

Diaz v Riverview Operating Co., LLC
2019 NY Slip Op 34244(U)
April 26, 2019
Supreme Court, Queens County
Docket Number: 701280/2018
Judge: Joseph Risi
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plaintiffs to commence a negligence action. The action was commenced on January 26, 2018 by the filing of a summons and complaint. By letter dated April 6, 2018, William Schwitzer & Associates, P.C. was notified by plaintiff Diaz that he had retained substitute counsel and that he was discharging them along with a duly executed Consent to Change Attorney.

Mullaney & Gjelaj, P.L.L.C., incoming counsel for the plaintiff Diaz, now move to compel William Schwitzer & Associates, P.C., outgoing counsel for plaintiff Diaz, to turnover its entire file for the within action. An attorney who has been discharged by his or client without cause has a retaining lien on the client's litigation papers and files in his or her possession (*see Mosiello v Velenzuela*, 84 AD3d 1188, 1189 [2nd Dept. 2011] *citing Lai Ling Cheng v Madansky Leasing Co.*, 73 NY2d 454, 457-458 [1989]; *Robinson v. Rogers*, 237 NY 467, 470-471 [1924]; *Lelekaksi v Kamanis*, 8 AD3d 630 [2nd Dept. 2004]). "Absent exigent circumstances, the attorney may generally not be compelled to surrender the papers and files until an expedited hearing has been held to ascertain the amount of the fees or reimbursement to which he or she may be entitled" (*Mosiello v Velenzuela*, at 1189 *citing Theroux v Theroux*, 145 AD2d 625, 626 [2nd Dept. 1988]); *Mint Factors v Cedar Tide Corp.*, 133 AD2d 222 [2nd Dept. 1987]). If the outgoing attorney is discharged for cause, the attorney is not entitled to any fee or lien, notwithstanding a specific retainer agreement (*see Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696 [2nd Dept. 2011]; *Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38 [1990]; *Callaghan v Callaghan*, 48 AD3d 500 [2nd Dept. 2008]). A discharge for cause refers, generally, to an attorney's impropriety or misconduct, or the attorney's abandonment of the client's case (*see Klein v Eubank*, 87 NY2d 459 [1996]; *Teichner v W&J Holsteins, Inc.*, 64 NY2d 977 [1985]) "An attorney is discharged for cause when his or her conduct falls 'below the ordinary and reasonable skill and knowledge commonly possessed by a

member of the profession' ”(*Batista v KLS-Kachroo Legal Services, P.C.*, 2012 NY Slip Op 32016 (U) [Sup. Ct. NY Co. 2012] *citing Peirce v. Neuman*, 2011 NY Misc. Lexis 3288 [Sup. Ct. NY Co. July 1, 2011]). However, “where 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” (*see Ramirez v Willow Ridge Country Club, Inc.*, 60 AD3d 406, 406 [1st Dept. 2009] *quoting Klein v Eubank*, at 464).

The movant submitted no admissible proof that William Schwitzer & Associates, P.C. was discharged for cause. In so finding, the Court notes that the Order to Show Cause is not supported with any testimony from the plaintiff Diaz and that furthermore, it appears that plaintiff Rivera has not discharged William Schwitzer & Associates, P.C. Instead, the Order to Show Cause is supported with the affirmation of counsel who has no personal knowledge of the circumstances which resulted in the law firm’s discharge. As such, the Court finds that the movant failed to demonstrate that the outgoing counsel was not acting within its right in seeking to enforce its lien prior to turning over the file to incoming counsel. Furthermore, the court cannot compel William Schwitzer & Associates, P.C. to transfer papers upon which they have a retaining lien before determining the value of the attorneys’ services and before assuring that payment for those services was adequately secured (*see Mint Factors v Cedar Tide Corp.*, at 222; *Pileggi v Pileggi*, 127 AD2d 751 [2nd Dept. 1987]; *Artim v Artim*, 109 AD2d 811 [2nd Dept. 1985]; *Rosen v Rosen*, 97 AD2d 837 [2nd Dept. 1983]; *Petrillo v Petrillo*, 87AD2d 607 [2nd Dept. 1982]; *Gamble v Gamble*, 78 AD2d 673 [2nd Dept. 1980]). The outgoing attorneys retaining lien depending on the retention of possession of the file, and conferred on them no rights other than to retain possession of the file until the payment for their services are secured (*see Mint Factors v Cedar Tide Corp.*, at 222; *First Nat. Bank & Trust Co. Of*

Ellenville v Novick Realty Corp., 72 AD2d 858, 859 [3rd Dept. 1979]). Accordingly, a hearing is warranted inasmuch as the parties are unable to agree to the amount of the disbursements (*Mosiello v Velenzuela*, at 1188).

ORDERED, that this matter is set down for a hearing on May at in Part 3, Courtroom 26 of the Queens County Supreme Court, located at 88-11 Sutphin Boulevard, Jamaica, New York 11435, on Tuesday, May 21, 2019 at 2:30 p.m.

Plaintiff's incoming counsel is directed to file proof of service by first class mail of a copy of this Order with Notice of Entry upon all parties, as well as on William Schwitzer & Associates, P.C. with the clerk of the Court on or before May 6, 2019.

This constitutes the decision and order of the Court.

Date: April 26, 2019


4/26/19
HON. JOSEPH RISI, A.J.S.C.