

Lynch v Incorporated Vil. of Northport

2007 NY Slip Op 33100(U)

September 26, 2007

Supreme Court, Suffolk County

Docket Number: 0000992/2006

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 992/2006

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 ANGELA P. LYNCH,

Plaintiff,

-against-

INCORPORATED VILLAGE OF
 NORTHPORT, RONALD F. MEGLIO
 and LINDA A. MEGLIO,

Defendants.

ORIG. RETURN DATE: JUNE 14, 2007
 FINAL SUBMISSION DATE: JUNE 14, 2007
 MTN. SEQ. #: 003
 MOTION: MG *CASEDISP*

ORIG. RETURN DATE: JUNE 14, 2007
 FINAL SUBMISSION DATE: JUNE 14, 2007
 MTN. SEQ. #: 004
 CROSS-MOTION: XMG

PLAINTIFF'S OUTGOING ATTORNEYS:
 SPADA, ARDAM, SIBENER
 & MILLER, P.C.
 64 SMITHTOWN BLVD.
 SMITHTOWN, NEW YORK 11787

PLAINTIFF:
 ANGELA P. LYNCH
 158 WOODBINE AVENUE
 NORTHPORT, NEW YORK 11768

**DEFENDANT VILLAGE OF
 NORTHPORT'S ATTORNEYS:**
 DONOHUE, McGAHAN, CATALANO
 & BELITSIS
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 P.O. BOX 350
 JERICHO, NEW YORK 11753
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**DEFENDANTS RONALD & LINDA
 MEGLIO'S ATTORNEY:**
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 1325 FRANKLIN AVENUE, SUITE 320
 GARDEN CITY, NEW YORK 11530
 516-741-2121

Upon the following papers numbered 1 to 6 read on these motions _____
FOR SUMMARY JUDGMENT AND A CHARGING AND RETAINING LIEN.
 Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; it is,

ORDERED that this motion by defendants, RONALD F. MEGLIO and LINDA A. MEGLIO (“defendants”), for an Order, pursuant to CPLR 3212, granting summary judgment in favor of defendants dismissing plaintiff’s complaint, along with all cross-claims, is hereby **GRANTED**. The Court notes that plaintiff has not filed opposition to this application. It is further

ORDERED that this motion by SPADA, ARDAM & SIBENER, P.C. (“SPADA”), the former attorneys of record for plaintiff, for an Order, pursuant to Judiciary Law § 475, imposing a charging lien upon plaintiff’s ultimate recovery, if any, and imposing a retaining lien upon plaintiff’s files in the amount of \$539.50, is hereby **GRANTED**, without opposition.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a fall that occurred on April 28, 2005 on a public sidewalk located along Woodbine Avenue, Northport, New York, which abuts the property owned by defendants.

By Order dated September 7, 2007, this Court granted a motion by defendant, INCORPORATED VILLAGE OF NORTHPORT, for summary judgment dismissing plaintiff’s complaint as asserted against the Village, along with all cross-claims, on the grounds that the Village did not receive prior written notice of the alleged defect in the sidewalk, in violation of Village Law § 6-628.

The remaining defendants now move for summary judgment seeking an Order dismissing plaintiff’s complaint, as well as all cross-claims asserted against these defendants. Defendants argue that an owner of land abutting a public sidewalk will only be liable to a pedestrian injured on a public sidewalk if that landowner created the defective condition complained of; caused the defect to occur because of some special use; or a local ordinance or statute casts a duty upon the landowner to maintain and repair the sidewalk and imposes liability for injuries resulting from a breach of that duty (see *Pinn v Baker’s Variety*, 32 AD3d 463 [2006]; *Stanchic v Lim*, 20 AD3d 411 [2005]; *Lehner v Boyle*, 7 AD3d 677 [2004]; *Eidelman v Hochhauser*, 242 AD2d 596 [1997]). Here, defendants have presented evidence that none of the aforementioned elements necessary to impose liability upon an abutting landowner are present.

