SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
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In The Matter of the Application of

THE VILLAGE OF PORT CHESTER TO ACQUIRE TITLE TO CERTAIN REAL PROPERTY LOCATED IN THE VILLAGE OF PORT CHESTER, WESTCHESTER COUNTY, STATE OF NEW YORK, AND DESIGNATED ON THE TAX MAPS OF THE VILLAGE OF PORT CHESTER AS SECTION 2, BLOCK 98, Lots 1B, 1C, 1D, 2A1, 3, 5, 6, 7 and 9.

Index No: 3793/00

DECISION & ORDER

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DICKERSON, J.

EMINENT DOMAIN: CLAIM ABANDONED AND CHARGING LIEN REJECTED

In this latest exploration[1] of the condemnation proceedings initiated in June of 1999 by the Village of Port Chester [" the Village "] which implemented a " Modified Marine Redevelopment Project (which) was the culmination of decades of discussions on how the Village could revitalize its blighted waterfront and downtown areas "[2], this Court must decide, among other things, whether the claimant Louis Perez d/b/a Luis Luncheonette [" the Claimant "] has abandoned his claim and, if so, whether his claim should be dismissed on the merits and, lastly, whether the Claimant's counsel, who have worked diligently

on his behalf, may impose a charging lien pursuant to Judiciary Law § 475 upon an alleged settlement between the Claimant and the Village. Stated, simply, the Court finds that the Claimant has abandoned his claim and, hence, his claim is dismissed on the merits and, lastly, the Claimant's counsel are not entitled to " a charging lien on the fund or judgment recovered through (their) efforts "[3] since there has been no " verdict, report, determination, decision, judgment or final order "[4] or settlement of the Claimant's claim with the Village[5].

Three Bites At The Apple

The Claimant has made the same motion not once, not twice, but three times before this Court and three times, including the decision herein, it has been denied.

The First Bite

On December 12, 2002 the Claimant made a motion before Justice Rosato of this Court seeking " An Order directing the Village of Port Chester to exchange appraisals and to file a Note of Issue and Statement of Readiness and for this Court to set a date certain for trial "[6]. That motion was denied by Justice Rosato in his Decision dated March 3, 2003[7]. In addition, the Claimant was ordered " to submit amended inventories

no later than thirty (30) days following vacatur of their respective premises “.

The Second Bite

On February 4, 2005 the Claimant made his second motion seeking the same relief which was denied by Justice Rosato in his Decision dated April 14, 2005[8] [“ there is little question, in this Court’s view, that claimant’s instant motion, seeking relief identical to that sought in his initial motion of 12/12/02 and absent any showing that the Court has either overlooked or misapprehended the relevant facts or had misapplied the law, on claimant’s first motion, appears to be facially frivolous “].

The Third Bite

And on October 26, 2005 the Claimant once again sought the same relief[9] denied twice before and which is hereby denied a third time for the reasons set forth in Justice Rosato’s April 14, 2005 Decision and, additionally, because of the Doctrine of law of the case [See e.g., Quinn v. Hillside Development Corp., 21 A.D. 3d 406, 800 N.Y.S. 2d 206 (2d Dept. 2005)(“ (motion) based on the same arguments and facts (and no demonstration of) extraordinary circumstances warranting a departure from the earlier determination on this issue “); AAA

Electricians Inc. v. Village of Haverstraw, 9 Misc. 3d 1120 (West. Sup. 2005)(" Since the Claimant's instant Notice of Motion is based on the ' same arguments and facts ' the Claimant raised before Justice Rosato, and did not ' demonstrate extraordinary circumstances warranting departure from the earlier determination on this issue ', Justice Rosato's decision is law of the case and this Court is bound by it ")].

