At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of May 2023.

P R E S E N T:

HON. WAYNE P. SAITTA,
Justice.

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KORSINSKY & KLEIN, LLP,
Plaintiff,

-against-

FHS CONSULTANTS, LLC,
Defendant.

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DECISION AND ORDER

Index No. 513969/16

Mot. Seq. No. 17

The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Notice of Motion, Affirmations, Memoranda of Law, and Exhibits Annexed	327-366
Affirmations in Opposition, Memoranda of Law, and Exhibits Annexed	368-378
Reply Affirmation	379
Additional Papers (Second Department's Decision & Order)	382, 385, 387-388

In this action to recover damages for breach of contract, plaintiff Korsinsky & Klein, LLP ("plaintiff"), moves for an order:

(1) pursuant to CPLR 3211 (b), striking the extant affirmative defenses of defendant FHS Consultants, LLC ("defendant"); namely: (a) documentary evidence, (b) failure to state a claim on which relief can be granted, (c) laches, (d) unclean hands, (e) that defendant complied with all applicable laws, regulations, and statutes, (f) that no act or omission of defendant proximately caused any of plaintiff's damages, (g) that defendant did not willfully, knowingly, or negligently commit any wrongful, illegal, or inappropriate act, (h) any damages allegedly sustained by plaintiff were the result solely of its own actions, (i) that plaintiff's demand for punitive damages is not permitted under

New York law for claims involving breach of a private contract, (j) plaintiff failed to attach the underlying agreement and failed to specifically reference the portions thereof that defendant allegedly breached, (k) plaintiff failed to provide an affidavit explaining, describing, or attaching the invoices that allegedly form the basis of its account-stated claim, and (l) plaintiff materially breached the underlying agreement with defendant, in each instance, because each such defense lacks merit and is an extension of the relief previously requested by defendant and granted by the Court, by short-form order, dated June 15, 2022 (the "June 2022 order"), which approved defendant's discontinuation of its counterclaims, and its withdrawal of its other affirmative defenses, in each instance, with prejudice;

(2) pursuant to CPLR 3212 (e), granting it partial summary judgment on the issue of liability in the amount of $288,903.59 (the "summary-judgment amount"), together with interest thereon from October 31, 2016, on the first, third, and fourth causes of action (all sounding in breach of contract), as well as on the tenth cause of action (sounding in account stated), of the second amended complaint;

(3) pursuant to CPLR 3212 (e), granting it partial summary judgment on the issue of liability on the sixth cause of action (sounding in breach of contract) and directing defendant's successor counsel to turn over to plaintiff $1,018.60 held in relation to the Tattnall matter representing plaintiff's share thereof (the "Tattnall escrow amount");[1]

[1] The Tattnall escrow amount is subsumed into the summary-judgment amount (NYSCEF Doc No. 339).

(4) directing defendant to account for all monies paid with respect to matters it assigned to plaintiff (as pleaded in the second and third causes of action for accounting and breach of contract, respectively), or in the alternative and/or in addition, pursuant to CPLR 3212 (c), directing a hearing on damages;

(5) pursuant to CPLR 3212 (c), directing a hearing on the reasonable value of plaintiff's legal services on those matters in which it did not appear as counsel of record; and

(6) pursuant to CPLR 6401, appointing "a receiver to substitute as counsel for any cases [in] which [defendant] failed to obtain new counsel" and for ancillary relief.

Defendant opposes all branches of plaintiff's motion.

Summary of Evidence Before the Court

(A)

Plaintiff is a law firm whose predecessor was retained to represent (and which, as the successor firm, continued to represent) defendant on various collection matters for the latter's clients. Defendant's clients (insofar as they were referred to plaintiff for collection) were, for the most part, nursing-home facilities who were owed receivables (Medicare, Medicaid, and private pay) for services they provided to their patients. The collection matters on contingency constituted the bulk of plaintiff's work for defendant. There was only one hourly matter (known as "Egan") which defendant referred to plaintiff for collection.

A written agreement, dated August 30, 2007 (the "retainer"), governed the terms of defendant's retention of plaintiff for contingency and, separately, for hourly collection

matters (NYSCEF Doc No. 333). According to the retainer, plaintiff's fee (excluding appeals) on the contingency matters was calculated (unless agreed to otherwise) at 22% of the amount "collected"; *i.e.*, when the recipient of the funds (be it the nursing facility, defendant, or plaintiff) was paid the amount due by Medicare, Medicaid, or the patient (or his/her family or estate) (the "contingency matters") (Retainer, ¶¶ 3, 9). It appears that plaintiff's contingency fee in Medicaid matters was 80% of 10% of the sums actually received by the facility.[2] The hourly matters (if so designated by defendant) were billed by plaintiff to defendant at plaintiff's then-prevailing hourly rates (the "hourly matters") (*id*., ¶ 3). In addition, defendant was to pay – when billed by plaintiff and regardless of any recovery – all costs, expenses, and other disbursements which plaintiff incurred on its behalf (*id*., ¶¶ 4-5). Defendant had the right to terminate plaintiff's services at any time upon written notice to plaintiff (*id*., ¶ 6).

(B)

By October 2014, the relationship between the parties soured. By email, dated October 30, 2014, timed at 3:58 p.m., from defendant's principal Saul Elliott Goldbaum ("Goldbaum") to plaintiff's principal Mark Korsinsky ("Korsinsky") "formally request[ed] that [plaintiff's] office cease working on any of [defendant's] files and prepare to forward them to a different attorney for collection" (the "termination email").[3] A few days thereafter, an email, dated November 6, 2014, timed at 9:37 a.m., from

[2] Defendant's outside counsel's (Morse Geller's) letter to plaintiff, dated October 4, 2014, at page 1 (annexed as exhibit to defendant's answer at NYSCEF Doc No. 341) ("Attorney Geller's letter").

