hours billed]; ***Francis v Altantic Infiniti, Ltd.***, 34 Misc3d 1221(A), 950 NYS2d 608 [Sup Ct Queens County 2012] [45% reduction in fees requested]; ***LaBarbera v D & R Materials, Inc***., 588 FSupp2d 342, 349 [EDNY 2008] [45% reduction in hours billed]; ***Southampton Day Camp Realty, LLC v Gorman***, 2012 WL 5893907 [Sup Ct Suffolk County 2012] [50% reduction in hours allowed for lead counsel]; ***Finkel v Omega Communication Servs., Inc***., 543 FSupp2d 156 [EDNY] [50% reduction in hours billed]; ***Days Inn Worldwide, Inc. v Amar Hotels, Inc***., 2008 WL 2485407, at *10 [SDNY 2008] [75% reduction in fees requested]; ***Riverhead Sanitation & Carting Corp. v Hampton Hills Golf & Country Club***, 2013 WL 1401263 [Sup Ct Suffolk County 2013] [88% downward adjustment to the hours allowed]; ***Dialcom LLC v AT & T Corp***., 37 Misc3d 1228(A), 964 NYS2d 58 [Sup Ct Kings County 2012] [100% reduction in fees requested]).

After careful review of the record, the Court finds that the petitioner is entitled to a charging lien for the reasonable value of the services rendered from October 28, 2010 to May 10, 2012, subject to the elimination of the hours listed for William Ferris, Esq., a 35% deduction in total hours expended by Jeffrey Powell, Esq., after the deduction of 5.3 hours from the date of the petitioner law firm's decision to withdraw as counsel, and a reduction in the hourly rate for each attorney, as discussed above.

Summary

	Billed Hrs.	Rate	Allowed Rate	Hrs.		
John P. Bracken -	4.0	$475.	$375.	4.0	=	$1,500.
Linda U. Margolin -	1.1	$450.	$375.	1.1	=	$ 412.50
William T. Ferris, III -	3.8	$375.		0.0	=	$ 0.00
Marilyn Lord James -	1.0	$275	$200.	1.0	=	$ 200.00
Gerard McCreight -	2.9	$235 / $325	$200.	2.9	=	$ 580.00
Jeffrey Powell -	318.2	$375.	$250.	318.2 - 5.3 -35%	=	197. = $49,250.00
Paralegals -	2.8	$40.18	$40.18	2.8	=	$112.50
				Total	=	$52,055.00

The Court declines petitioner's invitation to examine the fee request under the "excessive fee" standard set forth pursuant to the Rules of Professional Conduct (22 NYCRR 1200.0), rule 1.5 (formerly Code of Professional Responsibility DR 2-106 [22 NYCRR 1200.11(b)]), since the considerations that enter into whether a privately negotiated fee was "excessive" under the disciplinary rule are very different from

those to determine an appropriate charging lien (*see* ***Uy v Bronx Mun. Hosp. Ctr.***, 182 F3d 152 [2d Cir 1999]).

Costs and Expenses

The Court has examined the invoices and calculated the disbursements and costs incurred in prosecuting the action, which consists largely of the court filing fees, service charges, postage, and computerized legal research. Raymond does not dispute the requests for costs and expenses (*see* ***Stair v Calhoun***, 722 FSupp2d at 276, *supra*). The Court's review finds the expenditures to be reasonable, considering the above-described motion practice. The total that the Court finds to be reasonable is $5,472.99 and are proper items to attach to the lien. However, a review of the billing statements shows that payments of $887.65 ($582.66 on December 9, 2010 statement; $250 on March 7, 2011 statement; and $54.99 on August 4, 2011 statement) were previously paid by Raymond. The Court will also deduct the costs incurred in bringing the order to show cause for withdrawal, which totaled $330.63. Therefore, the Court will subtract $1,218.28 from the expenses allowed, resulting in a sum of $4,254.71. The combined charging lien figure is $56,309.71.

Deduction for payments made

The record discloses that Raymond paid $27,622.48 in fees and expenses. The Court must subtract from that sum the $887.65 known to have been previously paid by Raymond for costs and expenses. From the above computation, the Court must deduct $26,734.83 for payments already made by Raymond for fees and expenses (*see* ***Stair v Calhoun***, 722 FSupp2d 258, 276 [EDNY 2010]; ***Melnick v Press***, 2009 WL 2824586 at *10 [EDNY 2009]). Therefore, the total charging lien is $29,574.88.