The Village's Cross Motion

On March 2, 2005 the Village made a cross motion seeking an Order deeming the Claimant's claim " abandoned, discontinued or withdrawn " and " awarding costs and disbursements including attorneys fees " and " imposing financial sanctions ", pursuant to 22 NYCRR 130-1.1, against Claimant's counsel for " bringing a frivolous motion ". This cross motion was severed by Justice Rosato in his April 14, 2005 Decision and referred to this Court for disposition [" the more prudent course is to sever the instant cross-motion "].

Evidence Of Abandonment

The Village's Cross Motion was based upon the Claimant's failure to (1) file an Amended Inventory as ordered by Justice Rosato three years ago[10] which the Claimant declares to be unnecessary and of " no additional value "[11] and (2) an unsworn letter from the Claimant to the

Village Manager dated July 14, 2004 which states, in part, " I am writing to confirm that I have no claim against the Village of Port Chester, Village of Port Chester Industrial Development Agency or G&S Developers as a result of the G&S project. I found a new location for my business...I made my own arrangements with my old landlord and new landlord and do not wish to be involved in any legal matters or fixture claims...I am no longer represented by any law firm in this case. If the Village will provide me with a release form, I will be happy to sign it "[12].

Counsel Claims They Have Not Been Discharged

In response the Claimant's counsel asserted that they had not been " discharged by Mr. Perez nor has our office been informed to cease moving forward with this case "[13]. However, counsel has not been in contact with the Claimant since May 13, 2003 when he failed to attend a meeting to discuss a proposed settlement offer[14]. In addition, Claimant's counsel asserted that " upon information and belief, the Claimant has not abandoned, discontinued or withdrawn his condemnation claim "[15] and, further, citing C.P.L.R. § 3217(a)(2), " it is clear that the July 2004 letter is legally insufficient to discontinue Claimant's action "[16].

Subpoena The Claimant

After Justice Rosato's referral of the Village's Cross Motion this Court held a status conference on August 25, 2005 and advised counsel for the parties that the Court needed to know from the Claimant what his intentions were [See e.g., Ferraro v. Ferraro, 159 N.Y.S. 2d 901 (Kings Sup. 1956)(hearing held " to take proof as to whether the plaintiff had abandoned her action...On all the facts and proof submitted it is my view that the plaintiff abandoned her action ")]. In that regard the Court ordered counsel for the parties to separately serve Judicial Subpoenas on the Claimant requesting his presence at a Hearing to be held on September 28, 2005 at 3:00PM. Counsel for the Village served a Judicial Subpoena on the Claimant and Counsel for the Claimant served a Judicial Subpoena on a Ms. Loredana Smith, a co-tenant of the Claimant[17].

The No-Show Claimant

On September 28, 2005 the Court held a hearing expecting the Claimant to honor the Judicial Subpoenas. Unfortunately, the Claimant did not appear whereupon his counsel asked " that Mr. Perez be held in contempt "[18]. Nonetheless a Hearing was held during which the Court made the following observations.

" The Court: I had wanted to ask Mr. Perez the following questions ...Do you intend to pursue your claim against the Village of Port Chester? Have you abandoned your claim? Are you still represented by Mr. Rikon and his firm? And I understand that if the Village of Port Chester provides you with a release form, would you sign it? Is that true? Those are the basic questions I wanted to ask him in order to resolve this issue of representation[19] ".

If The Claimant Doesn't Care Why Should We?

" The Court: ...I thought it would be appropriate to get him in here and find out whether or not in fact he does want to pursue it. Without a claimant that's willing to go forward, what's the point of the exercise of having a trial in this matter and putting everyone to the burden of getting–-filing appraisals? If he doesn't show up, how can you go forward? [20]"

....

" The Court: That's not the issue. Issue is, is he willing today to proceed with the claim? You have no information on that; isn't that correct?

Mr. Sanchez: That's correct, your Honor.

The Court: Nobody does, so you don't have any information or belief...But there's no information that you have that as of this moment

he wants to pursue this claim. That was the whole purpose of getting him in here. [21]"

...