[3] The email was read into the transcript of Goldbaum's December 18, 2019, EBT at page 388, lines 2-16 (NYSCEF Doc. No 364).

Goldbaum to plaintiff's partner, Joseph Klein ("Klein"), reiterated that: (1) defendant terminated the retainer with plaintiff for most of the then-outstanding contingency matters and for all hourly matters; (2) defendant wanted plaintiff to transfer most of the then-outstanding contingency matters to other counsel defendant which had selected (collectively, the "transferred matters");[4] and (3) plaintiff, over defendant's objection, wanted to keep "over 20" then-outstanding contingency matters to work on post-termination (collectively, the "retained matters").[5] A response email, dated November 16, 2014, timed at 9:15 p.m., from Klein to Goldbaum, proposed, with respect to the transferred matters, a 50-50 split of plaintiff's contingency fee with successor counsel.[6] In response, successor counsel proposed a 25-75 split of plaintiff's fee on certain of the transferred matters, which proposal plaintiff rejected.[7]

(C)

Two years later, defendant, by letter, dated November 28, 2016, reaffirmed (by email) its prior termination of its relationship with plaintiff (the "termination letter").[8] Defendant, by way of the termination letter, reiterated its earlier request for plaintiff to transfer the retained matters, as well as all other then-outstanding contingency matters, to

[4] By agreement, dated March 18, 2014, defendant had retained Attorney Jason Gang as successor counsel ("successor counsel") to work on those contingency-collection matters which defendant would refer to him (NYSCEF Doc No. 335). The contingency-collection matters referred by defendant to successor counsel would later include (subject to the latter's acceptance on a matter-by-matter basis) some (but not all) of the transferred matters from plaintiff.

[5] FHS0000693 (NYSCEF Doc No. 340).

[6] FHS0000692 (NYSCEF Doc No. 340).

[7] Attorney Geller's letter at unnumbered page 4 (annexed as exhibit to defendant's answer at NYSCEF Doc No. 341).

[8] FHS0000696 (NYSCEF Doc No. 342).

successor counsel and further requested "a bill for the fees that you [plaintiff] believe that you are/will be entitled to [be paid by defendant] on each matter."[9]

Shortly thereafter, defendant, by email, dated December 8, 2016, timed at 10:48 a.m., supplied plaintiff with a full list of the active contingency matters (for a total of 20 of defendant's clients with a combined number of 30 patients spread across them[10]) which defendant believed plaintiff was then working on for defendant (the "active matters list"), and requested that plaintiff transfer all of those matters to successor counsel.[11] In the same email, defendant requested that plaintiff inform it of "any other active [matters]" plaintiff might have been then working on for defendant.[12]

In response to defendant's active matters list, plaintiff emailed defendant, under a cover letter, dated December 12, 2016, "the first batch of change of counsel forms" for defendant's clients (as well as for successor counsel) to sign so that "we [plaintiff] may process the change of counsel forms and our liens" (the "change-of-counsel list").[13]

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[9] FHS0000696 (NYSCEF Doc No. 342).

[10] The list of plaintiff's then outstanding contingency matters, as compiled by defendant in the attachment to its December 8, 2016 email to plaintiff, consisted of 20 facilities, as follows: (1) A. Holly (four patients: Jones, Rubio, Stachowlak, and Tattnall); (2) Augustana (two patients: Doran and Miller); (3) Beth Abraham (two patients: Clarke and Robinson); (4) Brooklyn Center (one patient: Bray); (5) Center for Nursing & Rehab (one patient: Cooke); (6) Central Island Healthcare (one patient: Macejko); (7) Chapin Home for the Aging (one patient: Greene); (8) Elmhurst Care Center (three patients: McPierre, Rubain, and Saliani); (9) Friedwald Center (one patient: Sagum); (10) Greater Harlem (one patient: Kearney); (11) Holliswood (two patients: Depaulitte [listed twice in defendant's list] and Dingle); (12) Island (one patient: Sabella); (13) Margaret Tietz Center (one patient: Manigault); (14) Mosholu (Medco) (one patient: Cohen); (15) Pelham Parkway (one patient: Gerald); (16) Schnurmacher (two patients: Dennehy and Henry); (17) Silver Lake (one patient: Rispoli); (18) Split Rock (one patient: Selfman); (19) Tarrytown Hall (two patients: Franks and Zemnick); and (20) Wayne (Medco) (one patient: Gladstone).

[11] GANG552, GANG553-GANG557 (NYSCEF Doc No. 343).

[12] GANG552 (NYSCEF Doc No. 343).

[13] FHS0000697-FHS0000709 (NYSCEF Doc No. 344).

Plaintiff's submission of the "first batch of change of counsel forms" in response to defendant's active matters list revealed, for the first time, a major disconnect between the parties' respective positions. Whereas defendant's active matters list reflected a total of 20 facilities (with 30 patients spread across them), plaintiff's change-of-counsel list reflected only six facilities (with nine patients spread across them) from defendant's active matters list.[14] What's more, plaintiff's change-of-counsel list added two facilities (with one patient each), as well as added one patient to one of the existing facilities on defendant's active matters list.[15] Separately, plaintiff billed defendant at $450 per hour for plaintiff's post-termination services from December 1, 2016 through May 17, 2017 on defendant's matters which plaintiff unilaterally refused to turn over to successor counsel, for a total of $23,863.18 (inclusive of $418.18 in disbursements) (the "post-termination services").[16]

[14] Plaintiff's change-of-counsel list overlapped defendant's active matters list as to only six facilities (with nine patients spread across them), as follows: (1) A. Holly (two patients: Jones and Tattnall); (2) Augustana (one patient: Doran); (3) Beth Israel (two patients: Clarke and Robinson); (4) Elmhurst Care Center (two patients: Rubain and Saliani); (5) Holliswood (one patient: Depaulitte [as noted, that patient was listed twice in defendant's active matters list]); and (6) Margaret Tietz Center (one patient: Manigault).

