

**Goldberg & Connolly v Graystone Constr.
Corp.**

2007 NY Slip Op 33382(U)

October 15, 2007

Supreme Court, Nassau County

Docket Number: 3256-06/

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

P R E S E N T :

**HON. IRA B. WARSHAWSKY,
Justice.**

TRIAL/IAS PART 12

GOLDBERG & CONNOLLY,

Plaintiff,

**INDEX NO.: 003256/2006
MOTION DATE: 09/18/2007
MOTION SEQUENCE: 006 & 007**

- against -

**GRAYSTONE CONSTRUCTION CORP. and
LAKHVINDER SINGH,**

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation & Exhibits Annexed.	1
Memorandum of Law in Support of Plaintiff's Motion to Turn Over Funds in Satisfaction of Judgment.	2
Notice of Cross Motion, Affidavit & Exhibits Annexed.	3
Judgment Creditor Jupiter Environmental Services' Memorandum of Law.	4
Reply Affirmation in Further Support of Plaintiff's Turnover Motion and In Opposition to Jupiter's Cross Motion & Exhibits Annexed.	5
Reply Memorandum of Law in Further Support of Plaintiff's Turnover Motion and in Opposition to Jupiter Environmental Service, Inc.'s Cross Motion for the Turnover of Funds.	6

In an action titled Jupiter Environmental Services, Inc. v. Graystone Construction Corp., Index No. 001292/2002, Graystone obtained a judgment against Jupiter Environmental for \$202,059.10 on a motion for summary judgment. Goldberg & Connolly, as attorneys for Graystone, gave the judgment to a Sheriff who executed on the judgment and collected \$127,842.68 from Jupiter's accounts. A balance of \$88,148.02 was voluntarily paid by the

judgment debtor, Jupiter, to Goldberg & Connolly, and the final additional amount of \$3,000.00 was paid to cover interest on the judgment. A satisfaction of judgment was issued to Jupiter.

Jupiter appealed. No agreement was ever made whereby Goldberg & Connolly was to hold these funds in escrow pending the outcome of the appeal.

Sometime thereafter, Goldberg & Connolly was relieved as counsel, on their motion, and the court fixed a retaining lien at the behest of Goldberg & Connolly. An exact amount was not set in the original plenary action. The instant case had not yet been started by Goldberg & Connolly at that time.

Goldberg and Connolly eventually brought this action against Graystone and Lakhvinder Singh for breach of contract, services rendered and an account stated, amongst other claims, based upon the defendants' failure to pay for a host of legal services rendered. This court granted summary judgment to Goldberg & Connolly. Specifically, two judgments were rendered in favor of Goldberg & Connolly – one for \$24,005.33 and the other for \$216,141.70. They remain unpaid. As of July 18, 2007, Goldberg & Connolly had \$225,115.51 in an interest bearing escrow account representing funds belonging to Graystone, the source of those funds being the payments from Jupiter when they satisfied the judgment.

On the decision on appeal this court's decision was reversed by the Appellate Division, Second Department.

Jupiter moved for restitution of the judgment it had paid and was granted a judgment by this court against Graystone, not against Goldberg & Connolly. Goldberg & Connolly now wants permission to turn over the funds held in its escrow account in partial satisfaction of its legal fees, and Jupiter has intervened to preclude said turnover and to have the same funds handed over to itself.

Numerous questions require a ruling by the court. Primary is whether the funds were held in "escrow" by Goldberg & Connolly for Graystone. If yes, could they be accessed by the attorney, Goldberg & Connolly, because of their retaining lien? If no, then who is entitled to the funds, Goldberg & Connolly or Jupiter? Which claimant has priority to receive these funds? See UCC 9 – 333(b).

"A common-law **retaining lien** is a **lien** for the entire balance of **account** on all papers, securities or moneys belonging to a **client** and in the possession of the attorney. A **retaining lien**

is dependent upon the attorney's physical possession of the **client's** property and cannot be enforced through a court order directing that the **lien** be satisfied out of property not in the possession or control of the attorney." *First Nat'l Trust Bank & Trust Co. v. Hyman Novick Realty Corp.*, 72 A.D.2d 858, 859 (3d Dep't 1979).

An attorney's retaining lien, therefore, is dependent upon possession. As an attorney does not have possession of funds that are held in trust or in an escrow account maintained on behalf of a client, an attorney may not assert a retaining lien over these funds. In *re Stella*, 90 A.D.2d 372, 372 (2d Dep't 1982). Although an attorney may not impose a lien on funds held in escrow, "where a lawyer has possession of funds (not trust funds nor escrow) that belong to his client, the lawyer may permissibly assert a retaining lien on those funds pending resolution of his fee dispute." (The Ethics Committee of the Nassau County Bar Association, Op. 85 - 7 (1985)).

