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Notice of Charging Lien Dismissed; Law Firm Retainer Fails to Contain Required Provisions

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Date filed: 2018-05-10

· Court: Supreme Court, Westchester County

· Judge: Special Referee Josephine Trovini

· Case Number: 4815-2012

Case Digest Summary

After plaintiff [represented by Karen Winner] sought dismissal of a notice of charging lien, [plaintiff's former] law firm Boies Schiller & Flexner, LLP, (BSF) sought an order fixing the lien in its favor for fees and disbursements owed to it by plaintiff in connection with the underlying matrimonial action. The court had to decide if BSF complied with its obligations under 22 NYCRR §§1400.2 and 1400.3 so that it would be entitled to fix its charging lien against plaintiff. It denied BSF's motion and dismissed the amended notice of charging lien, finding since the BSF retainer did not contain the provisions required to be in matrimonial retainers as explicitly mandated by 22 NYCRR §1400.3, BSF could not recover its outstanding fees for the underlying action. The court noted the retainer, among other things, did not describe the nature of services to be rendered other than to state they were "in connection with your matrimonial matter," failed to state how any part of the advance retainer may be refunded, did not state how attorneys' fees would be determined in case the client discharged the attorney, and failed to state how the attorney would be paid after the retainer was depleted.

Full Case Digest Text

DECISION AND ORDER

This matter was assigned to the undersigned Special Referee pursuant to the standing orders of the Hon. Alan D. Scheinkman, JSC, dated September 5, 2017 and December 13, 2017. The parties, their respective

counsel, and non-party movant Boies Schiller & Flexner, LLP, have consented to have the undersigned hear and determine this matter by Hear and Determine Stipulation, which was so ordered on April 17, 2018 by the Hon. Lewis J. Lubell, JSC. Accordingly, the following constitutes the decision and order of the undersigned Special Referee. This matter involves two motions pertaining to an amended Notice of Charging Lien (“charging lien”), which was filed by non-party movant Boies Schiller & Flexner LLP (“BSF”) on March 9, 2018.

On February 9, 2018, plaintiff filed motion sequence nine seeking an order (i) dismissing a notice of charging lien dated June 20, 2016 in the sum of \$902,336.00; (ii) staying all matters pursuant to CPLR 2201 as justice requires pending further order of this court;¹ and (iii) for such other relief as the court deems just and proper.

On March 9, 2018, BSF filed motion sequence ten seeking an order (i) fixing the lien granted by Judiciary Law §475 in favor of BSF for legal fees and disbursements owed to BSF by plaintiff in connection with the underlying matrimonial action in the sum of \$797,905.56, plus prejudgment interest²; (ii) directing that the lien be enforced against plaintiff’s distributive award pursuant to the settlement of the underlying divorce action; (iii) granting BSF prejudgment interest from thirty days after each of BSF’s unpaid invoices was issued; (iv) granting BSF a money judgment for the total outstanding legal fees and costs plus prejudgment interest; and (v) such further relief as the court deems just and proper.

A. Background

The parties were divorced by judgment dated May 6, 2015, which judgment incorporated but did not merge an on-the-record stipulation of settlement entered into on February 18, 2015.

Plaintiff retained BSF pursuant to a retainer agreement (“BSF retainer”) dated May 14, 2012 (Exhibit A to motion sequence ten), by which it appears plaintiff was initially charged a fee of \$100,000.00. Although the BSF retainer states: “[i]n addition, please review the attached Statement of Client Rights and Responsibilities”, a Statement of Client’s Rights and Responsibilities (“Statement of Client’s Rights”) was not appended to the BSF retainer annexed to the motion (Motion Seq. ten, Exhibit A). Although BSF avers that plaintiff was provided with and signed a Statement of Client’s Rights, which BSF claims sets forth its right to a charging lien in the event of nonpayment of fees (Affirmation of Charles Fox Miller, dated March 8, 2018,

⁵ [hereinafter “Miller Aff. ___”]), BSF has not produced a copy of the Statement of Client’s Rights signed by plaintiff and BSF.

