

**Noble v Noble**

2011 NY Slip Op 30835(U)

April 7, 2011

Sup Ct, Albany County

Docket Number: 571-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

CAROL NOBLE,

Plaintiff,

-against-

**DECISION and ORDER**  
**INDEX NO. 5711-08**  
**RJI NO. 01-08-94296**

STEVE NOBLE,

Defendant.

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Supreme Court Albany County All Purpose Term, March 28, 2011  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Boies, Schiller & Flexner, LLP  
Adam R. Shaw, Esq.  
*Attorneys for Plaintiff*  
10 North Pearl Street, 4<sup>th</sup> Floor  
Albany, New York 12207

Bixby, Crable & Stiglmeier, PLLC  
Paige Crable, Esq.  
*Former Attorneys for Plaintiff*  
19 Dove Street, Suite 301  
Albany, New York 12210

**TERESI, J.:**

Plaintiff, while represented by Paige Crable (hereinafter "Crable") of Bixby, Crable & Stiglmeier, PLLC, was granted a Judgment of Divorce (hereinafter "Judgment") by this Court on September 17, 2009. Except for a minor modification, the Judgment was affirmed by the Appellate Division - Third Department. (78 AD3d 1386 [2010]).

Shortly after entry of the Judgment, Crable's motion to withdraw as Plaintiff's counsel was granted. Her motion for a charging lien was also conditionally granted, in the event

Plaintiff's arbitration of Crable's attorney fee was untimely filed or rejected.<sup>1</sup> On this record, it does not appear that Plaintiff appealed or further challenged this Court's Charging Lien Order. By letter dated January 4, 2010, Plaintiff's arbitration demand was rejected and, by necessary implication, Crable's charging lien was fixed.

Crable now moves<sup>2</sup> for an injunction prohibiting either party from transferring any assets distributed under the Judgment without first notifying her firm and for an Order compelling Plaintiff to pay her charging lien out of any proceeds she receives from Defendant under the Judgment. While Plaintiff opposes the motion, Defendant has not. Because Crable demonstrated her entitlement to enforcement of her charging lien against only a portion of the Judgment's provisions, her motion is granted in part.

Although the relief Crable seeks is broad, both Crable and Plaintiff readily recognize that a "charging lien does not attach to an award of alimony and maintenance" (Rosen v. Rosen, 97 AD2d 837 [2d Dept. 1983], citing Turner v. Woolworth, 221 NY 425 [1917]) or "to an award of child support." (Haser v. Haser, 271 AD2d 253 [2d Dept. 2000]; Shipman v. City of New York Support Collection Unit, 183 Misc2d 478 [Sup. Ct. Bronx Co., 2000]). Rather, in a matrimonial action, a "charging lien is ... available [only] to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interests already

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<sup>1</sup> Such relief was granted by this Court's Letter Decision and Order, dated November 20, 2011 and Amended Letter Decision and Order, dated November 24, 2011 (hereinafter "Charging Lien Order").

<sup>2</sup> Contrary to Plaintiff's contentions, because Crable appeared in this action her motion to enforce her charging lien within it is not procedurally defective; and her failure to move by petition rather than order to show cause constitutes a non-prejudicial irregularity, which is hereby disregarded pursuant to CPLR §2001. (Haser v. Haser, supra; Ferraioli ex rel. Suslak v. Ferraioli, 8 AD3d 163 [1<sup>st</sup> Dept. 2004]).

held by the client” (Moody v. Sorokina, 50 AD3d 1522 [4th Dept. 2008]; Theroux v. Theroux, 145 AD2d 625 [2d Dept. 1989]), or against an “award of counsel fees to either the client or to subsequent counsel.” (Rosen v. Rosen, supra).

To the extent that Crable sought to enforce her charging lien against the Judgment’s award of maintenance or child support, her motion is denied.

The Judgment’s equitable distribution award, however, is not entirely restricted. To the extent that the Judgment transferred Defendant’s interest as a tenant by the entirety in the marital residence<sup>3</sup> to Plaintiff, less her separate property contribution and tenant by the entirety interest, such provision constituted the creation of a new fund. Specifically, the Judgment provided Defendant with a monetary credit (\$41,500) against other equitable distribution provisions, to balance Plaintiff’s receipt of his interest in the home. As such, Crable’s charging lien attaches to the marital residence to the extent of this new fund. Similarly, because Plaintiff was not a titled owner to the real property owned by East Ridge Associates, LLC or Southside Funding LLC but was granted a one half interest in such property, converted into a monetary value, again a new fund was created to which Crable’s charging lien attached. (Theroux v. Theroux, supra; Moody v. Sorokina, supra). Crable proffered no proof, however, that Plaintiff’s retention of two retirement accounts or her personal vehicle, all of which were titled in Plaintiff’s name individually, created a new fund. (Id.). Nor did she demonstrate the creation of a new fund with the Defendant’s retention of the vehicle he leased. Similarly unsupported is Crable’s contention that the Judgment’s household furnishings award created a new fund, because she did not establish the parties’ pre-action joint ownership of their respective household furnishings.

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<sup>3</sup> 14 East Ridge Road, Loudonville, New York.

Turning to the Judgment's award of attorneys fees (\$54,869.07) payable by Defendant to Plaintiff, such award created a new fund (Rosen v. Rosen, supra) to which Crable's charging lien attached.

To the extent that Plaintiff now challenges the propriety and amount of Crable's charging lien, such claims are precluded by the law of the case doctrine. As set forth above, this Court's Charging Lien Order previously granted Crable the charging lien she now seeks to enforce. As Plaintiff has set forth no proof establishing that she did not have a "full and fair opportunity to litigate the issue" previously, this objection is precluded. (Briggs v. Chapman, 53 AD3d 900, 902 [3d Dept. 2007], quoting Kaufman v Eli Lilly & Co., 65 NY2d 449 [1985]; Town of Massena v. Healthcare Underwriters Mut. Ins. Co., 40 AD3d 1177 [3d Dept. 2007]; People v. Evans, 94 NY2d 499 [2000]).

Accordingly, Crable's motion is granted to the extent that Plaintiff and Defendant are hereby Ordered:

1) to notify Crable, in writing by first class mail, of all transfers involving assets to which this Decision and Order has determined Crable's charging lien attached. Such notification shall occur fifteen days prior to the transfer.

2) to satisfy Crable's charging lien out of the proceeds of any transfer involving assets to which this Decision and Order has determined Crable's charging lien attached.

This Decision and Order is being returned to attorney Crable. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute

entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: April 7, 2011  
Albany, New York

  
JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated February 16, 2011, Affidavit of Paige Crable, dated February 15, 2011, with attached Exhibits A-F.
2. Affirmation of Adam Shaw, dated March 15, 2011, with attached Exhibits A-L.
3. Affidavit of Paige Crable, dated March 18, 2011, with attached Exhibit A.