

Shmueli v Corcoran Group

2007 NY Slip Op 33637(U)

November 5, 2007

Supreme Court, New York County

Docket Number: 0104824/2003

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

SARIT SHMUELI,
Plaintiff,

INDEX NO. 104824/2003

- v -

MOTION DATE 9/20/07

MOTION SEQ. NO. 012

THE CORCORAN GROUP, CENDANT GROUP,
NRT, TRESA HALL,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to 9 were read on this order to show cause to stay payment of settlement proceeds

Order to Show Cause— Affidavits — Exhibits A-D

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits 1-21; Exhibit 1A

3-6

Replying Affidavits — Exhibits A-R

7

Sur-Reply Affidavits

8-9

+ plus all papers read on Seq 013

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion, by order to show cause, is consolidated for disposition with Motion Seq. 013 and decided in accordance with the annexed memorandum decision and order.

J.S.C.

The two motions seek essentially the same relief; however, the order to show cause in Seq. 012 did not include a temporary restraining order.

FILED
NOV 13 2007

MICHAEL D. STALLMAN

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/5/07
New York, New York

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X

SARIT SHMUELI,

Index No. 104824/03

Plaintiff,

Decision and Order

-against-

THE CORCORAN GROUP, CENDANT GROUP,
NRT, TRESA HALL,

Defendants.

-----X

HON. MICHAEL D. STALLMAN, J.:

This action was tried by a jury to verdict in plaintiff's favor, in the amount of \$400,000 in compensatory damages, and \$1.2 million in punitive damages. After the verdict, plaintiff Sarit Shmueli discharged her trial counsel, Barry Viuker, Esq. (Morris Duffy Alonso & Faley [Morris Duffy]), and retained Hill Rivkins & Hayden LLP to represent her in defendants' appeal from the verdict.¹

Plaintiff's trial counsel Viuker and his firm Morris Duffy bring two motions, (Seq. 012 and 013) by order to show cause, each seeking essentially the same relief (although Seq. 013, unlike Seq. 012), contains a temporary restraining order for an order directing a stay of payment of any and all proceeds of any settlement, or an order directing that they be held in escrow pending judicial determination of entitlement to attorneys' fees and disbursements, and directing a hearing (Motion Seq. Nos. 012 and 013). Defendant in this action, NRT New York, Inc. d/b/a the Corcoran Group, indicates that it would advise plaintiff's trial counsel of any settlement and would agree to pay the

¹ Although it appears that a settlement of plaintiff's claims may have been worked out at the appellate pre-argument conference for the sum of \$1.35 million, the parties and attorneys disagree over whether there was a final, binding agreement; plaintiff claims that she did not authorize such a settlement. Any issues concerning what may have happened concerning an alleged settlement at the Appellate Division are not before this Court.

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proceeds of settlement or judgment into escrow or withhold payment pending the resolution of the dispute between plaintiff and her former trial counsel.

Plaintiff and her trial counsel now dispute the amount of attorneys' fees her trial counsel is entitled to recover. Mr. Viuker and Morris Duffy claim that he/they are entitled to recover 1/3 of the settlement proceeds; plaintiff claims that this contingency fee agreement was amended to reduce the contingency fee to 16.5%, pursuant to a letter dated March 26, 2003. See Faley Affirm., Ex B. She also questions whether there was any valid retainer agreement and disputes her trial counsel's claim of entitlement of a fee. The letter's author, Barry Viuker, claims that the crossouts and handwritten notations concerning a fee of 16½% were added without his consent, knowledge or agreement. See Faley Affirm., Ex C. Plaintiff's friend claims to have witnessed plaintiff and her lawyer executing the amended letter agreement. Satro Aff. ¶ 3. Plaintiff's appellate counsel argues that plaintiff's trial counsel is not entitled to any contingency fee at all, because the contingency fee agreement was allegedly not reduced to a writing. In reply, trial counsel claims that plaintiff reconfirmed in a subsequent letter that the contingency fee was 1/3 of the recovery.

Plaintiff also now claims that trial counsel had an undisclosed conflict of interest in this case, forced plaintiff to respond to certain discovery demands herself instead of preparing them for her, committed errors at trial, and sabotaged her appeal. See generally Shmueli Opp. Aff.; Shmueli Sur-Reply Aff; Shmueli Second Sur-Reply Aff.