Thereafter, just seven days later and on May 21, 2012, plaintiff also signed a retainer agreement (“the Bender Firm retainer”) with the law firm of Bender Rosenthal Isaacs and Richter, LLP (“the Bender Firm”). With regard to the Bender Firm, Dina Kaplan, Esq. (“Ms. Kaplan”), appeared for plaintiff in the underlying matrimonial action. It appears from a review of the submissions that BSF was co-counsel with the Bender Firm. The court takes judicial notice of the Bender Firm retainer, which was filed along with plaintiff’s statement of net worth in the Westchester County Clerk’s office on March 15, 2013.³

BSF asserts that its retainer with plaintiff was filed with the court (Reply Affirmation of Charles Fox Miller dated April 16, 2018, 5 [hereinafter “Miller Reply Aff.

__”]). Nonetheless, the court has taken judicial notice of the documents on file with the Westchester County Clerk, and notes that plaintiff’s statement of net worth filed on March 15, 2013 does not have the BSF retainer filed with it. It is only the Bender Firm’s retainer that was filed with plaintiff’s statement of net worth.

The original charging lien filed on June 20, 2016, was in the sum of \$902,336.00. By notice of amended charging lien filed on March 9, 2018, BSF amended the amount it sought to fix as its charging lien to \$797,905.56, inasmuch as BSF did not account for one of plaintiff’s payments in July 2015 (Miller Aff.

3). According to BSF, plaintiff has paid a total of \$693,599.00 in legal fees to BSF (Miller Aff.

26) since the inception of the underlying matrimonial action.

B. Parties’ Contentions

BSF alleges that plaintiff had several weeks to review the retainer agreement, and she was also advised by her brother-in-law who is an attorney. Furthermore, BSF claims that the retainer agreement was also reviewed on plaintiff’s behalf by an independent law firm, Covington & Burling LLP, and changes were made at that firm’s request (Miller Aff., 5). In further support of its request to fix its charging lien, BSF contends that it represented plaintiff for approximately two and one-half years, throughout discovery and highly contested pre-trial proceedings. BSF states that after it completed discovery and months before the trial began, it asked plaintiff to release it as counsel, but plaintiff pleaded with BSF to take a major role in the upcoming matrimonial trial. BSF also alleges that it appeared at the trial of plaintiff’s matrimonial action for approximately 22 days from November, 2014 through February, 2015. According to BSF, some trial days were handled only by Ms. Kaplan without BSF’s

attendance, as part of an effort to reduce plaintiff's attorney's fees and costs. BSF asserts that at regular intervals during trial, BSF repeated its assurance that plaintiff would be well-represented by Ms. Kaplan. Nevertheless, according to BSF, plaintiff and her parents insisted that BSF continue representing plaintiff during the trial, irrespective of the fact that BSF was then owed hundreds of thousands of dollars in fees and costs (Miller Aff. 6-10).

BSF argues that plaintiff did not object to a single fee invoice it rendered to her, nor did plaintiff ever claim, until these motions were filed, that BSF's services were anything less than excellent. According to BSF, plaintiff made periodic payments toward the fees and disbursements that BSF incurred and invoiced on a monthly basis. BSF states that plaintiff "praised our work and insisted that the Firm continue to represent her even as we advised that it was not necessary." (Miller Aff., 12, emphasis added).

BSF contends that Judiciary Law §475 entitles it to a charging lien inasmuch as plaintiff executed a retainer agreement with BSF, BSF issued invoices on a regular basis, and plaintiff paid BSF's legal fees until July, 2015. BSF also asserts that it has an account stated since plaintiff did not object to invoices within a reasonable time after having received them. In addition, BSF seeks enforcement of the charging lien against plaintiff's interest in the former marital residence asserting that plaintiff's interest in the home, over and above her one-half of a joint interest, created a new fund to which the charging lien attaches. BSF also seeks prejudgment interest on all unpaid balances beginning from thirty days after each invoice was issued (Miller Aff. 14-21).

