

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BARRY J. BRETT and LESLIE BRETT,

Petitioners,

-against-

JAROSLAWICZ & JAROS PLLC and ELIZABETH  
EILENDER,

Respondents.

**OPINION & ORDER**

15 Civ. 2921 (ER)

Ramos, D.J.:

Petitioners Barry J. Brett and Leslie Brett ask this Court to determine under N.Y. Judiciary Law § 475 the value of a charging lien held by their former counsel, Respondents Jaroslawicz & Jaros PLLC and Elizabeth Eilender. Petitioners argue that Respondents were discharged as counsel prior to the conclusion of the case and are therefore entitled only to the *quantum meruit* value of the legal services they rendered. Respondents argue that they were never discharged by Petitioners and the charging lien should therefore be enforced in the amount of \$191,966.66, the one-third contingency fee they were entitled to collect under their original retainer agreement. For the reasons set forth in this opinion, it is ORDERED that the charging lien in favor of Respondents is fixed in the amount of \$191,966.66.

**I. BACKGROUND**

On February 28, 2015, Petitioner Barry J. Brett (“Brett”) swallowed a 2.5 cm wire bristle with a bite of his meal at DB Bistro Moderne, a popular New York City restaurant. *See Am.*

Compl. ¶¶13–16. Brett underwent emergency surgery to extract the bristle, which had become lodged in his throat. Am. Compl. ¶18. He was then confined to a hospital Intensive Care Unit, where he underwent an extensive course of antibiotic treatment. Am. Compl. ¶18. To prosecute a claim for the damages he suffered, Brett and his wife retained Elizabeth Eilender, a lawyer at the law firm Jaroslawicz & Jaros PLLC (“J&J”). Resp’ts’ Ex. 1, at 1. Brett signed a retainer agreement with J&J for Eilender’s services on March 23, 2015. Resp’ts’ Ex. 1, at 5. The agreement provided that Eilender would be compensated for her services one-third of the gross sum recovered, with J&J paying all costs and expenses. Resp’ts’ Ex. 1, at 2. Appellate services were specifically excluded from the scope of the contract. Resp’ts’ Ex. 1, at 5.

Pursuant to the retainer agreement, Eilender represented the Bretts in a negligence and products liability action against DB Bistro Moderne (“Defendant”). Eilender represented the Bretts during all pretrial proceedings and at the jury trial, which took place from the 24th to the 27th of October 2016. The jury returned a verdict in favor of the Bretts and awarded them \$285,790.92 in compensatory damages and \$1,000,000 in punitive damages. J. 1–2, Nov. 18, 2016. Defendant’s counsel promptly notified the court of his intention to challenge the award of punitive damages post-trial. Trial Tr. 464:15–23.

The Bretts and Eilender got along up to and during the trial. Hr’g Tr. 73:2–6, Oct. 4, 2017. After the trial, however, a series of events led their relationship to sour. First, Brett and Eilender disagreed over whether to approach Defendant to settle. Days after the jury verdict was announced, Brett urged Eilender to approach Defendant with a settlement proposal he drafted. Hr’g Tr. 21:15–23, Oct. 4, 2017. Eilender did not do so, thinking that approaching Defendant unprompted might compromise the Bretts’s bargaining position. Hr’g Tr. 22:18–23:4, Oct. 4, 2017. Responding to an email in which Eilender laid out her reasoning, Brett requested that David

Jaroslawicz, a partner at J&J who was familiar with the case, call Brett to discuss the possibility of settlement. Pet'rs' Ex. 2, 3. No settlement offer was made by Eilender.

Second, Brett and Eilender disagreed over whether to file a motion for reargument on the issue of future damages. On November 14, 2016, this Court issued an order determining that, in lieu of the \$51,000 in future damages the Bretts claimed they were entitled to, they were owed \$5100. The next day, Brett sent Eilender a proposed draft of a letter motion to reargue. Pet'rs' Ex. 4. Eilender opposed making a motion to reargue, as did Jaroslawicz, who suggested the possibility of Brett appearing *pro se* before the Court if he insisted on making the motion against their advice. Pet'rs' Ex. 7. No motion to reargue the future damages issue was made.