[15] The additional listings on plaintiff's change-of-counsel list were: (1) Concourse Rehabilitation & Nursing (one patient: Frazier); (2) Bishop Henry B. Hucles Episcopal Nursing Center (one patient: Turner); and (3) Elmhurst Care Center (one of the facilities already included in defendant's active matters list but adding another patient [Lloyd]).

[16] Plaintiff's October 17, 2019, and May 17, 2017, invoices to defendant, Nos. 11884 and 8429, respectively (NYSCEF Doc No. 352). The post-termination invoices fail to reflect the hourly rate of plaintiff's attorneys. The Court calculated the hourly rate of $450 by correlating tasks with the corresponding amounts billed.

(D)

The summary-judgment amount of $288,903.59 which plaintiff seeks in the first branch of its motion can be broken down into four subsets:

(1) Plaintiff's *pre-termination* services on particular matters at the contingency rate, as set forth in its schedule e-filed under NYSCEF Doc No. 72 (the "original schedule"), as modified by plaintiff's "Errata Supplement A" e-filed under NYSCEF Doc No. 339 (the "revised schedule").[17] The *pre-termination* services were billed by plaintiff under the "additional" client number which started with number "9."

(2) Plaintiff's *additional* services on particular matters at the contingency rate, as set forth in the revised schedule. The *additional* services, despite their designation as such, were *not* billed by plaintiff under any "additional" client number.

(3) Plaintiff's aforementioned *post-termination* services, as calculated at the hourly rate, as set forth in its invoices[18] and as incorporated by reference (by way of its total amount) in plaintiff's revised schedule. The *post-termination* services were *not* billed under *any* client number.

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[17] Contrary to defendant's contention, the sworn revised schedule (which is annexed as the exhibit to the independently sworn errata sheet submitted by Korsinsky in connection with his execution and return of his pretrial deposition transcript to defendant's counsel) is admissible. The reasons are three-fold. First, Korsinsky, who was deposed on January 13, 2020, timely returned his executed pretrial deposition transcript on March 26, 2020, in accordance with the 60-day return deadline under CPLR 3116 (a), as extended under CPLR 2004 on account of the intervening COVID-19 pandemic (NYSCEF Doc Nos. 339 and 345). Second, at no time, thereafter, did defendant move to strike the errata sheet and revised schedule (*cf. Horn v 197 5th Ave. Corp.*, 123 AD3d 768, 770 [2d Dept 2014]). Third and finally, the portions of the revised schedule which the Court credited in the determination section of its decision and order to arrive at $82,970.40 as the total amount owed by defendant to plaintiff are not testimonial in nature because they are supported by the corresponding invoices.

[18] Plaintiff's October 17, 2019, and May 17, 2017, invoices to defendant, Nos. 11884 and 8429, respectively (NYSCEF Doc No. 352).

(4) Plaintiff's *disbursements* as set forth in its original schedule, and as modified or supplemented by the revised schedule, as were billed under the "client number" which started with number "2."

The first two of the four aforementioned subsets of the summary-judgment amount – the pre-termination services and the additional services – constitute the near entirety of the summary-judgment amount sought herein. The following table summarizes, by facility and patient: (1) the amounts claimed by plaintiff for the *pre-termination* and *additional* services, as listed in: (a) the original schedule and as modified by the revised schedule; (b) plaintiff's Notice to Admit, dated July 17, 2019 (the "NOA") (NYSCEF Doc No. 348); and/or (c) the invoices annexed to the NOA (also e-filed under NYSCEF Doc No. 348); and (2) defendant's written responses, if any, whether by way of: (a) Goldbaum's responsive affidavit, dated October 10, 2016 ("Goldbaum's affidavit") (NYSCEF Doc No. 341); (b) Goldbaum's hand-written notations on plaintiff's underlying invoices to defendant as annexed to plaintiff's NOA; and/or (c) defendant's verified answer to the second amended complaint, dated January 29, 2019 (the "answer"), together with the exhibits to the answer (NYSCEF Doc No. 332):

Facility/Patient's Name	***Pre-Termination* Services as claimed by plaintiff**	***Additional* Services as claimed by plaintiff**	**Defendant's responses**	**Conclusion of the amount owed by defendant to plaintiff at this stage of litigation**
Silver Lake/Rispoli	-$0-	$7,290.99	Denied by Answer, ¶ 18	Issue of Fact
Union Plaza/Kim	$5,098.20	-$0-	Admitted as owed at Goldbaum's Aff., ¶ 3.s; admitted (by failure to respond to) NOA, ¶ 4	$5,098.20 owed by defendant to plaintiff

Facility/Patient's Name	***Pre-Termination* Services as claimed by plaintiff**	***Additional* Services as claimed by plaintiff**	**Defendant's responses**	**Conclusion of the amount owed by defendant to plaintiff at this stage of litigation**
A. Holly/Kurz, Stage 1	$5,900.66	-$0-	Admitted as owed at Goldbaum's Aff., ¶ 3.p; further admitted (by failure to respond to) NOA, ¶ 14	$5,900.66 owed by defendant to plaintiff
Hebrew Home for Aged/Leventhal	$16,926.80	-$0-	Disputed by defendant at Goldbaum's Aff., ¶ 3.u, but admitted (by failure to respond) to the extent of $12,888.70, as stated in NOA, ¶ 19 (and in plaintiff's invoices to defendant, dated June 23, 2014, and April 1, 2014)	$12,888.70 owed by defendant to plaintiff
A. Holly/Lazaro	-$0-	$25,933.61 (not supported by any documentary evidence)		Issue of fact
Augustana/Doran	-$0-	$20,000 (not supported by any documentary evidence)		Issue of fact
A. Holly/Tattnall	-$0-	$1,018.60		Issue of fact
A. Holly/Schultz (Medicaid re-budgeting)	$5,078.54	-$0-	Admitted in (by failure to respond to) NOA, ¶ 11 (and in plaintiff's invoice to defendant, dated March 19, 2015).	$5,078.54 owed by defendant to plaintiff
A. Holly/Schultz (billing per check sent to defendant)	$2,843.40	-$0-	Not disputed by defendant; further supported by plaintiff's invoice to defendant, dated April 15, 2015 (NYSCEF Doc. No. 354)	$2,843.40 owed by defendant to plaintiff
Unidentified facility/Addorisio	-$0-	$3,507.46 (not supported by any documentary evidence)		Issue of fact
Schnurmacher/ Henry	-$0-	$4,000.00 (not supported by competent documentary evidence)[19]		Issue of fact