The Court:... He's not here. He doesn't care enough to come in and show us that he cares...You don't have a client who cares, what's your interest.

Mr. Rikon: Judge, I have a lien [22]".

The Claim Has Been Abandoned

It is clear that the Claimant has abandoned his claim as evidenced by (1) his failure to comply with Justice Rosato's March 3, 2003 Decision wherein he was ordered " to submit amended inventories no later than thirty (30) days following vacatur of their respective premises ", (2) his July 14, 2004 letter to the Village Manager dated July 14, 2004 which states, in part, " I am writing to confirm that I have no claim against the Village of Port Chester, Village of Port Chester Industrial Development Agency or G&S Developers as a result of the G&S project ", (3) his lack of contact with his counsel from May 13, 2003 to the present and (4) his failure to appear at a Hearing before this Court on September 28, 2005 to answer questions about his intentions to proceed. Why waste anymore of the resources of the Court, counsel and the Village on a Claimant who does not care enough to pursue his claim? Certainly, such a reluctant Claimant can not be forced to litigate [See e.g.,

Burnham Service Corp. v. National Council, 288 A.D. 2d 31, 732 N.Y.S. 2d 223 (1st Dept. 2001)("...a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted "); Christenson v. Gutman, 249 A.D. 2d 805, 671 N.Y.S. 2d 835 (3d Dept. 1998)]. In addition, the Claimant is an indispensable party at a trade fixtures trial and must be present to prove ownership and installation of the trade fixtures [" Without the claimant, ownership and installation cannot be proven and there can be no award for trade fixtures[23] "]. Hence, in the interests of justice and pursuant to C.P.L.R. 3217(b) this Court dismisses with prejudice all the claims of Luis Perez d/b/a Luis Luncheonette asserted herein on the grounds that they have been abandoned.

Claimant's Counsel Wants To Be Paid For Its Services

If the Claimant's claim is dismissed, which it is, the Claimant's counsel requests " that it be awarded its attorney's fees pursuant to its assignment of the claim, its Lien and its Retainer Agreement with Claimant "[24].

The Retainer Agreement

Evidently, Claimant's counsel entered into a Retainer Agreement which provided that the Claimant " agrees to pay and hereby assigns to said attorneys, for their services, twenty-five(25%) percent of the total award and interest that may be made or the amount paid for the taking of their trade fixtures contained in said property and twenty-five(25%) per cent for relocation payments obtained by the attorneys for the clients...The client shall pay any and all expenses, disbursements, appraisers and experts fees...This retainer relates to amounts obtained by suit, settlement or otherwise...Said attorneys' compensation and disbursements are to be paid as and when the advance payment and award is paid by the condemnor "[25].

The Assignment

The Claimant's counsel asserts that they have an " assignment of the claim [26]" and that the " Retainer...assigned a portion of the claim to counsel [27]". Claimant's counsel, of course, overstates the significance of the language in the Retainer Agreement [" assigns to said attorneys, for their services, twenty-five(25%) percent of the total award..."]. Counsel does not have an assignment of the Claimant's claim but an assignment of any award or settlement as compensation " for

their services " and hence " does not have the right to have the claim determined [28]".

Judiciary Law § 475

The Claimant's counsel urges this Court to enforce a charging lien based upon services rendered[29] against an alleged settlement [described by counsel as possibly " an illicit pay-off "[30]] of the Claimant's claim pursuant to Judiciary Law § 475 [See e.g., LMWT Realty Corp. v. Davis Agency, Inc., 85 N.Y. 2d 462, 626 N.Y.S. 2d 39, 649 N.E. 2d 1183 (1995)(" there is an additional equitable factor which is dispositive here: the attorney's services created *the fund at issue* [emphasis added], and under those circumstances the attorney's charging lien must be given effect "); Epstein & Furman v. Old Tyme Soft Drinks, Inc., 189 A.D. 2d 738, 593 N.Y.S. 2d 185 (1st Dept. 1993)(" The record is clear that the intent of all parties to the *settlement indemnification agreement* [emphasis added] was to deprive petitioner law firm of its fee "); Estate of Roslyn Dresner v. State of New York, 242 A.D. 2d 627, 662 N.Y.S. 2d 780 (2d Dept. 1997)(" the respondent is directed to disburse funds to satisfy the attorney's lien from the *proceeds of the condemnation award* [emphasis added] prior to the satisfaction of the tax liens "); Haser v. Haser, 271 A.D. 2d 253, 707 N.Y.S. 2d 47 (1st Dept. 2000)(" The IAS Court correctly ruled that the expedited

