

**Mitchell v Moore**

2008 NY Slip Op 31437(U)

May 19, 2008

Supreme Court, New York County

Docket Number: 0112484/2007

Judge: Walter Tolub

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

PRESENT: TOLUB  
Justice

PART 15

MITCHELL, STEPHEN T., ET AL

INDEX NO.

112484/07

MOTION DATE

MOTION SEQ. NO.

04

MOTION CAL. NO.

- v -  
MATRICIA MOORE, ET AL.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAY 22 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/19/08

WALTER B. TOLUB S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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

PRESENT: \_\_\_\_\_

PART 15

Justice

Stephen T. Mitchell

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 15

-----x  
STEPHEN T. MITCHELL,

Petitioners,

- against -

MATRICIA MOORE and CONSOLIDATED  
EDISON OF NEW YORK, INC.,

Respondents.  
-----x

WALTER TOLUB, J.:

Motions designated Sequence Numbers 001, 003, and 005  
are consolidated for disposition.

In Motion Sequence Number 001, petitioner, Stephen T. Mitchell, an attorney, moves, by order to show cause, for an order fixing a charging lien in his favor on 33% of the proceeds of the settlement he procured on behalf of respondent Matricia Moore ("Ms. Moore") in her Title VII and 42 USC 1981 action against respondent Consolidated Edison of New York, Inc. ("Con Ed").

In Motion Sequence Number 003, petitioner seeks an order holding Ms. Moore in contempt of court.

In Motion Sequence Number 004, petitioner moves, pursuant to CPLR 3211(a), to dismiss Ms. Moore's counterclaims.

In Motion Sequence Number 005, petitioner moves, pursuant to CPLR 3212, for summary judgment on his claims against Ms. Moore for attorney's fees and disbursements.

Index No. 112484/07

Seq. Nos. 001, 003,  
004, and 005

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COUNTY CLERK'S OFFICE  
NEW YORK

### BACKGROUND

By Retainer, dated October 3, 2002, Ms. Moore hired petitioner to represent her in an action against Con Ed, entitled *Moore v Consolidated Edison Co.*, US Dist Ct, SD NY, 00 Civ 7384. In that action, Ms. Moore alleged sexual and racial discrimination in employment (the "federal action"). Ms. Moore agreed to pay petitioner \$2,000, plus "thirty-three (33%) of any and all sums recovered (the gross settlement amount) should any settlement be made prior or subsequent to the filing of any legal proceeding in the federal or state court or before any arbitration panel" (*id.*, p. 2). Furthermore, paragraph 5 of the Retainer states:

During the course of this matter it may be necessary to hire experts, consultants, accountants, auditors, court stenographers, or appraisers to assist you. You are fully responsible for these costs. Our firm is to be reimbursed for all expenditures of this nature made by us within one month after we pay them

(*id.*, pp. 2-3). In addition, Ms. Moore agreed to pay 10% interest and reasonable attorney's fees if it becomes necessary to collect in court any fee or expense (*id.*, p. 4). Paragraph 9 states that "[a]ppeals of this matter are not included in this retainer and require a separate fee" (*id.*, p. 3).

On July 24, 2007, Ms. Moore authorized petitioner to settle the federal action. The parties drafted a confidential

settlement agreement and met with the judge in the federal action to disclose the terms. Counsel for both parties affirmed the settlement in open court.

The submissions include a copy of the confidential settlement agreement. Without compromising its confidentiality, the agreement states that the parties will implement its terms and conditions:

When (a) this Agreement has been signed by [Ms. Moore], her counsel, counsel for ... Con Edison and Morrill, a designated representative of Con Edison, and by Morrill; and (b) [Ms. Moore and her] attorney have executed the Section 32 Waiver Agreement, annexed hereto as Exhibit A ("Section 32 Agreement"), the Workers' Compensation Board has approved the Section 32 Agreement in accordance with Section 32 of the Workers' Compensation Law and the Workers' Compensation proceedings reflected in that Section 32 Agreement have been dismissed (as set forth in Exhibit A)

(Confidential Settlement Agreement, p. 2).

By order, entered July 27, 2007, the Court in the federal action dismissed said action, stating, in part:

On July 24, 2007, the parties informed the Court that this action had been settled pursuant to terms revealed to the Court off the record. Plaintiff's counsel affirmed that he was authorized by Plaintiff to enter into a settlement on those terms, including voluntary dismissal of her claims in this action. Accordingly, the Court now dismisses Plaintiff's claims with prejudice based on the settlement ... .

(Dismissal Order, Not of Mot).

On July 31, 2007, Ms. Moore terminated petitioner's services based on his alleged failure to follow her instructions in reaching a settlement in the federal action. Thereafter, a contentious and protracted fee dispute arose between petitioner and Ms. Moore. Petitioner filed a "Motion to Reconfirm Settlement," citing Ms. Moore's refusal to sign the settlement documents regarding attorney's fees. In addition, in August 2007, petitioner filed an application in federal court seeking to enjoin Con Ed from paying Ms. Moore the proceeds of the settlement. Petitioner asserted, *inter alia*, that he has a charging lien on the settlement, pursuant to Judiciary Law § 475.