[19] The Court cannot decipher from Goldbaum's handwritten notations on plaintiff's invoice to defendant, dated October 7, 2014 (NYSCEF Doc No. 369), whether defendant has acknowledged the existence of an outstanding balance due to plaintiff with respect to the Henry matter.

Facility/Patient's Name	***Pre-Termination* Services as claimed by plaintiff**	***Additional* Services as claimed by plaintiff**	**Defendant's responses**	**Conclusion of the amount owed by defendant to plaintiff at this stage of litigation**
Clarke/Beth Abraham	-$0-	$63,511.80 (not supported by any documentary evidence)		Issue of fact
Holliswood/Dingle	$18,679.32	-$0-	Admitted (by failure to respond to) NOA, ¶ 21; further supported by plaintiff's invoice to defendant, dated September 1, 2016 (NYSCEF Doc. No. 348)	$18,679.32 owed by defendant to plaintiff
Unidentified facility/Jolles	-$0-	$3,520.00 (not supported by any documentary evidence)		Issue of fact
Margaret Tietz/Manigault	-$0-	$38,149.29 (not supported by any documentary evidence)		Issue of fact
A. Holly/Wooten	$10,430.45	-$0-	Admitted by defendant at Goldbaum's Aff., ¶ 3.t, to the extent of $4,692.62[20]	$4,692.62 owed by defendant to plaintiff
Hebrew Home for Aged/Ptalis	$24,773.41	-$0-	Admitted (by failure to respond to) NOA, ¶ 16; further supported by plaintiff's invoice to defendant, dated September 8, 2014 (NYSCEF Doc. No. 348)	$24,773.41 owed by defendant to plaintiff
A. Holly/Tenbroeck	$3,015.55	-$0-	Admitted by defendant at Goldbaum's Aff., ¶ 3.v	$3,015.55 owed by defendant to plaintiff
Total owed by defendant to plaintiff at this stage of litigation				**$82,970.40**[21]

[20] This amount is identical to the amount which defendant was willing to concede as to the Wooten matter, as more fully set forth in Attorney Geller's letter at unnumbered page 2 (annexed as exhibit to defendant's answer at NYSCEF Doc No. 341).

[21] Although plaintiff also seeks recovery of $4,387.50 for the John Hatter matter (Korsinsky's Aff. in Support, dated June 22, 2022, ¶¶ 96-98, NYSCEF Doc No. 331), plaintiff failed to list this patient either in its original or in its revised schedules, and further failed to include in the summary-judgment amount what was owed on account of the John Hatter matter. At this juncture, the revised schedule encompasses the universe of the outstanding matters for the Court's review and resolution. The Court expresses no opinion on the merits of plaintiff's claim to the amount (if any) defendant owes plaintiff for the John Hatter matter.

(E)

Two weeks after the Court reserved decision on the instant motion on March 15, 2023, the Second Judicial Department, on plaintiff's appeal, vacated a portion of the court order, dated October 2, 2019 (Colon, J.) (the "preclusion order") (NYSCEF Doc No. 371), which purported to preclude plaintiff from utilizing certain documents in support of its claims (*see Korsinsky & Klein, LLP v FHS Consultants, LLC*, 214 AD3d 961 [2d Dept 2023]) (NYSCEF Doc No. 382). Defendant's contentions (throughout its memorandum of law in opposition at NYSCEF Doc No. 373) that the terms of the preclusion order barred plaintiff from proving any amount due to defendant have been rendered moot by the Second Judicial Department's vacatur of the preclusion order.

In furtherance of the vacatur of the preclusion order, the Second Judicial Department directed that plaintiff serve – and plaintiff did timely serve – its reformulated document demands and interrogatories (NYSCEF Doc Nos. 383 and 384, respectively). Because of the stay of discovery under CPLR 3214 (b) occasioned by the pendency of this motion, however, defendant is yet to respond to plaintiff's newly reformulated demands and interrogatories. To date, discovery has not been completed in this action.

Determination of Plaintiff's Motion

"Because of the uniqueness of the attorney-client relationship, traditional contract principles are not always applied to govern disputes between attorneys and clients"

(*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43 [1990]). "Thus it is well established that notwithstanding the terms of the agreement between them, a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney" (*id*.).[22] "If the discharge is with cause, the attorney has no right to compensation or to a retaining lien" (*Teichner v W&J Holsteins, Inc.*, 64 NY2d 977, 979 [1985]). Conversely, "[i]f the discharge is without cause before the completion of services, then the amount of the attorney's compensation must be determined on a quantum meruit basis" (*id*.).

