

<b>Starr v Gelbart &amp; Kesselman Dentistry, P.C.</b>
2017 NY Slip Op 31962(U)
September 15, 2017
Supreme Court, New York County
Docket Number: 805034/2013
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 6

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AUDREA STARR,

Plaintiff,

Index No.  
805034/2013

**DECISION and  
ORDER**

- against -

Mot. Seq. #002

GELBART AND KESSELMAN DENTISTRY, P.C.,  
Individually and doing business as FAMILY DENTAL  
GROUP, MICHAEL GELBART, D.D.S. AND CARL  
BLUMENSTEIN, D.M.D., P.C., Individually and doing  
Business as FAMILY DENTAL GROUP, ROBERT  
FRIEDMAN, D.M.D., and MICHAEL P. GELBART, D.D.S.,  
both Individually and doing business as FAMILY DENTAL  
GROUP,

Defendant.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff Audrea Starr (“Starr”) commenced this dental malpractice action by summons and complaint on January 24, 2013 against Defendants Gelbart and Kesselman Dentistry, P.C., Michael Gelbart, D.D.S., Carl Blumenstein, D.M.D., P.C., Robert Friedman, D.M.D., and Michael P. Gelbart, D.D.S. Originally, Starr retained the law firm of Lufty & Santora.

Pursuant to CPLR 321, James Lufty, Esq. (“Lufty”) on behalf of the law firm of Lufty & Santora moves by Order to Show Cause to withdraw as counsel for Starr. Lufty also moves for a 90 day stay of this action to permit Starr to retain new counsel. Lufty claims that his firm has reached an impasse with Starr because her settlement demand is inconsistent with Lufty’s analysis of the case. Lufty further claims that the attorney-client relationship has broken down because Starr refuses to speak with him over the phone. Lufty moves to preserve a charging and retaining lien to be determined upon payment of a settlement or judgment. He lastly requests that the Court direct Starr to immediately pay the disbursements,

costs and expenses related to this litigation. Lufty however does not append any exhibits with respect to the costs and disbursements to his Order to Show Cause.

Starr does not oppose. Starr no longer wishes to retain Lufty & Santora because Starr alleges that “Mr. Lufty’s handling of this case [is] inadequate and incompetent.” (affidavit of Starr at 1) Starr avers that after 4 years, Lufty “never completed the depositions of the 2 defendants although he told [Starr] and the court he would.” (affidavit of Starr at 1) Additionally, Starr claims that she would not mediate because the “demand was never discussed beforehand with [Starr] and . . . [Starr] was made aware of it by a third party.” (affidavit of Starr at 1) Starr further claims that “Mr. Lufty wrote in an email of October 2016 and 4 additional times in the 5 months prior in voice calls that he ‘shall move to be relieved as [Starr’s] lawyer.’ [Starr] agreed with him each time that he should go and that [Starr] wanted . . . to speak with the Judge.” (affidavit of Starr at 1) Starr alleges that “Lufty refused to file any motion and kept telling the courts at each subsequent appearance date that he was scheduling [Starr’s] mediation.” (affidavit of Starr at 1) However, “[t]hat was a complete fabrication as Mr. Lufty and [Starr] ha[d] not spoken in over 1 year.” (affidavit of Starr at 1)

Lufty provides no reply.

#### Attorney Withdrawal

CPLR 321 (2) provides, “An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.” The First Department has stated, “[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client.” (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]).

#### Charging and Retaining Liens

Judiciary Law § 475 provides in relevant part,

“From the commencement of an action, special or other proceeding in any court . . . or the initiation of any means of alternative dispute resolution including . . . mediation . . . the attorney who appears for a party 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, and the proceeds thereof in whatever hands they may come . . ."

"Under Judiciary Law § 475, a charging lien automatically comes into existence, without notice or filing, upon commencement of the action, and is measured by the reasonable value of the attorney's services in the action, unless fixed by agreement." (*Resnick v Resnick*, 24 AD3d 238, 239 [1st Dept 2005]) "A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action . . ." (*Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005]) "[A] charging lien is waived by an attorney who *without just cause* neglects or refuses to proceed with the prosecution of the case." (*Klein v Eubank*, 87 NY2d 459, 463 [1996]) "[W]here an attorney's representation terminates and there has been no misconduct, no discharge for just cause and no unjustified abandonment by the attorney, the attorney's right to enforce the statutory charging lien is preserved . . ." (*id.* at 1996) "Generally, however, if any attorney is discharged without cause he will be allowed a charging lien upon the proceeds of the lawsuit, the amount to be determined on a *quantum meruit* basis at the conclusion of the case . . . and his fees will be made a charge included within the fees to which the incoming attorney will be entitled." (*People v Keeffe*, 50 NY2d 149, 157 [1980])