Ms. Moore, *pro se*, opposed petitioner's application, sought to set aside the settlement agreement, and further sought to reconsider the July 27, 2007 dismissal order. Ms. Moore asserted, *inter alia*, that petitioner lacked authority to settle the federal action; that petitioner failed to produce certain documents to the defendants in the federal action, as ordered by the court; and that petitioner failed to convey her wishes regarding her pension, 401(k), and Workers' Compensation benefits in negotiating the settlement. In short, Ms. Moore insisted that petitioner coerced her into settling the federal action.

By order, dated September 19, 2007, the Court denied Ms. Moore's application to reopen the settlement in the federal action, and dismissed as moot petitioner's request to confirm the settlement.

The Court also relegated petitioner's fee claims to State Court. The Court concluded that the settlement affirmed in open court by counsel for both parties is final; that petitioner was authorized to settle the matter; and that the fee dispute between petitioner and Ms. Moore is ancillary to the federal action.

Ms. Moore signed the settlement on September 12, 2007, and petitioner signed it on December 14, 2007. However, at the Workers' Compensation hearing held on December 5, 2007, the Judge disapproved the § 32 Agreement, stating:

Based on the testimony of [Ms. Moore] here today, this Section 32 agreement is disapproved as improper as a matter of law since [Ms. Moore] has testified under oath that she was placed under duress in order to accept this Section 32 agreement. Case Closed. No further action is planned by the Board at this time

(Not of Disapproval, § 32 Agreement, p. 1).

Petitioner commenced this proceeding seeking to recover payment for his services on behalf of Ms. Moore in the federal action. The petition alleges that petitioner diligently prosecuted the federal action, and that petitioner complied with Ms. Moore's request that he settle that action, but that Ms. Moore has refused to compensate petitioner in accordance with the terms of the Retainer. Petitioner states that his efforts included numerous pretrial motions and responses, preparation of expert witnesses and reports, extensive trial preparation, settlement negotiations, and an appeal before the United States Circuit Court for the Second Circuit. He further states that he

has received only an initial payment of \$2,000. Thus, petitioner seeks to enforce a charging lien on 33% of the proceeds of the settlement in the federal action.

The petition also claims that Ms. Moore breached the terms of the Retainer by failing to pay petitioner for his services that resulted in the settlement. Petitioner asserts that since July 30, 2007, Ms. Moore has refused to communicate with him regarding the payment of his fees, and that Ms. Moore withheld her signature on settlement documents for more than six weeks in order to hinder his efforts to collect the fee contemplated by the retainer. In addition, petitioner claims that Ms. Moore attempted to recover the settlement proceeds without notifying petitioner. Thus, petitioner seeks an order directing that he recover directly from Con Ed his fees together with costs and disbursements, as contemplated by the Retainer.

Ms. Moore answered, generally denying the allegations in the petition, and asserting counterclaims for negligence, legal malpractice, breach of contract, and breach of fiduciary duty. She maintains that petitioner failed to comply with her express instructions regarding settlement negotiations. She states that she directed petitioner to separate the Workers' Compensation claims from the other claims in the federal action. She also asserts that another attorney, and not petitioner, represented her only on her Workers' Compensation claims; and that the

settlement in the federal action did not include her Workers' Compensation claims.

On September 12, 2007, this Court issued a temporary restraining order enjoining Con Ed or the defendants in the federal action from turning over the settlement proceeds to Ms. Moore. To date, none of the settlement proceeds have been distributed.<sup>1</sup>

By letter, dated December 10, 2007, petitioner withdrew his demand for legal fees relating to Ms. Moore's Workers' Compensation claims, as well as the motion for contempt. Petitioner maintains that the issues remaining before the Court are (1) his demand for summary judgment on his claim for 33% of the settlement proceeds, and his application to dismiss the counterclaims of Ms. Moore; (2) his request for an evidentiary hearing as it relates to his demand for compensation for his work as appellate counsel, costs, and disbursements; and (3) his demand for attorney's fees incurred in connection with his efforts to recover fees under the Retainer.

#### **DISCUSSION**

As stated, petitioner argues that he is owed 33% of the settlement proceeds, plus costs and disbursements, with interest

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<sup>1</sup>After a January 8, 2008 hearing in the federal action, the Court denied several of petitioner's motions, including a motion for leave to reopen the settlement and to intervene in the federal action.

from July 27, 2007, when the federal action was dismissed. He seeks to enforce a charging lien against said proceeds.