"In general, a hearing is required to determine whether a client has cause for discharging an attorney" (*Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011]). It is fundamental, however, that "a motion [or a branch thereof] may be decided without a hearing unless the papers submitted raise a factual dispute on a material point which must be resolved before the court can decide the legal issue" (*Hawkins v Lenox Hill Hosp.*, 138 AD2d 572, 572 [2d Dept 1988] [internal quotation marks omitted]). "Accordingly, a court may determine whether an attorney was discharged for cause without conducting a hearing if there is no factual dispute as to the attorneys' conduct unresolvable from the papers on the motion" (*Sessa v Doxey*, 172 AD3d 939, 940 [2d Dept 2019]).

[22] It must be noted, however, that "[u]ntil an attorney of record is discharged by order of the court or by the filing of the consent of the retiring attorney and party in the prescribed form (*see* CPLR 321 [b]), the attorney represents the party" (*Hawkins v Lenox Hill Hosp.*, 138 AD2d 572, 573 [2d Dept 1988]).

"Although the determination that an attorney was discharged for cause may be based upon either negligence or misconduct, more than a generalized dissatisfaction with counsel's services is required" (*Roe v Roe*, 117 AD3d 1217, 1218 [3d Dept 2014]). Notably, the client must make "a prima facie showing of any cause for [the] discharge" to trigger a hearing on this issue (*see Gyabaah v Rivlab Transp. Corp.*, 102 AD3d 451, 453 [1st Dept 2013], *affd* 22 NY3d 1018 [2013]).

Here, defendant has failed to make a prima facie showing that plaintiff was discharged for cause. Although Goldbaum subsequently claimed to have been dissatisfied with the manner in which plaintiff collected on the assigned matters, neither the termination email of October 30, 2014, nor the termination letter of November 28, 2016 reflected dissatisfaction with plaintiff's services to indicate a termination for cause (*see Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 222-223 [1st Dept 2005]; *see also Maher v Quality Bus Serv., LLC*, 144 AD3d 990, 991 [2d Dept 2016]). Defendant's post-termination allegations of plaintiff's misconduct arose only in response to the latter's assertion of a lien (*see Chadbourne & Parke, LLP*, 18 AD3d at 223). The record, viewed in its entirety, demonstrates that defendant had (and still has) a fee dispute with its former counsel (plaintiff herein), rather than a bona-fide claim of attorney misconduct (*see Sessa*, 172 AD3d at 940).[23] Defendant's discharge of plaintiff without cause is part of the background against which the instant motion must be determined.

[23] Although it is true, as a general matter, that "[a]n attorney who violates a disciplinary rule may be discharged for cause and is not entitled to any fees for services rendered" (*Doviak v Finkelstein & Partners, LLP*, 90 AD3d 696, 699 [2d Dept 2011]), defendant has submitted no documentary proof to raise a triable issue fact – much less to support an inference – that plaintiff attorneys violated any (footnote continued)

(1) Plaintiff's Request to Strike Defendant's Extant Affirmative Defenses

In the course of this action, defendant discontinued all of its counterclaims with prejudice, pursuant to CPLR 3217 (b), against plaintiff (NYSCEF Doc No. 366). Concurrently, defendant withdrew, with prejudice, certain of its affirmative defenses; namely: (1) lack of justiciable controversy; (2) standing; (3) collateral estoppel/res judicata; (4) statute of limitations; (5) waiver; and (6) contributory/comparative negligence (*id.*; defendant's answer at NYSCEF Doc No. 332). Defendant's discontinuance of its counterclaims and its withdrawal of the foregoing affirmative defenses was granted by the aforementioned June 2022 order.

In the *first* branch of its motion, plaintiff contends that the foregoing discontinuance/withdrawal on defendant's part (coupled with the corresponding judicial approval as embodied in the June 2022 order) preclude defendant from asserting nine of its extant affirmative defenses (as listed in the margin[24]) on the grounds of res judicata/collateral estoppel, and that its other affirmative defenses – failure to attach (and

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disciplinary rules. Goldbaum's subjective belief (in ¶ 15 of his affidavits, dated November 29, 2021, and September 15, 2022, at NYSCEF Doc Nos. 365 and 368, respectively) that "[p]laintiff's conduct constituted a major ethical violation," is insufficient to raise a triable issue of fact.

[24] The nine of defendant's extant affirmative defenses are comprised of the following: (1) documentary evidence; (2) failure to state a cause of action; (3) laches and unclean hands; (4) compliance with applicable law; (5) lack of proximate cause; (6) absence of wrongful, illegal, or inappropriate conduct; (7) plaintiff as the sole cause of its damages; (8) the unenforceability of plaintiff's demand for punitive damages under the circumstances of this action; and (9) plaintiff's material breach of the retainer (defendant's answer, ¶¶ 28, 29, 32, 33, 34, 45, 36, 37, and 40, respectively).

refer to the relevant portions of) the retainer, and failure to provide an explanatory affidavit (defendant's answer, ¶¶ 38 and 39, respectively)[25] – are devoid of merit.

CPLR 3211 (b) provides that "a party may move for judgment dismissing one or more defenses on the ground that a defense is not stated or has no merit." "Ordinarily the only issue presented upon a motion to strike an affirmative defense is whether there is any legal or factual basis for the assertion of the defense" (*Winter v Leigh-Mannell*, 51 AD2d 1012, 1012 [2d Dept 1976]). The allegations set forth in the answer must be liberally construed and viewed in the light most favorable to the defendant, who is entitled to the benefit of every reasonable inference (*see 182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]).

"The doctrine of *res judicata* precludes a party from litigating a claim where a *judgment on the merits* exists from a prior action between the same parties involving the same subject matter" (*Matter of Josey v Goord*, 9 NY3d 386, 389 [2007] [internal quotation marks omitted; emphasis added]). Under res judicata, or claim preclusion, a valid final *judgment* bars future actions between the same parties on the same cause of action (*see Matter of Reilly v Reid*, 45 NY2d 24, 27 [1978]; *Fitzgerald v Hudson Natl. Golf Club*, 35 AD3d 533 [2d Dept 2006]).