Plaintiff has opposed the motion asserting that BSF's request for a charging lien is null and void because BSF failed to substantially comply with the rules governing retainer agreements in matrimonial matters as set forth in 22 NYCRR §1400.2, and §1400.3.4 In addition, plaintiff asserts she was grossly overcharged for unnecessary and duplicative services, and she was never provided with a Statement of Client's Rights. Plaintiff further argues that BSF's invoices were inaccurate and misleading, BSF improperly charged plaintiff for working on their fee claims against her, and improperly charged her for the time of Theodore Uno, Esq., an attorney not licensed to practice law in New York. Plaintiff also disputes that there was an account stated inasmuch as the totals owed on the invoices BSF sent to her were not the actual totals owed. Finally, plaintiff contends that BSF

did not create a new fund to which the charging lien could attach. (Affirmation of Karen Winner, filed April 9, 2018, [hereinafter "Winner Aff."]).

C. The Brennan Report

The propriety of BSF's fees is the subject of a report ("Brennan Report") issued by Timothy Brennan, Esq., ("attorney Brennan"). The Brennan Report resulted from defendant having retained attorney Brennan in connection with the underlying matrimonial action on or about July 27, 2014, to provide an opinion as to the reasonableness of legal fees and expenses incurred by plaintiff in the matrimonial action, both with regard to BSF and the Bender Firm.⁵

In her response to BSF's motion herein, plaintiff asserts that she has been seriously hampered in defending against the charging lien BSF seeks, because neither BSF nor defendant have produced a copy of the Brennan Report, despite her counsel's request. Notably, by email dated Wednesday March 14, 2018, plaintiff's counsel requested of BSF a copy of the Brennan Report, which was allegedly turned over to BSF in discovery. (Winner Aff., Exh. 1). By email dated March 28, 2018, Amy Donehower, Esq., one of the BSF attorneys representing plaintiff wrote:

[u]nder normal conditions, we would happily provide the report, but, given the circumstances, we feel we must assert our retaining lien and ask that Ms. Kaufman either pay us what we are owed or get the report some other way. (Winner Aff., Exh. 1).

Furthermore, BSF charged plaintiff for its review of the Brennan Report. A time entry by Attorney Donehower on December 9, 2014, indicates that she reviewed the Brennan Report and charged plaintiff 3 hours for such review (Motion Seq. ten, Exh. C).

Thereafter, it appears that BSF did produce a copy of the Brennan Report. Charles Fox Miller states in his reply affirmation dated April 16, 2018 at page 7, "although the firm initially asserted its retaining lien, it has now provided Plaintiff's counsel with a copy to remove this issue from contention." (Miller Reply Aff., p. 7).

The Brennan Report makes a number of findings with regard to the propriety of BSF's representation of plaintiff in this matter. Attorney Brennan found: (i) the BSF retainer does not comport with the requirements set forth in 22 NYCRR §1400.3; (ii) Theodore Uno, Esq., a BSF attorney admitted to practice in Florida and California, engaged in the unauthorized practice of law in the underlying matrimonial action; (iii) BSF aided and abetted the unauthorized practice of law by Mr. Uno; (iv) a portion of the legal services billed to plaintiff by BSF are improper, unreasonable, and/or unnecessary; and, (v) travel expenses billed to

plaintiff are improper, unreasonable and excessive. With regard to the Bender Firm retainer, however, attorney Brennan found that it complied with the mandates set forth in 22 NYCRR §1400.3.6

The Court also notes that during an appearance before Justice Lawrence Ecker on November 13, 2014, counsel for defendant raised the issue of Theodore Uno, Esq., having appeared in the underlying matrimonial action and having spent in excess of \$200,000.00 in legal fees when he was not authorized to practice law in the State of New York, nor admitted pro hac vice in the action. The transcript of that appearance reveals the following: Mr. Milich7: [M]r. Uno...is an attorney who has appeared in this case and has spent in excess of \$200,000.00 in legal fees in this matter and is not authorized to practice law in the State of New York...

The Court: Sir [to Mr. Uno], you are an attorney?

Mr. Uno: I am, Your Honor.

The Court: Are you admitted in the State of New York?

Mr. Uno: I am not, Your Honor.

* * * *

The Court: Okay. Have you participated in these proceedings by way of deposition or disclosure in any other aspects?

Mr. Uno: I was sitting at some depositions. I did not ask any questions or make any objections. I assisted Mr. Miller in his preparation and in handing him folders and such.