Finally, Brett became dissatisfied with Eilender's work on the opposition to Defendant's Rule 50 and 59 motions, which Defendant filed on November 28, 2016. Opposition briefing was due on December 28, 2016. Trial Tr. 465:9–466:3. Brett and Eilender clashed over how to approach the brief. In the middle of the drafting process, Brett called Eilender to notify her that another law firm, Troutman Sanders LLP, was going to take over the briefing. Hr'g Tr. 48:9–12, Oct. 4, 2017. Eilender agreed. Hr'g Tr. 48:9–12, Oct. 4, 2017. On December 14, 2016, Eilender and the Bretts signed a stipulation for withdrawal and substitution of counsel. Resp'ts' Ex. 5. This stipulation was never filed with the Court. Sometime after the stipulation was signed, the Bretts paid Eilender and J&J their full one-third legal fee on the compensatory damages portion of the verdict. Hr'g Tr. 12:22–13:6, Oct. 4, 2017.

With new counsel, the Bretts filed their opposition to Defendant's Rule 50(b) and 59(e) motions on December 28, 2016. Defendant filed its reply on January 11, 2017. Before the motion could be decided, the Bretts and Defendant entered mediation on the punitive damages award. Hr'g Tr. 3:4–8, Sept. 15, 2017. During mediation, on March 22, 2017, Brett sent Eilender an email

seeking to “confirm” that she would not be paid pursuant to the retainer agreement, instead offering to pay her 10% of any settlement eventually reached, up to \$50,000. Pet’rs’ Ex. 10. Eilender did not accept. The Bretts eventually settled the punitive damages award at \$575,900. Hr’g Tr. 3:17–18, Sept. 15, 2017. As Defendant did not challenge the jury verdict’s award of compensatory damages, upon the settlement, all claims asserted had been resolved. The Court consequently ordered the action against Defendant discontinued on June 27, 2017.

Though she was not involved in the mediation, Eilender continued to represent Brett after she signed the stipulation substituting counsel. Specifically, Eilender negotiated to reduce the amount on Brett’s Medicare lien. Hr’g Tr. 82:8–21, Oct. 4, 2017. Documents uploaded to the Court’s Electronic Case Filing system continued to be sent to Eilender and J&J.

After the settlement was reached, Eilender asserted a lien over the funds, preventing their immediate disbursement by Defendant. Hr’g Tr. 3:21–4:4, Sept. 15, 2017. On September 15, 2017, the Court held a conference to resolve outstanding payments issues with Defendant. At the conference, the Bretts also asked the Court to resolve the value of Eilender’s claimed lien, pursuant to N.Y. Judiciary Law § 475. Hr’g Tr. 4:18–5:9, Sept. 15, 2017. The Bretts claimed that Eilender is not entitled to any compensation because she was discharged for cause. Hr’g Tr. 5:2–5, Sept. 15, 2017. Eilender’s counsel stated that his “client heard for the first time today that she was discharged for cause.” Hr’g Tr. 14:4–5, Sept. 15, 2017.

A hearing to resolve the lien was held on October 4, 2017. At the hearing, the Bretts maintained that Eilender was not entitled to any compensation for her legal services because she was discharged for cause. Hr’g Tr. 2:25–3:8, Oct. 4, 2017. Eilender testified that she was never told she was discharged at all:

THE COURT: Ms. Eilender, were you ever told in so many words that you were discharged?

THE WITNESS: Never.

THE COURT: Did you at any point come to an understanding that you were discharged?

THE WITNESS: No.

Hr'g Tr. 81:22–82:2, Oct. 4, 2017. Eilender also testified, however, that she had signed a stipulation to the substitution of counsel:

MR. BRETT: Ms. Eilender, in or about December of 2016, was there a substitution of counsel executed and signed and became effective?

THE WITNESS: Yes.

MR. BRETT: So Troutman was substituted for you as counsel?

THE WITNESS: Yes.

Hr'g Tr. 83:14–19, Oct. 4, 2017. At the end of the hearing, the Court found that Eilender was not discharged for cause. Hr'g Tr. 84:7–8, Oct. 4, 2017. However, the Court reserved decision and requested briefing on whether Eilender was discharged without cause, and if she was, what relief she would be entitled to. Hr'g Tr. 85:20–86:8, Oct. 4, 2017.

## II. DISCUSSION

A client may discharge his or her attorney at any time, with or without cause. *Universal Acupuncture Pain Servs., P.C. v. Quadrino & Schwartz, P.C.*, 370 F.3d 259, 263 (2d Cir. 2004). An act of a client “indicating an unmistakable purpose to sever relations” is sufficient to establish a discharge. *Costello v. Bruskin*, 58 A.D.2d 573, 574 (N.Y. App. Div. 2d Dep't 1977). If the client discharges an attorney retained on a contingency fee basis after the attorney has fully performed the duties set out in their contract, the attorney is entitled to the fee set out in the contract. *See McAvoy v. Schramme*, 238 A.D. 225, 228 (N.Y. App. Div. 1st Dep't 1933), *aff'd*, 263 N.Y. 548

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