

**Oakwood LLC v C.D.M.R.J. & Assoc. LLC**

2007 NY Slip Op 30720(U)

April 12, 2007

Supreme Court, Suffolk County

Docket Number: 0023675/2003

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK  
**COMMERCIAL DIVISION**  
**TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 1-10-07  
SUBMITTED: 1-10-07  
MOTION NO.: 006-MD

\_\_\_\_\_  
OAKWOOD LLC, H.S. CARE LLC, 305 LLC,  
ABRAHAM SCHAULSON, HENRY SCHON and OTTO  
WEINGARTEN,

Plaintiffs,

SILLER WILK LLP  
Attorneys for Plaintiffs  
675 Third Avenue  
New York, New York 10017

-against-

MORRISON COHEN LLP  
Prior Attorneys for Defendant  
909 Third Avenue  
New York, New York 10022

C.D.M.R.J. AND ASSOCIATES LLC,

Defendant.

\_\_\_\_\_  
HELLER, HOROWITZ & FEIT, P.C.  
Attorneys for Defendant  
292 Madison Avenue  
New York, New York 10017

Upon the following papers numbered 1 to 22 read on this motion to void charging lien; Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 9-13; 14-21; Replying Affidavits and supporting papers    ; Other 22; it is,

**ORDERED** that the motion by the defendant for an order voiding the attorney charging lien of Morrison Cohen, LLP, or setting aside the parties' settlement is granted solely to the extent that the charging lien is voided; and it is further

**ORDERED** that the motion is otherwise denied; and it is further

**ORDERED** that the issue of the fee due Morris Cohen, LLP, is referred to a hearing, which shall be held on June 4, 2007 at 11:00 a.m., Supreme Court, Courtroom 7, Arthur M. Cromarty Criminal Court Building, 210 Center Drive, Riverhead, New York 11901.

On September 18, 2003, a judgment by confession in the amount of \$900,250 was entered in the Supreme Court, Suffolk County, in favor of the defendant, CDMJR and Associates, LLC (hereinafter CDMJR) and against the plaintiffs Oakwood LLC, H.S. Care LLC, 305 LLC, and Abraham Schaulson. Also on September 18, 2003, a judgment by confession in the amount of

\$1,000,250 was entered in the Supreme Court, Kings County, in favor of CDMJR and against the plaintiffs Otto Weingarten and Henry Schon. Shortly thereafter, CDMJR served restraining notices on various banks and other financial institutions where the plaintiffs maintained accounts. In October 2003, the plaintiffs commenced this action and another action in the Supreme Court, Kings County, to vacate the aforementioned judgments and restraining notices. By a so-ordered stipulation dated October 22, 2003, the restraining notices were vacated on the condition that the plaintiffs Otto Weingarten and Henry Schon deposit \$1,050,000 in escrow, which they did. The Kings County action was subsequently consolidated with this action. In November 2004, Morris Cohen, LLP (hereinafter Morris Cohen), appeared in the consolidated action on behalf of the defendant CDMJR. By an order dated October 14, 2005, Morris Cohen was granted leave to withdraw as counsel for CDMJR, and the issue of Morris Cohen's fee was referred to a hearing to be scheduled and conducted by the court upon resolution of the outstanding issues. On November 13, 2006, the trial of the consolidated action commenced before this court. On November 14, 2006, the second day of trial, a settlement was reached. The settlement provided that both judgments by confession be vacated and that CDMJR's current attorneys, Heller, Horowitz & Feit, P.C., be paid \$825,000. Also on November 14, 2006, Morris Cohen served a notice of charging lien upon the counsel of record in this action. The defendant CDMJR has moved to void the lien.

Judiciary Law § 475 provides, in pertinent part, as follows:

From the commencement of an action \* \* \* or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come[.]

To create a charging lien, an attorney's efforts must result in (1) a client asserting a claim, (2) which can result in proceeds, (3) payable to or for the client's benefit. Therefore, a defendant's attorney cannot obtain a charging lien unless the client asserts a counterclaim. An attorney who merely defends or protects his client's interest in property without obtaining an affirmative recovery is not entitled to a lien on the property that the client retains (*see, Tunick v Shaw*, 6 Misc 3d 1014[A], \*3; *United Orient Bank v 450 W. 31<sup>st</sup> St. Owners Corp.*, 155 Misc 2d 675, 676; *Manshul Constr. Corp., v Geron*, 225 BR 41, 49-50; *Schick v Invex*, 215 BR 13, 15-16).

It is undisputed that the defendant CDMJR did not file a counterclaim in either this action or in the Kings County action that was consolidated with this action. CDMJR argues, "The creation of the escrow fund obviated the need for it to assert a counterclaim or to continue the prosecution of its original action to enforce the judgments by confession." However, an attorney's right to collect out of funds or property that he obtains for his client is premised on the theory that it is the attorney who has created the fund out of which he is paid by his efforts (*see, Tunick v Shaw, supra* at \*3); *Manshul Constr. Corp., v Geron, supra* at 49). Here, the escrow fund was created to replace the restrained property. It was not the result of any effort by Morris Cohen since it was created before Morris Cohen represented CDMJR. Morris Cohen was merely protecting CDMJR's

interest in the fund. Had CDMJR prevailed in this action, it would not have resulted in any additional recovery for CDMJR. Under these circumstances, the court finds that, in the absence of a counterclaim, Morris Cohen is not entitled to a charging lien. Accordingly, the motion is granted, and the charging lien is voided.

Although it is not necessary to address CDMJR'S prayer for alternate relief, the court notes that all of the parties, including CDMJR, were aware of Morris Cohen's claim for legal fees when they entered into the settlement, which was placed on the record in open court. Accordingly, the court finds that CDMJR has failed to establish any ground for setting aside the parties' settlement (*see, Hallock v State of New York*, 64 NY2d 224, 230; *Gage v Jay Bee Photographers*, 222 AD2d 648, 649; *Herzfeld v J&M Realty Assocs.*, 151 AD2d 644).

When an attorney is discharged without cause before the completion of services, the amount of his compensation must be determined on a quantum meruit basis (*see, Teichner v W&J Holsteins*, 64 NY2d 977, 979; *Lopresti v Ingenito*, 229 AD2d 567). There is no allegation that Morris Cohen was discharged for cause. Therefore, notwithstanding the absence of a charging lien, the matter is referred to a hearing to compute the amount due Morris Cohen on a quantum meruit basis (*see, Chardbourne & Parke LLP v AB Recur Finans*, 18 AD3d 222, 223).

HON. ELIZABETH HAZLITT EMERSON

DATED: April 12, 2007

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J. S.C.