It is beyond dispute that the Retainer between petitioner and Ms. Moore, coupled with the commencement of the federal action, gives petitioner a lien on Ms. Moore's claims in that action. An attorney's charging lien is a security interest in the favorable result of litigation, giving the attorney an equitable interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client (*Chadbourn & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1<sup>st</sup> Dept 2005]).

In New York, an attorney's charging lien is governed by statute (see Judiciary Law § 475). Section 475 states:

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon a 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 hand 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.

Under § 475, a charging lien automatically comes into existence, without notice or filing, upon the commencement of the action, and is measured by the reasonable value of the attorney's

services on the action, unless fixed by agreement (*Resnick v Resnick*, 24 AD3d 238, 239 [1<sup>st</sup> Dept 2005]). An attorney's charging lien is something more than a mere claim against either property or proceeds; an attorney's charging lien "is a vested property right created by law and not a priority of payment" (see *LMWT Realty Corp. v Davis Agency, Inc.*, 85 NY2d 462, 468 [1995]). Section 475 is remedial and should be liberally construed to aid its purpose which is to furnish security for attorneys by giving them liens upon subject matter of actions (*Morgan v Drewry*, 285 App Div 1 [1<sup>st</sup> Dept 1954]).

However, although the parties to the federal action reached a settlement of Ms. Moore's claims, resulting in the dismissal of said action, it is also clear that impediments to implementation of that settlement remain. As stated, implementation of the settlement requires approval of the § 32 Agreement by the Workers' Compensation Board. Here, however, the Judge in the Workers' Compensation proceeding disapproved the § 32 agreement as improper since Ms. Moore testified under oath that she was coerced into accepting the agreement.

Furthermore, without disclosing the terms of the settlement agreement, and notwithstanding the withdrawal of petitioner's claims to the Workers' Compensation portion of the settlement, the parties sharply dispute the amount to which petitioner is entitled and the agreement does not set forth a specific settlement amount. Moreover, although petitioner states that he

is willing to accept the amount the Ms. Moore acknowledges is owed to him, he does not abandon his claims to additional settlement funds. In addition, Ms. Moore maintains that petitioner's claim to a percentage of her pension violates the prohibition against the assignment or alienation of benefits provided under a pension plan (see 29 USC 1056[d][1]; *City of Hope Natl. Med. Ctr. v Healthplus, Inc.*, 156 F3d 223, 226 [1<sup>st</sup> Cir. 1998]; *American Tel. & Tel. Co. v Merry*, 592 F2d 118, 120-121 [2d Cir 1979]).

The above-mentioned impediments to implementation of the settlement, and the protracted dispute between petitioner and Ms. Moore as to the specific fee amount owed preclude summary judgment on petitioner's claim for 33% of the settlement proceeds (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, the motion for summary judgment must be denied.

Petitioner also seeks to dismiss Ms. Moore's counterclaims for negligence, legal malpractice, breach of contract, and breach of fiduciary duty. The gravamen of the counterclaims is that petitioner failed to comply with Ms. Moore's specific instructions during settlement negotiations. These counterclaims mirror the arguments that were repeatedly raised by Ms. Moore in the federal action. The counterclaims were rendered moot by the confidential settlement agreement executed by Ms. Moore and petitioner, and the dismissal of the federal action. Thus, the motion to dismiss the counterclaims in this action is granted.

Petitioner's request for an evidentiary hearing on his demand for compensation for his work as appellate counsel, costs, and disbursements is denied as the Retainer expressly excludes appeals of the federal action, and petitioner offers no evidentiary proof to establish that Ms. Moore engaged him to perform appellate work.

The motion of summary judgment on petitioner's claim for attorney's fees and costs incurred in connection with his efforts to recover fees under the Retainer is also denied. As stated, the settlement proceeds have not yet been distributed. To the extent that Ms. Moore has not received any money from Con Ed and is not enjoying the benefits of the settlement, she is as much an aggrieved party as petitioner.

Accordingly, it is

ORDERED that petitioner's motion for summary judgment on his claim for 33% of the settlement proceeds is denied; and it is further

ORDERED that the motion for an order holding Ms. Moore in contempt of court is voluntarily withdrawn by petitioner; and it is further

ORDERED that the motion to dismiss the counterclaims of Ms. Moore is granted and the counterclaims are severed and dismissed; and it is further

ORDERED that petitioner's request for an evidentiary hearing as it relates to his demand for compensation for his work as

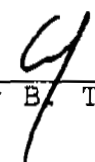
appellate counsel, costs, and disbursements is denied; and it is further

ORDERED that petitioner's motion for summary judgment on his claims for attorney's fees incurred in connection with his efforts to recover fees under the Retainer is denied.

Counsel for the parties are directed to appear for a Preliminary Conference on June 13, 2008 at 11AM in room 335 at 60 Centre Street.

Dated: 5/19/08

ENTER:

  
\_\_\_\_\_  
Walter B. Tolub J.S.C.

**FILED**  
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