procedure of Judiciary Law § 475 is designed to attach only *the specific proceeds of the judgment or settlement* [emphasis added] in the action "); Ozorowski v. Pawloski, 207 Misc. 407, 139 N.Y.S. 2d 31 (Mont. Cty. Ct. 1955) (" An attorney at common law was protected by two kinds of liens, a retaining lien on all papers in his possession and a charging lien on *the fund or judgment recovered through his efforts* [emphasis added]. The charging lien ' was a device invented by the courts for the protection of attorneys against the knavery of their clients, by disabling clients from *receiving the fruits of recoveries* [emphasis added] without paying for the valuable services by which the *recoveries* [emphasis added] were obtained '")].

There Is No Fund Against Which A Charging Lien May Be Imposed

Judiciary Law § 475 requires that there be a " verdict, report, determination, decision, judgment or final order "[31] against which a charging lien may be imposed. The cases interpreting Judiciary Law § 475 require that counsel's efforts actually create " *a fund* ", " *settlement indemnification agreement* ", " *proceeds from a condemnation award* ", " *specific proceeds of the settlement or judgment* ", " *the fund or judgment recovered through his efforts* ", " *the fruits of recoveries* ".

There is no evidence that the Claimant settled his claim with the Village [" This alleged settlement was not approved by this office or

recommended to the Village "[32]; " the settlement documents have yet to be executed [33]"], the only other party herein. Hence, there is no justification for the imposition of a charging lien against an alleged settlement with the Village since there has been none, clandestine or otherwise [See e.g., Ozorowski v. Pawloski, 207 Misc. 407, 139 N.Y.S. 2d 31 (Mont. Cty. Ct. 1955)(" Plaintiff's attorney acquired a lien upon the amount of the settlement which may not be defeated by the payment thereof to his client. It was the duty of the defendant to ascertain the amount due the attorney and to retain it for him. Failure to do so renders him liable for the value of the services and disbursements of his opponent's attorney ")].

Troubling Questions, Indeed.

Claimant's counsel has many troubling questions[34] suggesting that the Claimant may have been subjected to " duress ", " coercion ", the recipient of an " illicit pay-off " arising from the " wrongful conduct of the Village, the developer, G&S Port Chester, LLC or some other entity "[35]. None of these questions are of any relevance herein since there has been no settlement between the Claimant and the Village and the Claimant has chosen to abandon his claim notwithstanding the diligent efforts of his counsel.

Conclusion

Based upon the foregoing the motion of the Claimant is denied in its entirety, the cross motion of the Village is granted, to the extent of dismissing the Claimant's claim with prejudice because it has been abandoned and denied, to the extent it seeks an award of attorneys fees, costs and disbursements and financial sanctions pursuant to 22 NYCRR 130-1.1.

This constitutes the Decision and Order of this Court.

Dated: White Plains, N.Y.
December 9, 2005

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HON. THOMAS A. DICKERSON
JUSTICE SUPREME COURT

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ENDNOTES

1. See Matter of Application of The Village of Port Chester, 5 Misc. 3d 1031(A)(West. Sup. 2004)(discussion of advance payments and interest payments in condemnation proceedings).