[25] The Court interprets plaintiff's contention (at page 13 of its supporting memorandum of law at NYSCEF Doc No. 329) that "[o]n an account-stated claim, there is no requirement that plaintiff *attach* the invoices to the complaint" as addressing defendant's affirmative defenses of failure to *attach* (and refer to the relevant portions of) the retainer, and failure to provide (or *attach*) an explanatory affidavit.

"*Collateral estoppel*, or issue preclusion, precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and *decided against that party* . . . , whether or not the tribunals or causes of action are the same" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] [internal quotation marks omitted; emphasis added]). "The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*id*.).

Here, the underlying issues of whether plaintiff committed certain acts against defendant, as alleged in the since-withdrawn counterclaims, were never determined in this action. Defendant's withdrawal of its counterclaims, with prejudice (as embodied in the Court's June 2022 order[26]), cannot be construed to be the kind of a final judgment for res judicata purposes, nor a determination following a full and fair opportunity to litigate the issues that would be necessary to collaterally estop defendant from asserting its extant affirmative defenses (*see Maybaum v Maybaum*, 89 AD3d 692, 695 [2d Dept 2011]).[27]

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[26] Contrary to plaintiff's suggestion, the Court's June 2022 order did not constitute "law of the case." "[T]he doctrine of the law of the case applies only to legal determinations that were necessarily resolved on the merits in the prior decision" (*Baldasano v Bank of New York*, 199 AD2d 184, 185 [1st Dept 1993]). In approving defendant's withdrawal of its counterclaims and of some of its affirmative defenses, this Court did not implicitly or explicitly address (much less decide) their merits (or lack thereof) (*see Foley v Foley*, 190 AD3d 953, 955 [2d Dept 2021]; *Gilligan v Reers*, 255 AD2d 486, 487 [2d Dept 1998]).

[27] Plaintiff's reliance (at page 9 of its opening memorandum of law) on the short-form order, dated February 10, 2021 (Knipel, J.) (NYSCEF Doc No. 363), which resolved its prior motion to extend the note-of-issue ("NOI") filing deadline, is misplaced as can be gleaned from the contents of that order, as quoted in full below:

> "Plaintiff moves to extend NOI by 90 days, stating discovery is owed (mot. seq. 14). The motion is opposed, and defendant points out numerous delays caused by plaintiff. Plaintiff in reply contends that it must ask further questions at EBT. The defendant has a

(footnote continued)

Accordingly, nine of defendant's extant affirmative defenses (as listed in the margin[28]) are *not* barred by the doctrines of res judicata/collateral estoppel.[29]

Conversely, two other affirmative defenses – failure to attach (and refer to the relevant portions of) the retainer, and failure to provide an explanatory affidavit (defendant's answer, ¶¶ 38 and 39, respectively) – are controverted by the record. The retainer and the explanatory affidavits are, in fact, annexed to the instant motion under NYSCEF Doc Nos. 333 (retainer) and 330-331 (affidavits). Accordingly, the *first* branch of plaintiff's motion which is to strike defendant's extant affirmative defenses is *granted solely to the extent* that the affirmative defenses of failure to attach (and refer to the relevant portions of) the allegedly breached agreement (*i.e.*, the retainer), and failure to provide an explanatory affidavit (as pleaded in defendant's answer, ¶¶ 38 and 39, respectively), are stricken, and the remainder of the first branch of its motion is denied (*cf. Boies, Schiller & Flexner LLP v Modell*, 129 AD3d 533, 535 [1st Dept 2015]).

> pending motion to withdraw its counterclaims (mot. seq. 15). Based on all of the foregoing and the fact that further discovery may no longer be needed after decision on mot. seq. 15, [plaintiff's] motion is decided as follows: NOI by 8/27/21. No further discovery is ordered herein as it is unclear what will remain outstanding after decision on mot. seq. 15."

[28] To reiterate, those nine affirmative defenses are comprised of the following: (1) documentary evidence; (2) failure to state a cause of action; (3) laches and unclean hands; (4) compliance with applicable law; (5) lack of proximate cause; (6) absence of wrongful, illegal, or inappropriate conduct; (7) plaintiff as the sole cause of its damages; (8) the unenforceability of plaintiff's demand for punitive damages under the circumstances of this action; and (9) plaintiff's material breach of the retainer (defendant's answer, ¶¶ 28, 29, 32, 33, 34, 45, 36, 37, and 40, respectively).

[29] By way of illustration, several of the extant affirmative defenses are facially valid. The affirmative defense (in ¶ 28 of defendant's answer) alleging failure to state a cause of action cannot be stricken under CPLR 3211 (b), "as this [would] amoun[t] to an endeavor by the plaintiff to test the sufficiency of [its] own claim" (*Lewis v US Bank N.A.*, 186 AD3d 694, 697 [2d Dept 2020]). Similarly, the affirmative defense (in ¶ 37 of defendant's answer) that plaintiff is not entitled to punitive damages in a breach-of-contract action, is facially valid (*see Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 [1994]).

(2) Plaintiff's Request for Partial Summary Judgment on Liability as to $288,903.59

In the *second* branch of its motion, plaintiff seeks an order, pursuant to CPLR 3212 (e), granting it partial summary judgment on the issue of liability in the amount of $288,903.59 (previously referred to as the "summary-judgment amount") on the first, third, and fourth causes of action (all sounding in breach of contract), as well as on the tenth cause of action (sounding in account stated), together with interest thereon from October 31, 2016.