Mr. Milich: Through July of this year he has billed the client at \$174,848 of which he is charging at a rate of \$790 an hour for most of the time, and 38.8 hours at 760 an hour. The firm bills for his travel time from-1 assume bills for his travel time or-I don't know if they do, but travel time is put on the bill. The bill probably-that's as of July-is probably well in excess of \$200,000.The total bill of the invoice Boies Schiller firm as of March.... as of March is approximately 900,000 of which he has in excess 200,000 [sic]. So what you're looking at is in what he does-and I will say this. He's attended conferences with the client. He attended a settlement conference with me on the other side without Mr. Miller present and talked about settlement of the case, and he has been practicing law in his office in New York-not in Florida, in New York-where he's attended depositions, put his name on depositions.. it says that Mr. Uno is present as what? At \$790 an hour?

Mr. Milich: And what I'm asking is that he be barred from sitting here basically as an attorney to help or to facilitate. Just because he's not sitting at this table doesn't mean that he can sit back here and do what he's been doing for \$220,000 up until this point.

(Miller Reply Aff., Exh. I, pp. 17-22).

During the conference, counsel for plaintiff articulated that Mr. Uno was an integral part of plaintiff's team.

D. Legal Standard

BSF seeks a charging lien based upon a theory of an account stated.

(Miller Aff.

3, 12, 16, 17). A charging lien is a statutory remedy which establishes a vested property right in the attorney and comes into existence at the commencement of the action. *Daley v. Daley*, 230 AD2d 82 (1st Dept. 1997). It is a security interest in the favorable result of the litigation, giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client. *Charnow v. Charnow*, 134 AD3d 875 (2d Dept. 2015).

An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due. *Cach LLC v. Aspir*, 137 AD3d 1065 (2d Dept. 2016). A party seeking to establish an account stated must show that the defendant received the plaintiff's account statements for payment and retained these statements for a reasonable period of time without objection. *Id.* In the case of existing indebtedness, the agreement may be implied as well as express. *Cach LLC*, 137 ADd3d at 1066, see also, *Jim-Mar Corp. v. Aquatic Constr.*, 195 AD2d at 869 (3d Dept. 1993). "An agreement may be implied where a defendant retains bills without objecting to them within a reasonable period of time, or makes partial payment on the account". *American Express Centurion Bank v. Cutler*, 81 AD3d 761, 762 (2d Dept. 2011).

With regard to domestic relations matters, 22 NYCRR Part 1400 explicitly sets forth the procedures attorneys who represent a client in a matrimonial matter are required to follow. Failure to comply with 22 NYCRR §1400.3, which requires the execution and filing of a retainer agreement setting forth the nature of services to be rendered and the terms of compensation, precludes an attorney from seeking any fees against his or her client. *Mulcahy v. Mulcahy*, 285 AD2d 587 (2d Dept. 2001); see also, *Bentz v. Bentz*, 71 AD3d 931 (2d Dept. 2010); *Gahagan v. Gahagan*, 51 AD3d 863, 864 (2d Dept. 2008); *Bishop v. Bishop*, 743 NYS2d 724 (2d Dept. 2002). In

addition, where an attorney seeks to recover a fee from an adversary spouse, he or she may only do so where there is substantial compliance with 22 NYCRR §1400.3. *Mulcahy*, 285 AD2d at 588; see also, *Bentz*, 71 AD3d at 931-932; *Sherman v. Sherman*, 34 AD3d 670 (2d Dept. 2006) (absent substantial compliance with 22 NYCRR §1400.3 attorney cannot recover fee from an adversary spouse).

The provisions contained in 22 NYCRR Part 1400 were promulgated to address abuses in the practice of matrimonial law and to protect the public. *Mulcahy*, 285 AD2d at 588 (“22 NYCRR 1400.3 was ‘promulgated to address abuses in the practice of matrimonial law and to protect the public’ such that failure to comply with the rule precludes recovery of an attorney’s fee”); *Julien v. Machson*, 245 AD2d 122 (1st Dept. 1997).

