

Scardace v Mid Is. Hosp., Inc.

2011 NY Slip Op 32062(U)

July 14, 2011

Sup Ct, Suffolk County

Docket Number: 22223/1992

Judge: Joseph Farneti

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

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

ANTHONY SCARDACE and SUSAN
SCARDACE,

Plaintiffs,

-against-

MID ISLAND HOSPITAL, INC., ARTHUR J.
REGO, ROBERT REED, and JAMES
DICKSON,

Defendants.

ORIG. RETURN DATE: JANUARY 13, 2011
FINAL SUBMISSION DATE: JANUARY 27, 2011
MTN. SEQ. #: 009
MOTION: MG

ORIG. RETURN DATE: JANUARY 13, 2011
FINAL SUBMISSION DATE: JANUARY 27, 2011
MTN. SEQ. #: 010
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 9 read on this motion TO VACATE
JUDGMENT AND CROSS-MOTION TO VACATE TEMPORARY RESTRAINING ORDER
Order to Show Cause and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Affirmation in Further Support and in Opposition and supporting papers 7, 8; Reply
Affirmation 9; it is,

ORDERED that this motion by plaintiffs, ANTHONY SCARDACE and
SUSAN SCARDACE (collectively "plaintiffs"), for an Order:

- (1) vacating the Judgment dated February 9, 2010, and entered on March 9, 2010 ("Judgment");
- (2) denying the enforcement of the Execution Order by Cary Scott Goldinger, Esq. ("Goldinger") against plaintiffs, pursuant to CPLR 5240;
- (3) granting a permanent stay of enforcement of any judgment as and for the charging lien of Goldinger against plaintiffs unless and until plaintiffs recover monies from a settlement, verdict or judgment in connection with this action;
- (4) denying Goldinger entitlement to the accrual of interest on the amount of the charging lien; or, in the alternative
- (5) denying Goldinger entitlement to the accrual of interest unless and until plaintiffs recover monies from a settlement, verdict or judgment in connection with this action,

is hereby **GRANTED** to the extent provided hereinafter; and it is further

ORDERED that this cross-motion by Goldinger, former attorney for plaintiffs, for an Order:

- (1) vacating the temporary restraining Order heretofore issued by this Court on December 15, 2010, with respect to enforcement of the Judgment;
- (2) ratifying the April 16, 2004 Order; or, in the alternative
- (3) directing that a hearing be held on the record to determine the basis for Goldinger to collect on the alleged valid and enforceable Judgment he obtained and to be paid his attorney's fees, plus interest and costs, immediately, and regardless of the ultimate outcome of the underlying action; and
- (4) deeming the Judgment as immediately enforceable in its entirety, permitting Goldinger to immediately proceed upon the execution and enforcement of the Judgment; and

(5) granting reasonable attorney's fees to Goldinger in connection with having to oppose plaintiffs' application, in the sum of \$3,500,

is hereby **DENIED** in its entirety for the reasons provided hereinafter.

On December 15, 2010, this Court issued the following temporary restraining Order, pending the hearing and determination of plaintiffs' motion:

ORDERED, that CARY SCOTT GOLDINGER, ESQ., the SUFFOLK COUNTY SHERIFF, ENFORCEMENT OFFICER, and any other person acting on behalf of Cary Scott Goldinger, Esq., be hereby enjoined and restrained from attempting to enforce the money judgment against the Plaintiffs; and it is further

ORDERED, that Plaintiff's employer, STONY BROOK UNIVERSITY HOSPITAL, be hereby enjoined and restrained from withholding and remitting any portion of Plaintiff's income to Cary Scott Goldinger, Esq., the Suffolk County Sheriff, the Enforcement Officer, or any other person acting on behalf of Cary Scott Goldinger, Esq., in connection with the Income Execution by Cary Scott Goldinger, Esq. against Plaintiffs.

Plaintiffs commenced this action in 1992 pursuant to Executive Law § 296 alleging, among other things, that plaintiff ANTHONY SCARDACE was subjected to a hostile work environment based on defendants' perception that he was infected with the HIV virus. Defendants had previously filed a motion for summary judgment. By Order dated February 4, 2003 (Werner, J.), the Court granted the motion to the extent of dismissing the complaint except for the first and fifth causes of action. On appeal, the Appellate Division, Second Department modified the Order by also dismissing the fifth cause of action for discriminatory discharge (*see Scardace v Mid-Island Hosp.*, 21 AD3d 363 [2005]). Thus, the only remaining claim is the cause of action alleging a hostile work environment. Defendants again recently moved for summary judgment asserting different grounds for relief. Defendants claimed that plaintiff ANTHONY SCARDACE cannot maintain this action against his employer because he failed to file a grievance and proceed to arbitration as provided in the Collective Bargaining Agreement ("CBA") between defendants and plaintiff's union. By Order dated

June 24, 2011, this Court denied the motion, finding that defendants failed to establish their entitlement to judgment as a matter of law, as plaintiffs are not alleging a violation of the CBA, but rather employment discrimination based on a disability pursuant to the Executive Law. This Court held that the CBA does not contain clear and unmistakable language waiving an employee's right to a judicial forum for claims of employment discrimination.