Interest

As set forth in the retainer letter, "[a]ccounts with balances due our firm over thirty (30) days shall accrue interest at the rate of sixteen (16%) percent per annum" (Pl. Ex. 1). In fact, the final invoice before the withdrawal of the petitioner law firm shows an interest charge of $6,302.43 (*see* Pl. Ex.2, June 5, 2012 invoice). However, with the withdrawal as counsel, the consideration is one of a quantum meruit fee analysis. Since the retainer letter, once terminated is no longer the controlling standard (*see* ***Pilitz v Incorporated Vil. of Freeport***, 762 FSupp2d 580, 583 [EDNY 2011]), interest pursuant thereto is not a factor to be determined at this time by the Court. The petition before the Court is one "to fix attorneys fees and charging lien", that is, to determine the lien. The only issue is the reasonable value of the legal services provided. This is not an action to enforce a charging lien. As noted above, an attorney's recovery under Judiciary Law § 475 is contingent upon his client obtaining a favorable outcome, since the charging lien is a specific attachment to the funds which constitute the client's recovery (*see* ***Butler, Fitzgerald & Potter v Sequa Corp.***, 250 F3d 171, 177 [2d Cir 2001]). Unlike a judgment in a plenary action which can be exercised against all of the former client's assets, the charging lien attaches to the verdict, decision, judgment, or amount agreed upon in a settlement, once the agreement is made.

While there is case law that holds prejudgment interest may arise from the date of service of the motion to fix the lien (*see* ***Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York***, 302 AD2d 183, 192, 754 NYS2d 220 [1st Dept 2002]) or from the date the underlying litigation was settled (*see* ***Klein v Eubank***, 263 AD2d 357, 693 NYS2d 541 [1st Dept 1999]), or immediately upon discharge (*see* ***Simon v Unum Group***, 2010 WL 2541145 at *3 [SDNY 2010], *rearg denied* 2010 WL 2788175 [SDNY 2010], *affd* ***Simon v Sack***, 451 Fed Appx 14, 2011 WL 6091681 [2d Cir 2011]), such determinations were made in the context of a claim to enforce a charging lien after a settlement or award.

The Court therefore excludes from this determination any calculation of interest, including the interest charge of $6,302.43. In any event, while the Disciplinary Rules of the Code of Professional

Responsibility do not address the question of whether an attorney can charge interest on monies owed for legal services provided and the amount of interest that can be charged, case law has limited same to what is "fair and reasonable" (***Kutner v Antonacci***, 16 Misc3d 585, 589, 837 NYS2d 859 [Dist Ct, Nassau County, 1st Dist, 2007] [9% prejudgment interest rate]; *compare* ***Bryan L. Salamone, P.C. v Cohen***, 965 NYS2d 324, 2013 WL 1867006 [Sup Ct Suffolk County 2013] [interest rate rendered retainer agreement null and void]).

Accordingly, the total charging lien is $29,574.88. Payment of the amount is to be deferred until enforcement of the lien is sought to be made from any affirmative recovery in the action, upon the conclusion thereof (*see* ***Rosen v Rosen***, 97 AD2d 837, 468 NYS2d 723 [2d Dept 1983]), against the fund created thereby (*see* ***Chadbourne & Parke, LLP v AB Recur Finans***, 18 AD3d 222, 794 NYS2d 349 [1st Dept 2005]; *see also* ***Golden v Whittemore***, 125 AD2d 94, 510 NYS2d 340 [4th Dept 1986]; ***Desmond v Socha***, 38 AD2d 22, 327 NYS2d 178 [3d Dept 1971]; ***Rosewood Apts. Corp. v Perpignano***, 2005 WL 1084396 [SDNY 2005]; ***Emery Celli Brinckerhoff & Abady LLP v Rose***, 29 Misc3d 1230(A), 2010 WL 4941989 [Sup Ct New York County 2010]).

DATED: 7/12/13

THOMAS F. WHELAN, J.S.C.