An attorney’s failure to comply with 22 NYCRR §1400.2 and §1400.3 will preclude the establishment of a charging lien (*Bishop*, 295 AD2d at 383; *Pillai v. Pillai*, 15 AD3d 466 [2d Dept. 2005]), and will also preclude recovery on the basis of an account stated. *Morrison Cohen Singer & Weinstein LLP v. Brophy*, 19 Ad3d 161 (1st Dept. 2005), citing *Mulcahy*, 285 AD2d 587; see also, *Hyman & Gilbert v. Withers*, 47 Misc.3d 219 (Sup. Ct. West. Co. 2014); cf, *Edelman v. Poster*, 72 AD3d 182. (2d Dept. 2010).

Upon examination of 22 NYCRR Part 1400, the court notes that 22 NYCRR §1400.2 specifically requires the following:

An attorney shall provide a prospective client with a statement of client’s rights and responsibilities in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement.... The attorney shall obtain a signed acknowledgment of receipt from the client. (emphasis added)

The statement shall contain the following:

UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK
STATEMENT OF CLIENTS RIGHTS AND RESPONSIBILITIES

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and your attorney please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. He or she should be readily available to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are entitled to a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

Your attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

Your attorney may not request a retainer fee that is nonrefundable. That is, should you discharge your attorney, or should your attorney withdraw from the case, before the retainer is used up, he or she is entitled to be paid commensurate with the work performed on your case and any expenses, but must return the balance of the retainer to you. However, your attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent by counsel, and to raise any objections or errors in a timely manner. Time spent in discussion or explanation of bills will not be charged to you.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to cover legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you. You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

In the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

Attorney's signature

Client's signature

Date

The Statement of Client's Rights must be signed by both the attorney and the prospective client. Failure to provide a prospective client with the Statement of Client's Rights will preclude the recovery of any attorney's fees. Bishop, 295 AD2d at 588.

In addition, 22 NYCRR §1400.3 provides that "an attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered.... [t]he agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth (emphasis added)." 22 NYCRR §1400.3 also states that the agreement shall contain the following information(emphasis added):

1. Names and addresses of the parties entering into the agreement;
2. Nature of the services to be rendered;
3. Amount of the advance retainer, if any, and what it is intended to cover;
4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client;
5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;
6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;
7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect;
8. Any clause providing for a fee in addition to the agreed-upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.

9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in discussion of the bills received;
10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;
11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;
12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.
13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

E. Legal Analysis

The determinative question in this matter is whether BSF complied with its obligations as set forth in 22 NYCRR§1400.2 and §1400.3 such that it would be entitled to fix its charging lien against plaintiff; and, to the extent that its motion can be construed to assert a charging lien against defendant, the adversary spouse, whether it substantially complied with its obligations. *Mulcahy*, 285 AD2d at 588.

Turning to the substance of the BSF retainer, this court finds that the BSF retainer does not contain the provisions that are required to be in matrimonial retainers, as explicitly mandated by 22 NYCRR §1400.3. First, the BSF retainer does not describe the nature of services to be rendered other than to state that the services are "in connection with your matrimonial matter." (22 NYCRR §1400.3, item 2.) No indication is stated in the BSF retainer regarding whether BSF was rendering pre-judgment services, post-judgment legal services, serving as appellate counsel or what type of work the firm would be performing with regard to plaintiff's "matrimonial matter". The importance of detailing the scope of the representation is apparent here in retrospect. As noted, just seven days after retaining BSF, plaintiff retained the Bender Firm, therefore calling into question the precise nature of the services BSF was hired to perform.⁸ Next, the BSF retainer does not state the "[circumstances under which any portion of the advance retainer may be refunded, what happens should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, how the attorneys' fees and expenses are to be determined in such case, and that the remainder of the advance retainer shall be refunded to the client." (22 NYCRR §1400.3, item 4).

In addition, the BSF retainer does not state that the client has the right to cancel the agreement at any time, and how the attorney's fees will be determined and paid should the client discharge the attorney at any time during the course of representation. (22 NYCRR §1400.3, item 5).

Moreover, the BSF retainer does not state how the attorney will be paid through the conclusion of the case after the retainer is depleted, and whether plaintiff would be required to pay another lump sum. Although the BSF retainer states the hourly rates for the attorneys who would be working on plaintiff's case, there is no language pertaining to changes in rates or fees. (22 NYCRR §1400.3, item 7). Likewise, although the BSF retainer contains the frequency of itemized billing every 60 days, it does not state that the client may not be charged for time spent in discussion of the bills received.(22 NYCRR §1400.3, item 9).

