

Lezcano v Lezcano

2007 NY Slip Op 31486(U)

June 4, 2007

Supreme Court, Suffolk County

Docket Number: 0000040/2006

Judge: Emily Pines

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Supreme Court - State of New York
I.A.S. Term, Part 23, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Original Motion Date: 04-23-2007
Motion Submit Date: 04-26-2007
Motion Sequence No.: 001 RRH

RODRIGO LEZCANO,

Plaintiff,

-against-

DIEGO LEZCANO,

Defendant .
X

Attorney for Plaintiff

Siler & Ingber, LLP
1399 Franklin Avenue, Suite 103
Garden City, New York 11530

Attorney for Defendant

Mallilo & Grossman
163-09 Northern Blvd.
Flushing, New York 11358

ORDERED, that the motion by RONALD D. INGBER, ESQ., for an Order pursuant to **Judiciary Law §475** scheduling a hearing to enforce the charging lien of SILER & INGBER, LLP against the proceedings of the settlement of the above-captioned action is considered as Notice of Petition and Petition and granted; and it is further

ORDERED, that a hearing is scheduled for August 6, 2007 at 10:00 a.m. before the undersigned; and it is further

ORDERED, that at the hearing, the Court will also consider the imposition of sanctions against JACK GROSSMAN and MALLILO & GROSSMAN, pursuant to **22 N.Y.C.R.R. Part 130**.

This is a motion by Ronald D. Ingber, Esq. ("Ingber"), former counsel for Plaintiff in the underlying personal injury action, seeking to enforce a charging lien pursuant to **Judiciary Law §475**. Initially, on the Court's own motion, the papers are converted into a Petition and pleadings of a special proceeding. *Gurvitsch v. Gurvitsch*, 239 A.D.2d 465, 658 N.Y.S.2d 42 (2d Dept. 1997). The relevant facts are as follows:

On or about November 23, 2005, Plaintiff retained SILER & INGBER, LLP ("SILER & INGBER") to prosecute a personal injury action resulting from a motor vehicle accident on November 12, 2005. Plaintiff executed a retainer agreement in which he agreed to pay SILER & INGBER 33 1/3

percent (33 1/3%) of any amount recovered whether by suit, settlement or otherwise. SILER & INGBER thereafter commenced an action against Defendant by filing a Summons and Verified Complaint on or about January 4, 2006. According to Ingber, in March of 2006, Allstate Insurance Company, insurance company for Defendant in the personal injury action, tendered, in writing, its policy sum in the amount of \$50,000. Shortly thereafter, however, Plaintiff discharged SILER & INGBER and substituted MALLILO & GROSSMAN (“MALLILO”) as his counsel of record. Ingber then wrote to MALLILO and forwarded the tender from Allstate, an itemization of expenses incurred, a stipulation of substitution, a request for reimbursement of expenses and a claim for a charging lien. MALLILO would not agree to the charging lien of \$16,495.92 (representing 33 1/3 % of the \$50,000 tender) and commenced a proceeding in Queens County seeking a release of the file from SILER & INGBER. By Order (Hart, J.) dated November 8, 2006, Justice Hart directed the release of the file upon the payment to SILER & INGBER of their expenses of \$512.25 and referred the issue of the charging lien to this Court in conjunction with the underlying personal injury action.

SILER & INGBER now move for a charging lien in the amount of \$16,495.92, or in the alternative, a hearing to enforce the charging lien against the proceeds of the settlement of the personal injury action.

Plaintiff, via his counsel, Jack Grossman, opposes the motion. Although he does not dispute that the Allstate policy in the amount of \$50,000 has been tendered, he argues that he has also commenced an action against the landowner where the accident occurred, and thus that the application for a charging lien is premature. Plaintiff argues that SILER & INGBER’s fee should be determined by the amount of work they performed on the case, and not based upon the Allstate tender. Curiously, Plaintiff also submits a personal affidavit, dated June 2, 2006 that was included as part of the Queens case seeking release of the file. In that affidavit, plaintiff states that “On or about March 9, 2006, I retained the Law Firm of Mallilo and Grossman to represent me in regard to this matter and I have been informed that my prior attorney has been suspended.” Plaintiff does not indicate by whom he was informed of this information.

In his Reply Affirmation, Ingber argues that SILER & INGBER should not be required to wait for the outcome of the litigation in the underlying personal injury action to receive its attorneys’ fees and that based upon the tender of the \$50,000 policy, they should be entitled to \$16,495.62, or in the alternative, a hearing on the amount of the charging lien. Ingber further takes issue with the submission of plaintiff’s affidavit wherein it is alleged that his prior attorney was suspended. Ingber affirms that he and his partner, Jeffrey B. Siler, the principals of SILER & INGBER, were and have been continuously since their admission to the bar, attorneys-at-law in good standing and licensed to practice in the State

of New York. Ingber asserts that MALLILO & GROSSMAN should receive no fee for misconduct in connection with the submission of this affidavit.

Judiciary Law §475 provides that “From the commencement of an action...the attorney who appears for a party has a lien upon his client’s cause of action..., 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; 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.”

It cannot be disputed that SILER & INGBER, who commenced the underlying personal injury action and obtained the tender of the Allstate policy, have a statutory lien pursuant to **Judiciary Law §475** for legal services rendered. *Smerda v. City of New York*, 7 A.D.3d 511, 776 N.Y.S.2d 86 (2d Dept. 2004). This lien cannot be effected by the substitution of counsel who may ultimately settle the matter. *Gurvitsch, supra; Flores v. Barricella*, 123 A.D.2d 600, 506 N.Y.S.2d 885 (2d Dept. 1986). The outgoing attorney may seek to enforce his lien at the time of the substitution or wait until the conclusion of the case. *Lai Ling Cheng v. Modansky Leasing Co., Inc.*, 73 N.Y.2d 454, 541 N.Y.S.2d 742, 539 N.E.2d 570 (1989). *See also, Paulsen v. Halpin*, 74 A.D.2d 990, 427 N.Y.S.2d 333 (4th Dept. 1980).

Based upon the foregoing, the Notice of Motion and underlying papers are converted into a Notice of Petition and Petition pursuant to **Judiciary Law §475**, the Petition is granted and this matter is referred to a hearing on August 6, 2007 for the purpose of establishing the amount of the charging lien of SILER & INGBER, LLP.


Part 130 of the **Uniform Rules** for the Trial Courts provides for awards of costs and the imposition of sanctions for frivolous conduct. **22 N.Y.C.R.R. §130-1.1** defines frivolous conduct to include asserting “material factual statements that are false.” **§130-1.1-a** requires attorneys to certify every paper submitted to the Court, indicating that “to the best of that person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous.”

Here, Plaintiff’s current counsel, Mallilo & Grossman, have submitted an affidavit from plaintiff wherein he indicates that former counsel were suspended. Plaintiff had originally submitted this affidavit in conjunction with his attempt to obtain the release of his file from SILER & INGBER in the

Queens action more than six (6) months ago. The Court is thus troubled that Mallilo & Grossman would submit this affidavit, containing what appears to be a blatant misrepresentation of the legal standing of the principals of SILER & INGBER, after they had ample opportunity to determine that such allegation was untrue. Therefore, at the hearing on August 6, 2007, the Court will also consider the imposition of sanctions against JACK GROSSMAN and MALLILO & GROSSMAN for frivolous conduct.

The foregoing constitutes the *DECISION* and *ORDER* of the Court.

Dated: June 4, 2007
Riverhead, New York



EMILY PINES
J. S. C.