"Summary judgment is not a provision for an abbreviated trial of material issues of fact but merely a procedure for determining whether there are material issues of fact" (*Marshall, Bratter, Greene, Allison & Tucker v Mechner*, 53 AD2d 537, 537 [1st Dept 1976]). "Once it is determined that there are such issues of fact, summary judgment must be denied at least as to those material issues of fact" (*id*.; *see also Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978] ["summary judgment . . . should not be granted where there is any doubt as to the existence of a triable issue"] [internal quotation marks omitted]; *accord Matter of Bank of New York [Ling Kuo Li]*, 269 AD2d 112, 113 [1st Dept 2000] ["if it was the court's perception that factual issues existed, there was an obligation to deny the motions, not to direct the appointment of a referee"]).

As calculated in the table set forth in Part D above, the Court has determined that plaintiff showed its prima facie entitlement to summary judgment on the issue of liability on the first, third, fourth, and tenth causes of action in the aggregate amount of *$82,970.40* (representing the sum of the allowed portions of the pre-termination and

additional services for the corresponding patients listed in the table), whereas defendant, in opposition, failed to raise a triable issue of fact as to any of those portions (and the corresponding patients) (*see Jeffrey L. Rosenberg & Assoc., LLC v Lajaunie*, 54 AD3d 813, 814 [2d Dept 2008]). Whether defendant owes plaintiff the *balance of $205,933.19* (*i.e.*, the summary-judgment amount of $288,903.59 sought herein, minus the amount of $82,970.40 awarded herein) cannot be determined, as a matter of law, on the record before the Court at this stage of litigation (*see Brill & Meisel v Brown*, 113 AD3d 435, 437 [1st Dept 2014]; *Kluczka v Lecci*, 63 AD3d 796, 798 [2d Dept 2009]). Accordingly, the *second* branch of plaintiff's motion which is for partial summary judgment on the issue of liability on the first, third, fourth, and tenth causes of action is *granted to the extent* of $82,970.40, plus interest from October 31, 2016, and the remainder of the second branch of its motion is denied.

A few comments on the remainder of the *second* branch of plaintiff's motion are warranted. Plaintiff additionally seeks compensation for its *post-termination* legal services to defendant at the $450 hourly rate in the aggregate amount of $23,863.18 (inclusive of $418.18 in disbursements) for the period from December 1, 2016, to May 17, 2017 (NYSCEF Doc No. 352). Quantum meruit compensation for post-termination legal services "is not limited to a calculation based on the number of hours worked multiplied by a reasonable hourly rate" (*Gould v Decolator*, 131 AD3d 445, 447 [2d Dept 2015]). Rather, "[i]n fixing an award of legal fees in quantum meruit, a court should consider evidence of the time and skill required in the case, the complexity of the matter, the attorney's experience, ability, and reputation, the client's benefit derived from the

services, and the fee usually charged by attorneys for similar services" (*SBC 2010-1, LLC v Smits Structure Corp.*, 167 AD3d 795, 795 [2d Dept 2018]). The Court is unable to determine, on the current record, whether (and to what extent) plaintiff is entitled to compensation for its *post-termination* legal services to defendant.

(3) Plaintiff's Request for Partial Summary Judgment as to $1,018.60

In the *third* branch of its motion, plaintiff seeks an order, pursuant to CPLR 3212 (e), granting it partial summary judgment on the issue of liability in the amount of – and for the turn-over from successor counsel to plaintiff of – $1,018.60 held in relation to the Tattnall matter representing plaintiff's share thereof (previously referred to as the "Tattnall escrow amount"), with such relief being sought under the sixth cause of action sounding in breach of contract.[30] Here, the record raises triable issues of fact as to: (1) the magnitude of work which remained to be performed on the Tattnall matter *after* defendant directed plaintiff to transfer it to successor counsel;[31] (2) whether successor counsel assented to plaintiff's "no fee-split" position that successor counsel must work essentially "for free" on the Tattnall matter *post*-substitution;[32] and (3) the

[30] As noted, the Tattnall escrow amount of $1,018.60 is subsumed into the summary-judgment amount of $288,903.59 which is the subject of the second (and previously determined) branch of plaintiff's motion.

[31] According to Goldbaum, "when [successor counsel] took over the Tattnal[l] matter from Plaintiff, he was told there was little to no work left to be done on the [matter]. However, upon taking the [matter] over, [successor counsel] learned this was not the case and [he] was required to attend multiple court appearances and do significant work to resolve the [matter]" (Goldbaum's Aff., dated November 29, 2021, and September 15, 2022, ¶ 19 at NYSCEF Doc Nos. 365 and 368, respectively).

[32] Korsinsky's email to, among others, successor counsel, dated December 21, 2016, timed at 4:53 p.m. (NYSCEF Doc No. 376) ("We [*i.e.*, plaintiff] are not consenting to any 'fee split' you requested [on the Tattnall matter]. We expect our full fee.").

calculation of the amount due to plaintiff for its *pre*-substitution work on the Tattnall matter.[33] Accordingly, the *third* branch of plaintiff's motion is *denied*.

(4) Plaintiff's Request for an Accounting

The *fourth* branch of plaintiff's motion which is for an order directing defendant to account for all monies paid with respect to matters it assigned to plaintiff (as pleaded in the second and third causes of action for accounting and breach of contract, respectively), or in the alternative and/or in addition, pursuant to CPLR 3212 (c), for a hearing on damages, is *denied in its entirety*. An "attorney stands in a fiduciary relation to the client" (*Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112, 118 [1995]), and "not the other way around" (*Appel v Schoeman Updike Kaufman Stern & Ascher LLP*, 2015 WL 13654007, *28 [SD NY 2015]).[34] "The fiduciary relationship between lawyer and client is a one-way street because the law 'superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client

[33] As the Court of Appeals observed in this regard:

> "The outgoing attorney may elect to take compensation on the basis of a presently fixed dollar amount based upon quantum meruit for the reasonable value of services or, in lieu thereof, the outgoing attorney has the right to elect a contingent percentage fee based on the proportionate share of the work performed on the whole case. The percentage may be fixed at the time of substitution but, as several courts have recognized, is better determined at the conclusion of the case when such factors as the amount of time spent by each lawyer on the case, the work performed, and the amount of recovery can be ascertained."