The BSF retainer also does not contain a provision stating that plaintiff had the right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case. (22 NYCRR §1400.3, item 10). The importance of including this provision is apparent when viewed in light of the fact that the Brennan Report was received by BSF in discovery, and plaintiff alleges that she did not receive a copy and none was produced until in and around the time BSF filed its reply papers on this motion.

So too, the BSF retainer does not contain a provision stating whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary. (22 NYCRR §1400.3, item 11). Finally, the BSF retainer does not contain a provision regarding under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court. (22 NYCRR §1400.3, item 12).

In summary, of the 13 provisions that are required to be in matrimonial retainer agreements pursuant to 22 NYCRR §1400.3, the BSF retainer is lacking at least 8 of the required provisions. Accordingly, the court finds that BSF failed to comply, or even substantially comply, with 22 NYCRR §1400.3, since its retainer with plaintiff is deficient in numerous respects. See *Flanagan v. Flanagan*, 175 Misc.2d 160 (Sup. Ct. N.Y. Co. 1997) (retainer agreement lacking several provisions as set forth in 22 NYCRR 1400.3 found not compliant).

In addition, the court finds that BSF has failed to sustain its burden of demonstrating that it filed the BSF retainer with the court as required by 22

NYCRR §1400.3. Although BSF alleges that its retainer was filed (Miller Reply Aff.

5), the court has taken judicial notice of the documents on file with the Westchester County Clerk's office and notes that the BSF retainer was not filed along with plaintiff's statement of net worth, nor was it ever separately filed. 22 NYCRR §1400.3 requires that the retainer agreement must contain the provisions set forth therein and "must be filed with the court with the Statement of Net Worth" (emphasis added). There is no proof that BSF complied with the filing requirement contained in 22 NYCRR §1400.3. Inasmuch as BSF has failed to sustain its burden of demonstrating that the BSF retainer was filed with plaintiff's statement of net worth, and the BSF retainer is substantively deficient as more fully set forth supra, the court finds that BSF has failed to comply, or even substantially comply, with 22 NYCRR §1400.3, and therefore cannot recover its outstanding fees for the underlying matrimonial action. Accordingly, BSF's request for a charging lien must fail in all respects. Bishop, 295 AD2d at 383 (charging lien correctly denied where attorney failed to comply with 22 NYCRR Part 1400); Mulcahy, 285 AD2d at 588 (an attorney is precluded from seeking fees from his or her client where the attorney has failed to comply with 22 NYCRR §1400.3); Hunt v. Hunt, 273 AD2d 875 (4th Dept. 2000) (attorney precluded from seeking fees against client where he did not comply with 1400.2 and 1400.3 where strict compliance is required and failure to abide by rules will result in preclusion from recovering such legal fees); see also, Pillai v. Pillai, 15 AD3d 466 (2d Dept. 2005) (charging lien denied since attorney failed to demonstrate it substantially complied with rules where it failed to provide a statement of client's rights and responsibilities and failed to file the retainer agreement with the court and provide itemized bills); Bentz, 71 AD3d 931-932 (award of attorney's fees improper against adversary spouse where applicable retainer was not filed with the court until the defendant made motion for attorney's fee and therefore the attorney did not substantially comply with 22 NYCRR §1400.3).

The court also finds that BSF has failed to sustain its burden of demonstrating that it complied with 22 NYCRR §1400.2 with regard to providing plaintiff with a Statement of Client's Rights. Although the BSF retainer states "[i]n addition, please review the attached Statement of Clients Rights and Responsibilities", BSF has failed to produce a copy of the Statement of Client's Rights. None was appended to the BSF retainer that has been produced (Motion seq. ten, Exh. A), and it has not been attached as an exhibit to any of the motion papers. Although BSF argues that plaintiff acknowledged receiving the Statement of Client's Rights by

signing the BSF retainer, the court rejects this argument. The statement contained in the BSF retainer is not an acknowledgment that plaintiff received the Statement of Clients Rights. It is merely a sentence in BSF's retainer that plaintiff read the Statement of Client's Rights that purports to be attached to the BSF retainer, when in fact no such document has been produced by BSF. Accordingly, BSF cannot enforce a charging lien against plaintiff. Bishop, 295 AD2d at 383 (an attorney's failure to provide prospective client with statement of rights and obligations will preclude collection of a fee, as well as failure to comply with 22 NYCRR Part 1400, which requires execution and filing of retainer agreement setting forth the terms of service).¹⁰