There is no clear proof to show that the funds obtained or paid to Goldberg & Connolly by Jupiter were held in escrow nor were they to be held in escrow by Goldberg & Connolly pending the outcome of Jupiter's appeal. Jupiter did not bond the judgment pending appeal. It paid it. Funds paid by and to an attorney by a judgment debtor when the judgment is later reversed on appeal where said funds were retained by counsel as payment of a non-contingency fee debt owed to counsel by judgment creditor (the client) are not funds held for restitution by the attorney. *Abrahami v. UPC Constr.*, 248 A.D.2d 272, 272 (1st Dep't, 1998). Where a fee is contingent, restitution will be directed, as both lawyer and client shared the risk on the outcome of the litigation. If however, a debtor creditor relationship exists, recovery will be denied. *Zaccour v. Zaccour*, 32 A.D.2d 745, 745 - 746 (1st Dep't 1969). Moreover, the institution of legal proceedings to recover attorney's fees against a former client does not destroy an existing retaining lien. *Matter of Fox*, 22 Misc. 2d 177, 179 (1960).

Jupiter principally relies on two cases to support its claim to the funds held by Goldberg & Connolly, *Forstman v. Schulting*, 108 N.Y. 110, 113 (1888) and *Haebler v. Myers*, 132 N.Y. 363 (1892). In *Forstman* it was held, "both parties and attorneys who, through the aid of the court, have come into possession of property or money during a litigation, which subsequent proceedings in the action show was either wrongfully acquired, or unjustly retained, may be compelled to restore it to the rightful owner by order and attachment to enforce such restoration." *Forstman v. Schulting*, at 113. *Forstman* does not deal with an attorney's assertion

of a retaining lien; more importantly is inapplicable because it involved an erroneous order of the court, something that was not present in this case. The reversal of this Court's order does not in and of itself make that decision erroneous. The Appellate Division reversed summary judgment on a finding of a factual question. "No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way - that the judgment was right and would be affirmed." Langley v. Warner, 3 N.Y. 327, 331 (1850).

Haebler also relies on the issuance of an erroneous judgment or court order. There the court held "when money is collected upon an erroneous judgment which, subsequent to the payment of the money, is reversed, the legal conclusion is irresistible that the money belongs to the person from whom it was collected." Haebler v. Myers, at 368. Jupiter further contends that since the money has remained in Goldberg & Connolly's client fund account, the law firm has not been paid, and as such the funds should be turned over to Jupiter. While it is true that the money remains in Goldberg & Connolly's client fund account, it remains there since the Rules of Professional Responsibility directly prohibit an attorney from taking funds out of a client trust account without express authorization if a fee is in dispute. (MODEL CODE OF PROF'L RESPONSIBILITY DR 9 - 102(B); See also 22 NYCRR 1200.46(b)(4) (2007)). More similar to the present case is Langley v. Warner. In Langley, a verdict was entered in favor of a debtor against a creditor and paid to the debtor's attorney. Subject to a settlement agreement between the debtor and his attorney, the debtor released the money to his attorney in satisfaction of attorney fees. Subsequently the verdict against the debtor was reversed and entered in favor of the creditors. When restitution was not made, the creditors went after debtor's attorney. The Court of Appeals stated, "the defendant has got none of the plaintiffs' money; he has got nothing but his own. Walsh had a perfect title to the money when it was collected - just as perfect as it would have been if no certiorari had been issued The plaintiffs have taken up the strange notion, that because they were trying to get the judgment reversed, Walsh could not give a good title to the money, especially if he paid it to one who knew what they were doing." Langley v. Warner, at 330. Once Jupiter released the money to Graystone via its attorney, it became the property of Graystone. Since Jupiter chose not to bond the judgment pending appeal, they voluntarily assumed the risk that the money would not be there to collect should the judgment be

reversed. Additionally, if the judgment had been bonded, the money would not have become the property of Graystone, if at all, until after termination of the appeal. In such a case, Goldberg & Connolly would not have been able to assert a retaining lien over that money since it would not truly have been in their possession. (“The fact that the claimant consented to have the checks for fees and disbursements drawn by the city to the attorneys, rather than to collect the award and then pay the money over to the attorneys, does not change the situation. The awards were made and payable to the claimant. Payment to its assignees was payment to it.” In re Claredon Rd., 165 Misc. 626, 627 (1937)).