(*Lai Ling Cheng v Modansky Leasing Co., Inc.*, 73 NY2d 454, 458 [1989] [internal citations omitted]).

[34] *See also Sanchez & Daniels v Koresko & Assoc.*, 2005 WL 4888082, *7 (ND Ill 2005) ("The Court is unaware of any authority holding that a client owes a fiduciary duty to his attorney. Rather, a fiduciary duty runs in the opposite direction.").

property and *honoring the clients' interests over the lawyer's*' " (*id*. [quoting *Matter of Cooperman*, 83 NY2d 465, 472 [1994] [emphasis in the original]). Inasmuch as defendant, as a former client of plaintiff, was not its fiduciary, plaintiff is not entitled to an accounting from defendant (*see Michnick v Parkell Products, Inc.*, 215 AD2d 462, 463 [2d Dept 1995]).

(5) Plaintiff's Request for a Hearing as to Certain Matters

In the *fifth* branch of its motion, plaintiff seeks an order directing a hearing on the reasonable value of its legal services on those matters in which it did not appear as counsel of record. "An attorney of record who is discharged without cause possesses a charging lien pursuant to Judiciary Law § 475 which constitutes an equitable ownership of the cause of action an[d] attaches to any recovery" (*D'Ambrosio v Racanelli*, 129 AD3d 900, 901 [2d Dept 2015] [emphasis added]).[35] Under Judiciary Law § 475, however, the attorney must appear as counsel of record for the charging lien to be valid (*see Matter of Picciolo v State*, 287 AD2d 721, 722 [2d Dept 2001]). As to those matters for which plaintiff never appeared as counsel of record for defendant, it is not entitled to a charging lien. Even without the charging lien, however, plaintiff may be entitled to the

[35] Judiciary Law § 475 provides, in relevant part, that:

> "From the commencement of an action . . . in any court . . . , or the provision of services in a settlement negotiation at any stage of the dispute, the attorney *who appears for a party* has a lien upon his or her client's cause of action . . . , which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien" (emphasis added).

reasonable value of its legal services on a quantum meruit basis; *provided* that (as is the instance here) it was discharged without cause (*see Teichner*, 64 NY2d at 979). Under the circumstances of this case, it is appropriate to defer for trial the determination of the reasonable value of plaintiff's legal services on those matters in which it did not appear as counsel of record (*accord White & Case LLP v Shipman Assoc., LLC*, 214 AD3d 469, 470 [1st Dept 2023]). Accordingly, the fifth branch of plaintiff's motion is *denied*.

(6) Plaintiff's Request for the Appointment of a Receiver

The *final* branch of plaintiff's motion seeks the appointment of "a receiver to substitute as counsel for any cases [in] which [defendant] failed to obtain new counsel" and for ancillary relief (Notice of Motion, ¶ f. at NYSCEF Doc No. 327)[36] must be *denied*. A receiver, as an officer of the court, cannot, at the same time, represent and owe an undivided loyalty to defendant (*accord Appel*, 2015 WL 13654007, *23 n 9 ["(I)t is fundamental to the attorney-client relationship that an attorney have an undivided loyalty to his or her client. This duty should not be diluted by a fiduciary duty owed to some

[36] Whereas plaintiff's supporting memorandum of law states (at page 24 at NYSCEF Doc No. 329) that "the temporary receiver will efficiently and fully ascertain the condition of the cases, assure completion, collect recoveries, and account for its income," such explanation is at odds with plaintiff's Notice of Motion which states (in ¶ f.) that plaintiff is seeking the appointment of "a receiver to substitute as counsel for any cases [in] which [defendant] failed to obtain new counsel" and for ancillary relief (NYSCEF Doc No. 327). Plaintiff's request in its Notice of Motion is reiterated in plaintiff's supporting affidavits (Samuel Diamanstein's Aff., dated July 6, 2022, ¶ 130.f., and Korsinsky's Aff., dated June 22, 2022, ¶ 107.f., at NYSCEF Doc Nos. 330 and 331, respectively). CPLR 2214 (a) provides, in relevant part, that "[a] notice of motion shall specify . . . the relief demanded. . . " (*see also Matter of Nelson v New York State Dept. of Motor Vehicles*, 188 AD3d 692, 694 [2d Dept 2020] ["Generally, a formal notice of motion . . . should be used to request . . . relief. . . ."]). Thus, plaintiff's request for relief as demanded in ¶ f. of its Notice of Motion – that the receiver, once appointed, be substituted as counsel for defendant's clients – supersedes any inconsistent and/or additional request in plaintiff's memorandum of law.

other person, such as co-counsel, to *protect that person's interest in a prospective fee*."] quoting *Scheffler v Adams & Reese, LLP*, 950 So 2d 641, 652-653 [La 2007)] [emphasis added]).

WHEREFORE it is ORDERED that plaintiff's motion is *granted solely to the extent* that:

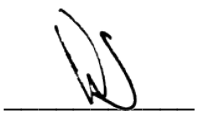
(1) defendant's *affirmative defenses* of failure to attach (and refer to the relevant portions of) the agreement, and failure to provide an explanatory affidavit (as pleaded in defendant's answer, ¶¶ 38 and 39, respectively) are *stricken*; and

(2) plaintiff shall have a *judgment* against defendant in the principal sum of $82,970.40, plus interest from October 31, 2016; and the *remainder of its motion is denied*; and it is further

ORDERED that plaintiff's counsel shall settle a judgment in the principal sum of $82,970.40, plus interest from October 31, 2016, on notice pursuant to 22 NYCRR 202.48 (a); and it is further

This constitutes the decision and order of the Court.

E N T E R,



J. S. C.