Finally, the court must address BSF's assertions regarding plaintiff's alleged failure to object to BSF's invoices, or to Mr. Uno having worked on her case, prior to BSF's motion to fix a charging lien. The court rejects the import of BSF's arguments, which is that BSF is entitled to recovery based upon a theory of an account stated.

The dispositive question is whether BSF complied with 22 NYCRR §1400.2 and 22 NYCRR §1400.3, and in this case the court finds that with regard to plaintiff, BSF failed to comply, or even substantially comply, with its obligations. The mandates set forth in 22 NYCRR Part 1400 were enacted to protect litigants from overreaching by attorneys in domestic relations matters. Mulcahy, 285 AD2d at 588. It is axiomatic that BSF cannot assert it is entitled to a charging lien on the grounds that they have an account stated when they cannot demonstrate compliance, or even substantial compliance, with 22 NYCRR §1400.2 and 22 NYCRR §1400.3. See, Morrison Cohen Singer & Weinstein LLP, 19 Ad 3d 161, citing Mulcahy, 285 AD2d 587; see also, Hyman & Gilbert, 47 Misc.3d 219; cf, Edelman, 72 AD3d 182. Indeed, it would make little sense if the mandates of the statute could be defeated simply by asserting the existence of an account stated.

Accordingly, notwithstanding plaintiff's alleged failure to voice concerns over BSF's work until BSF sought a charging lien, or whether plaintiff or her trial counsel failed to object to Mr. Uno's work on this case, the court simply cannot countenance, and will not sanction, BSF's failure to adhere to the explicit requirements set forth in 22 NYCRR §1400.2 and 22 NYCRR §1400.3, compliance with which as set forth herein, is a prerequisite to the recovery of any fees in a domestic relations matter. Therefore, based upon the foregoing, it is hereby

ORDERED that BSF's motion for a charging lien (Motion sequence ten) is denied in all respects; and it is further

ORDERED that Motion sequence nine is granted solely to the extent that the amended notice of charging lien is dismissed; and it is further ORDERED that all other relief requested herein not specifically addressed is denied.

THIS IS THE DECISION AND ORDER OF THE COURT.

The following papers were read:

1. Order to Show Cause (Motion Seq. nine), Affidavit of Beth Coplan Kaufman, sworn to January 9, 2018, with all exhibits annexed thereto;
2. Order to Show Cause (Motion Seq. ten), Affirmation of Charles Fox Miller, Esq., dated May 8, 2018; Affidavit of Theodore Uno, Esq., dated May 8, 2018; with all exhibits annexed thereto;
3. Amended notice of charging lien, dated March 8, 2018;
4. Affirmation of Elliot Polland, Esq., March 7, 2018, in response to motion by Karen Winner to dismiss the charging lien with all exhibits annexed thereto;
5. Affirmation in opposition of Karen Winner, Esq., dated April 8, 2018, with all exhibits annexed thereto; plaintiff's memorandum of law to dismiss amended notice of charging lien and in opposition to the BSF/Former Counsel's Order to Show Cause;
6. Affidavit of Beth Coplan Kaufman, sworn to April 6, 2018;
7. Non-Party Boies Schiller Flexner LLP's Reply Affirmation Concerning Charging Lien; affirmation of Charles Fox Miller, dated April 16, 2018 with all exhibits annexed thereto;
8. Report of Timothy J. Brennan, Esq., in the Matter of Kaufman v. Kaufman, Index No. 4815/2012, filed with the court on April 20, 2018, with all exhibits annexed thereto.