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Zuckerman v City of*

New York, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It is well-settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidentiary proof in admissible form to demonstrate the absence of any material issues of fact (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendants have made a *prima facie* showing of entitlement to judgment as a matter of law (see e.g. *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Rodriguez v N.Y. City Transit Auth.*, 286 AD2d 680 [2001]). Defendants have submitted evidence that none of the elements necessary to impose liability upon an abutting landowner are present. Plaintiff has not established the existence of any material issues of fact which require a trial of the action. Accordingly, defendants' motion for summary judgment is granted.

The SPADA firm has filed a cross-motion seeking the imposition of a charging lien upon plaintiff's ultimate recovery, if any, and a retaining lien upon plaintiff's files until counsel is reimbursed in the amount of \$539.50, representing costs and disbursements incurred. The Court of Appeals has stated that because a cause of action is a species of property, an attorney acquires a "vested property interest" in the cause of action at the signing of the retainer agreement and thus a "title to 'property and rights to property' "; a charging lien does not merely give an attorney an enforceable right against the property of another, it gives the attorney an equitable ownership interest in the client's cause of action (*LMWT Realty Corp. v Davis Agency*, 85 NY2d 462 [1995], quoting *In re City of New York*, 5 NY2d 300 [1959]; see Judiciary Law § 475; *Estate of Dresner v State*, 242 AD2d 627 [1997]). The client's property right in her own cause of action is what remains after transfer to the attorney of the agreed-upon share upon the signing of the retainer agreement (*LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, *supra*, *In re City of New York*, 5 NY2d 300, *supra*; *Estate of Dresner v State*, 242 AD2d 627, *supra*).

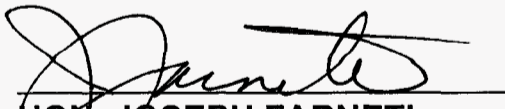
By Order dated April 10, 2007, this Court relieved the SPADA firm as attorneys of record for plaintiff. Within that Order, the Court found that the SPADA firm may be entitled to a charging lien for the reasonable value of services rendered prior to being relieved (see Judiciary Law § 475; *Smerda v City of New York*, 7 AD3d 511 [2004]; *Artache v Goldin*, 173 AD2d 667 [1991]; *Lai Ling Cheng v Modansky Leasing Co.*, 73 NY2d 454 [1989]; *Luciano v Trabucco*, 159 AD2d 695 [1990]), and/or a retaining lien upon plaintiff's files, but that the SPADA firm failed to annex a copy of the retainer agreement to its moving papers. Therefore, the Court denied SPADA's application without prejudice to renew upon proper papers.

The SPADA firm has now renewed its application and submitted a copy of the retainer agreement between the firm and plaintiff. The retainer agreement indicates, among other things, that plaintiff will be liable for reimbursement of expenses whether or not there is a recovery, and that if the attorney-client relationship is terminated prior to completion of the case, a fair and reasonable fee will be determined.

Judiciary Law § 475 provides that an attorney who appears for a party in an action has a lien upon his client's claim, which attaches to a determination in the client's favor and to the resulting proceeds wherever they are, and the lien cannot be affected by any settlement between the parties (*Judiciary Law § 475; Cataldo v Budget Rent A Car Corp.*, 226 AD2d 574 [1996]; *Oppenheim v Pemberton*, 164 AD2d 430 [1990]). The Court finds that counsel has appeared in this action on behalf of plaintiff by filing the within summons and complaint. Therefore, counsel is entitled to a charging lien against any proceeds realized by plaintiff in this action, on a quantum merit basis. However, given the Court's Orders in this matter to date, plaintiff will not recover any proceeds from the defendants. Notwithstanding the foregoing, the Court finds that the SPADA firm is entitled to a retaining lien upon plaintiff's files in the amount of \$539.50.

The foregoing constitutes the decision and Order of the Court.

Dated: September 26, 2007



HON. JOSEPH FARNETI
Acting Justice Supreme Court