2. Brody v. Village of Port Chester, 2005 WL 3274976 (2d Cir. 2005)(inadequate notice of statutory right to challenge condemnor's public use determination). See also: Didden v. Village of Port Chester, 304 F. Supp. 2d 548 (S.D.N.Y. 2004)(landowners challenge condemnation of their land; application for preliminary injunction halting eminent domain proceedings during pendency of suit denied); Didden v. Village of Port Chester, 322 F. Supp. 2d 385 (S.D.N.Y. 2004)(claims dismissed).

3. Rose v. Pawloski, 207 Misc. 407, 139 N.Y.S. 2d 31 (Montgomery County Court 1955).

4. McKinney's Consolidated Laws of New York, Judiciary Law § 475, p. 5.

5. Affirmation of Liane V. Watkins dated November 9, 2005 at para. 19-26 [" Watkins Aff. III "] (" this office was not a party to any alleged settlement with the claimant...As Mr. Rikon admits the alleged settlement was not with the Village, the only other party to the proceeding with respect to this claim...This alleged settlement was not approved by this office or recommended to the Village...").

6. Affirmation of Liane V. Watkins dated March 2, 2005 In Support Of Cross Motion & In Opposition To Motion [" Watkins Aff. I "] at Ex. A.

7. Watkins Aff. I at Ex. B.

8. Affirmation of Liane V. Watkins dated October 26, 2005 in Further Support of Cross Motion [" Watkins Aff. II "] at Ex. A.

9. Claimants Memorandum of Law dated October 26, 2005 at p. 2 [" Claimant's Memo. I "]; Watkins Aff. II at para. 3; Watkins Aff. III at para. 4.

10. Watkins Aff. I at paras. 9-16.

11. Affirmation of Michael Rikon dated April 1, 2005 In Reply and In Opposition [" Rikon Aff. I "] at para. 21.

12. Watkins Aff. I at Ex. D.

13. Affidavit of Philip Sanchez sworn to April 4, 2005 at para. 9 [" Sanchez Aff. "]; See also Rikon Aff. II at para. 16.

14. Sanchez Aff. at paras. 3-6.

15. Rikon Aff. I at para. 8.

16. Claimant's Memo. I at pp. 3-4.

17. See Affidavits of Service dated September 20, 2005 [Village] and September 22, 2005 [Claimant].

18. Watkins Aff. II at Ex. B; Transcript of September 29, 2005 Hearing at pp. 6-8 [" Trans. "].

19. Trans. at pp. 6-7.

20. Trans. at p. 7.

21. Trans. at p. 11.

22. Trans. at p. 12.

23. Watkins Aff. II at paras. 12-16.

24. Claimant's Memo. I at p. 2.

25. Claimant's Memo. I at Ex. A.

26. Claimant's Memo. I at p. 2.

27. Claimant's Reply Memorandum of Law dated November 8, 2005 at p. 2 [" Claimant's Reply Memo. "].

28. Watkins Aff. III at para. 8. In any event, counsel admits the rather limited nature of their " assignment " in Claimant's Reply Memo. at p. 4 ("...the Retainer Agreement...also operates as an assignment to our firm of a portion of the monies paid to the Claimant in this action ").

29. Claimant’s Memo. I at p. 4 (“ ...filed a Notice of Claim... filed an Amended Notice of Claim with Schedule...filed an appeal with the Court of Appeals...retained a trade fixture appraiser to prepare an inventory, assess the value of (the) claims and prepare a report... “).

30. Claimant’s Reply Memo. at p. 4 (”...when the Court has no assurances that the (July 14, 2004) letter was knowingly and voluntarily written as opposed to being done under duress, coercion and following an illicit pay-off “).

31. McKinney’s Consolidated Laws of New York, Judiciary Law § 475, p. 5.

32. Watkins Aff. III at paras. 21-26.

33. Claimant’s Memo. I at p. 3.

34. Claimant’s Memo. I at pp. 4-5; Claimant’s Reply Memo. at pp. 4-5.

35. Claimant’s Reply Memo. at p. 4.