Dated: May 10, 2018

White Plains, NY

Footnotes

1. The request for a stay, which is based on the pendency of an action plaintiff commenced in New York County to set aside the stipulation in the underlying matrimonial action, is moot. This court has been notified that plaintiff voluntarily discontinued the New York County action with prejudice by stipulation dated April 22, 2018.
2. As more fully set forth herein, the amended notice of charging lien filed on March 9, 2018 is for approximately \$100,000.00 less than the original charging lien due to an error on BSF's part in failing to credit plaintiff with a payment.
3. The Bender Firm retainer filed with plaintiff's statement of net worth states that its initial fee was \$25,000.00.

4. As set forth *infra*, the relevant case law appears to draw a distinction regarding whether the fees are sought against the client, or the adversary spouse. An attorney who has failed to comply with 22 NYCRR §1400.3, which requires the execution and filing of a retainer agreement setting forth the nature of services to be rendered and the terms of compensation, is precluded from seeking any fees against his client. *Mulcahy v. Mulcahy*, 285 AD2d 587 (2d Dept. 2001); *Bentz v. Bentz*, 71 AD3d 931 (2d Dept. 2010); *Gahagan v. Gahagan*, 51 AD3d 863, 864 (2d Dept. 2008). Where an attorney seeks to recover a fee from an adversary spouse, he may only do so where there is substantial compliance with 22 NYCRR §1400.3.

Mulcahy, 285 AD2d at 588. As more fully detailed herein, BSF's motion for a charging lien, examined under either standard, fails.

5. In his report, attorney Brennan states that he began his career over 30 years ago in 1980 as an attorney for the Grievance Committee for the Ninth Judicial District. Attorney Brennan stated in the report that since 1983 he has been engaged in the private practice of law concentrating in the representation of attorneys and judges in matters before the Disciplinary Committee and the Commission on Judicial Conduct, and representing litigants in matrimonial and family court matters. (Brennan Report p. 2).

6. The Brennan report raises numerous questions regarding BSF's involvement in this matter. Among other items, the Brennan report notes that an attorney having no apparent experience in matrimonial matters, David A. Barrett, Esq., whose biography identifies his areas of expertise as litigation, antitrust, class actions, intellectual property, and securities litigation, was involved in a conference with Charles Miller, and billed plaintiff \$2,260.00 for his time. The Brennan Report also states that travel charges in excess of \$60,000.00 without any further description were billed to plaintiff, which on its face appears to be excessive. Attorney Brennan also noted "the BS&F firm contacted Joel Bender, Esq. on March 7, 2012, which was one day after the office conference between Charles Miller, Esq., and James Fox Miller Esq. It is clear that, from the beginning, BS&F made a determination that their firm could not, or should not, undertake the representation of Plaintiff unless Plaintiff also had 'local counsel.'" (Brennan Report p. 13). According to the Brennan report, "[o]n its face it does not appear reasonable or necessary to involve more than a half dozen lawyers from multiple locations, to adequately represent the plaintiff in this matrimonial matter." (Brennan Report at p. 14).

7. Lee Milich, Esq., appeared as counsel for defendant in the underlying matrimonial.

8. Although not determinative here, the Brennan Report notes that plaintiff testified at her deposition that she retained BSF, and then it was BSF who retained the Bender Firm (Brennan Report, p. 20). This testimony dovetails with a notation in the Brennan Report that is based upon BSF's time records, that BSF contacted Joel Bender, Esq, on March 7, 2012, one day after an office conference between Charles Miller, Esq., and James Fox Miller, Esq. (Brennan Report, p. 13, 19).

9. This court does not make any finding regarding whether bills were sent to plaintiff since BSF's retainer is substantively deficient, BSF did not file the retainer with plaintiff's statement of net worth, and BSF did not sustain its burden of demonstrating that it provided plaintiff with a Statement of Client's Rights, all of which defeats BSF's motion to fix a charging lien.

10. In addition, the court notes that the only time the BSF retainer was filed with the court in the matrimonial action was as Exhibit M to an unsigned order to show cause filed with the Westchester County Clerk on June 13, 2014, a portion of which order to show cause requested counsel fees. This is insufficient compliance with the statute. See, *Wagman v. Wagman*, 8 AD3d 263 (2d Dep't 2004) (award of counsel fees improper where retainer agreement was not filed with the court until the making of the fee motion, and therefore plaintiff's counsel did not substantially comply with 22 NYCRR §1400.3).