Mr. Viuker's and Morris Duffy's applications are in the nature of enforcing a charging lien on the settlement proceeds, the entitlement and amount of which are disputed. The charging lien "attaches to the judgment and the proceeds of the judgment and cannot be affected by settlement between the parties." People v Keefe, 50 NY2d 149, 156 (1980); Judiciary Law § 475.

An attorney may enforce a charging lien for services rendered to a client simply by making an application to the court in the proceeding where the attorney has appeared, if defendant still possesses the proceeds or knowingly deprived the attorney of compensation; to enforce the lien against defendant's other assets, the attorney must bring a separate action against the defendant. Haser v Haser, 271 AD2d 253 (1st Dept 2000). "[T]he Supreme Court retains jurisdiction, without the need for a plenary action, to determine [counsel's] entitlement to fees based on its charging lien against any proceeds of this action pursuant to Judiciary Law § 475." Costello v Kiaer, 278 AD2d 50, 51 (1st Dept 2000).

Whether the amount of the charging lien is to be calculated based on a purportedly valid contingency fee agreement, or in quantum meruit, raises factual issues. Therefore, the issue of whether Mr. Viuker and/or Morris Duffy is entitled to a charging lien, the amount of the charging lien, and all other issues raised by the motions, including the genuineness and validity of any document, which all relate to enforcement of a lien upon the proceeds of a settlement or judgment, are referred to a Special Referee to hear and determine. Neuwirth v Melvin, 191 Misc 305 (Sup Ct, Kings County), affd 274 AD 897 (2d Dept 1948). The parties' consent to a reference to hear and determine is not required because the special proceeding does not require trial by jury. CPLR 4317 (b); Matter of King, 168 NY 53 (1901) (enforcement of charging lien is equitable in nature, analogous to foreclosure mechanic's lien); Flores v Barricella, 123 AD2d 600 (2d Dept 1986) (court properly struck jury demand in proceeding to enforce charging lien).

Although plaintiff apparently argues that her former counsel was not effective, the Court notes that she did not discharge counsel until after the jury returned a substantial verdict in her favor.

Mr. Viuker and Morris Duffy have met their burden of proving entitlement to injunctive relief under the traditional three prong test for injunctive relief. A party seeking a preliminary injunction under CPLR Article 63 must establish (1) likelihood of success on the merits; (2) irreparable injury absent the relief and (3) a balance of the equities in its favor. W.T. Grant Co. v Srogi, 52 NY2d 496 (1981); Albini v Sorlock Assoc., 37 AD2d 835 (2d Dept 1971).

Under the circumstances, including the settlement discussions in the Appellate Division, plaintiff's expressed position that she is representing herself for purposes of settlement, and the lack of communication between plaintiff and her former trial counsel, there is a danger that trial counsel's rights to a determination of the charging lien issues could be vitiated were moneys to be paid out to plaintiff on a settlement or post-appeal judgment, before determination of the charging lien issues; there is a likelihood that such payment would result in immediate, irreparable harm. Under the circumstances presented, there is a likelihood that plaintiff's trial counsel will be able to prove entitlement to a charging lien in some amount, although the Court does not opine on the merits of the parties' assertions. The equities balance in movants' favor, because movants could well be substantially prejudiced were the relief not granted, and plaintiff cannot show any prejudice. It is only appropriate, under the unusual circumstances of this case, to preserve the status quo by staying disposition of the amount of any judgment or settlement. It is premature to order the payment of proceeds into escrow now; given the dispute over the settlement conference at the Appellate Division and the pendency of the appeal, the amount that defendant would escrow is now uncertain. There is no suggestion, let alone evidence, that defendant would be unable or unwilling to pay a judgment

or settlement in this action, the amount of the charging lien, and all other issues relating to enforcement of a lien upon the proceeds are referred to a Special Referee to hear and determine; and it is further

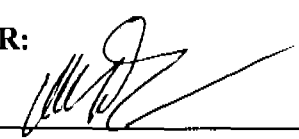
ORDERED that pending further court order, all parties and attorneys are stayed from distributing, cashing and/or collecting any and all proceeds of judgment or settlement.

Copies to plaintiff and all counsel.

This decision constitutes the order of the Court.

Dated: November 5, 2007
New York, New York

ENTER:



MICHAEL D. STALLMAN, J.S.C.

MICHAEL D. STALLMAN
J.S.C.

[FILED]
NOV 13 2007
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NEW YORK