It is also clear to the court that Goldberg & Connolly was not acting as an escrow agent, nor were these funds being held “in escrow” in any traditional sense, nor were they funds to be held “in trust”. The mere fact that funds are held in an interest bearing account does not mean that they are being held “in escrow.” In Marsano v. State Bank of Albany, the funds were deposited by the attorneys into an account for the client, as “trustees for the benefit of G. O. General Contracting Co.” Marsano v. State Bank of Albany, 27 A.D.2d 411, 414 (3d Dep’t 1967). This in effect made the attorneys escrowees of the funds maintained in the account, therefore, the attorneys acted “merely as a custodian of the funds in a sense not contemplated by the term ‘possessor’ as employed in retaining lien cases” Id.

The present case is distinguishable in that Jupiter turned funds over to Goldberg & Connolly, not as the escrow agent of Graystone or as Lakhvinder Singh’s trustee, but as attorneys acting in their professional capacity. There was no express agreement that Goldberg & Connolly was to act in any manner other than its professional capacity, in which case a retaining lien may rightfully be asserted. Similarly in, In re O’Connor’s Estate, an administratrix had given her attorneys \$600 as payment of their fee, and later sought the money back to be considered as part of the estate for accounting purposes. The trial court found for the administratrix and ordered the attorneys return the money, however, on appeal that decision was reversed in view of the fact that the \$600 was an estate fund over which the attorneys held in their possession and therefore possessed a retaining lien over. In re O’Connor’s Estate, 177 A.D. 616, 616 (1st Dep’t 1917)(emphasis supplied). The Court of Appeals, in distinguishing rights existing under a charging lien from those of a retaining lien has found that an attorney acting in

good faith has a right to assert a retaining lien over funds in his possession until he has been paid:

On the contrary the general proposition that an attorney has a lien for his costs and charges upon deeds or papers, or upon moneys received by him on his client's behalf in the course of his employment, is not doubted, nor does it stand upon questionable foundations. It comes to us *super antiquas vias*. . . . Lord Mansfield declared that the practice which protected it 'was established on general principles of justice, and that courts, both of law and equity, had carried it so far that an attorney or solicitor may obtain an order to stop his client from receiving money in a suit in which he has been employed for him, till his bill is paid' . . . In re Application of Knapp, 85 N.Y. 284, 293 (1881)(emphasis supplied).

The court further explained that the reason the attorney's retaining lien exists is "compensation for his professional services rendered and for disbursements expended by him." Id. at 297. Knapp further dealt with fixing an amount for legal fees, whereas we are not confronted with the problem of an indeterminate sum for legal fees. The amount owed to Goldberg & Connolly has already been fixed by two judgments; the first in the amount of \$24,005.33 and the second in the amount of \$216,141.70, totaling \$240,147.03, for which \$225,115.51 is held in an interest bearing escrow account representing funds that belong to Graystone.

These were not funds from a closing, be it of real estate or the sale of a business, nor are they funds recovered in a tort action where the attorney earned a contingency fee from a successful outcome. If the fees had been earned on a contingency fee basis, Goldberg & Connolly could not rightfully assert a lien. "Where a fee is dependent for its existence as well as amount upon the outcome of litigation, it is our view that such fee is not earned until the matter be finally concluded, unless there be a specific agreement to the contrary. A party ordinarily follows the advice and direction of counsel in retaining or disbursing moneys received while a matter is pending. To place the full burden of complete restitution upon the shoulders of a party, where distribution or disbursements have been made, would be both inequitable and unjust. Where, then, a fee is contingent, restitution of moneys received will be directed against an attorney as well as a party in the event of an adverse determination." Mormilo v. Allied Stevedores Corp., 8 A.D.2d 217, 218 (1st Dep't 1959).

These funds were and are in the possession of Goldberg & Connolly and are technically being held for its client, Graystone. Thus, we are down to the issue of who has a priority lien or right to these funds. Does UCC 9 – 333 control?

N.Y. Uniform Commercial Code § 9 – 333 entitled, Priority of Certain Liens Arising by Operation of Law, specifically U.C.C § 9 – 333(b) states, “a possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.” U.C.C § 9 – 333 (2007). A retaining lien arises out of common law and can only be enforced if the person claiming to have a retaining lien has physical possession of the “goods” in question, unlike a charging lien which arises by operation of a statute. Under U.C.C. § 9 – 333, a retaining lien, being a possessory lien, has priority over any other security interest.

The court holds that Goldberg & Connolly has a judgment and a retaining lien on the funds of Graystone in its escrow account and that the retaining lien has priority over the judgment against Graystone obtained by Jupiter. Accordingly, it is

ORDERED that Goldberg & Connolly’s application for a “turnover” order is granted, and they may pay to themselves, out of the funds held for Graystone, the amount of their retaining lien/judgment as previously determined by the court.

Dated: October 15, 2007



J. B. Warshawsky

ENTERED

OCT 18 2007

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