A retaining lien "gives an attorney the right to keep, with certain exceptions, all of the papers, documents and other personal property of the client which have come into the lawyer's possession in his or her professional capacity as long as those items are related to the subject representation." (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 186 [1st Dept 2002]) "[A]n attorney's retaining lien generally lasts 'until [the attorney's] disbursements have been fully paid and, as a general rule, his fees have been determined.'" (*id.* at 187) "[A] court has discretion to 'secure the fees and to order the files to be returned to the client before the fees have been paid . . .'" (*id.* at 187 n 1) However, "absent proof of discharge for cause, [an attorney] cannot be compelled to give up plaintiff's file before such disbursements are paid or secured." (*Tuff & Rumble Management, Inc, v Landmark Distributors, Inc.*, 254 AD2d 15, 15 [1st Dept 1998]) Accordingly, in *Warsop v Novik* (50 AD3d 608, 609 [1st Dept 2008]), the First Department of the Appellate Division modified the trial court's order to provide "that the subject file be turned over only after plaintiff pays disbursements . . . or provides security therefor . . ."

“With respect to either lien, a hearing may be required to determine the amount of compensation due and owing to the discharged attorney.” (*Roe v Roe*, 117 AD3d 1217, 1219 [3d Dept 2014]) The Court, in its discretion, may substitute the statutory charging lien for the retaining lien with respect to an attorney’s fee. (*Security Credit Systems, Inc. v Perfetto*, 242 AD2d 871, 872 [4th Dept 1997])

### For Cause

Where an attorney violates the Code of Professional Responsibility, the attorney forfeits any entitlement to fees. (*Yannitelli v D. Yannitelli & Sons Consts. Corp.*, 247 AD2d 271, 272 [1st Dept 1998]; *Matter of Winston*, 214 AD2d 677, 677 [2d Dept 1995])

The Code of Professional Responsibility provides in relevant part, “A lawyer shall act with reasonable diligence and promptness in representing a client.” (Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.3 [a]) “A lawyer shall not neglect a legal matter entrusted to the lawyer.” (Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.3 [b]) “A lawyer shall . . . keep the client reasonably informed about the status of the matter.” (Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.4 [a] [3])

### Discussion

The attorney-client relationship between Lufty and Starr has deteriorated because Starr has not spoken with Lufty in “over 1 year.” She refuses to speak with Lufty over the phone. Sufficient cause therefore exists in this case for Lufty & Santora to withdraw as counsel. (*see Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]).

Although Lufty requests that the Court order Starr to immediately pay the disbursements, costs and expenses related to this litigation, Lufty has not provided the Court with any information as to these disbursements, costs and expenses. The Court cannot direct Starr to pay or secure an unknown amount. In the interest of reducing delay, the Court will accord Lufty one last opportunity to submit his disbursements, costs and expenses to Starr.

However, the Court in its discretion substitutes the charging lien for the retaining lien with respect to Lufty’s fee. (*see Security Credit Systems, Inc. v Perfetto*, 242 AD2d 871, 872 [4th Dept 1997]) The charging lien remains until

such time as a Court determines whether Lufty's representation terminated for cause. (*see Roe v Roe*, 117 AD3d 1217, 1219 [3d Dept 2014])

Wherefore it is hereby

ORDERED that the motion of the law firm of Lufty & Santora to be relieved as attorneys for plaintiff Audrea Starr is granted without opposition; and it is further

ORDERED that no further proceedings may be taken in this matter without leave of this court for a period of 30 days from the date of this order within which time plaintiff Audrea Starr must appoint a substitute attorney by October 15, 2017 or shall be deemed to be proceeding *pro se*; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Lufty & Santora serve a copy of this order with notice of entry upon Audrea Starr and upon the attorneys for all other parties appearing herein by overnight mail; and it is further

ORDERED that, WITHIN 3 DAYS OF THE DATE OF THIS DECISION, the law firm of Lufty & Santora serve a copy of the disbursements, costs and expenses upon Audrea Starr; and it is further

ORDERED that, WITHIN 5 DAYS OF THE DATE OF THIS DECISION, Audrea Starr pay the disbursements, costs and expenses or provide security therefor should she dispute them; and it is further

ORDERED that, WITHIN 6 DAYS OF THE DATE OF THIS DECISION, the law firm of Lufty & Santora serve Audrea Starr's client file upon Audrea Starr notwithstanding whether Lufty & Santora served a copy of the disbursements, costs, and expenses upon Audrea Starr within 3 days of the date of this decision; and it is further

ORDERED that, Lufty & Santora's charging lien on Audrea Starr's causes of action is substituted for the retaining lien and preserved until such time as a Court may hear and determine whether Lufty's representation terminated for cause; and it is further

ORDERED that any new attorney retained by plaintiff Audrea Starr shall file a notice of appearance with the Clerk of the Trial Support Office (Room 158) and the Clerk of the Part; and it is further

ORDERED that all parties are directed to appear for a compliance conference on October 17, 2017, at 9:30 AM in Part 6, 71 Thomas Street, Room 205 D

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: SEPTEMBER 15, 2017



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Eileen A. Rakower, J.S.C.