Goldinger is the former attorney for the plaintiffs herein. Plaintiffs allege that at the time they retained Goldinger, they entered into a contingent retainer agreement, whereby Goldinger was entitled to legal fees in the amount of forty (40%) percent of any proceeds recovered in the instant litigation. As such, plaintiffs contend that Goldinger is only entitled to legal fees if plaintiffs actually obtain some monetary recovery.

On or about July 2, 2003, plaintiffs discharged Goldinger as their attorney. Thereafter, Goldinger asserted a charging lien and a retaining lien and allegedly refused to turn over plaintiffs' file to their then-current counsel, Ruth M. Pollack, Esq. Ms. Pollack then moved for an Order directing Goldinger to turn over plaintiffs' file and for a hearing to resolve the issue of Goldinger's retaining and charging liens. By Order dated February 25, 2004 (Molia, J.), the Court granted the motion to the extent of setting the matter down for a hearing "to determine whether [Goldinger] was discharged for cause, and if not, his compensation or security to be posted before the plaintiffs' files in this matter may be turned over."

Thereafter, the Court issued an Order dated April 16, 2004 (Baisley, J.), which indicated that the parties had waived the hearing; directed that plaintiffs' new counsel pay to Goldinger the sum of \$1,393.75 as and for his out-of-pocket expenses; ordered that Goldinger was entitled to an "attorney's lien" against the file as and for legal services rendered and that Goldinger shall have a charging lien and a *quantum merit* claim against the file, to be determined upon submission of papers; and directed Goldinger to immediately release the file to plaintiffs' new counsel.

Plaintiffs allege that Goldinger did not submit any papers in support of his fee application until on or about December 16, 2006, on an *ex parte* basis, which was rejected by the Court. Subsequently, on December 4, 2007, Goldinger served notice of entry of the April 16, 2004 Order and a notice of settlement of a proposed Order awarding Goldinger legal fees in the amount of \$118,593.25,

together with interest from April 16, 2004 through December 31, 2007, plus costs. The application was apparently missing a supporting attorney's affirmation, so in response to a request by the Court, Goldinger submitted an affirmation, dated July 14, 2008, then seeking legal fees in the amount of \$165,099.92. By Order dated January 21, 2009 (Baisley, J.), the application was granted to the extent of fixing a charging lien in favor of Goldinger in the amount of \$37,150. By Order dated June 15, 2009 (Baisley, J.), the Court denied Goldinger's motion for reargument. By decision and Order dated March 30, 2010, the Appellate Division, Second Department affirmed the Order of January 21, 2009 (see *Scardace v Mid-Island Hosp.*, 71 AD3d 1117 [2010]). On February 9, 2010, this Court signed the subject Judgment in the amount of \$37,150, plus interest taxed by the Clerk of the Court from April 16, 2004 through March 9, 2010, the date of entry, in the amount of \$19,721.48, for a total of \$57,738.48. Goldinger then caused an income execution to be served upon plaintiff ANTHONY SCARDACE on or about November 22, 2010.

Plaintiffs have now filed the instant application seeking, among other things, to vacate the Judgment. Plaintiffs argue that as Goldinger was granted a charging lien, he was not entitled to covert such lien into the Judgment prior to the resolution of this matter.

In opposition, Goldinger cross-moves to vacate the temporary restraining Order heretofore issued by this Court on December 15, 2010, which stayed enforcement of the Judgment, and to "ratify" the Order of April 16, 2004 (Baisley, J.). In the alternative, Goldinger seeks an Order directing that a hearing be held to determine the basis for him to collect on the "valid and enforceable" Judgment he obtained and to be paid his attorney's fees, plus interest and costs, immediately, regardless of the ultimate outcome of the underlying action; deeming the Judgment as immediately enforceable, permitting Goldinger to immediately proceed upon the execution and enforcement of the Judgment; and granting reasonable attorney's fees to Goldinger in connection with having to oppose plaintiffs' application, in the sum of \$3,500. Goldinger alleges that the Order of April 16, 2004 granted him three separate liens, to wit: (1) a retaining lien; (2) a charging lien; and (3) a lien in *quantum meruit*. Goldinger relies on the language of the April 16, 2004 Order (Baisley, J.) which indicated that he "shall have a charging lien *and* a *quantum meruit* claim against said file" (emphasis supplied). Further, Goldinger argues that the Judgment was based upon the Order of January 21, 2009, "awarding me a lien on this action in the sum of \$57,738.48."

An attorney's statutory or charging lien is to be distinguished from an attorney's general or retaining lien. The latter applies only to papers and property of the client which are in an attorney's possession and is extinguished when that possession terminates other than by court Order (*see Kaplan v Reuss*, 113 AD2d 184 [1985], *affd* 68 NY2d 693 [1986]). The former is governed by Judiciary Law § 475, which 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]).

As acknowledged by Goldinger, it has been held that:

There are three separate and distinct remedies which are available to a discharged attorney to recover the value of his legal services. The first remedy available to an attorney discharged without cause is . . . a plenary action in *quantum meruit* seeking a judgment for the reasonable value of the services, which would be enforceable against all of the client's assets. Such a cause of action accrues immediately upon the attorney's discharge. The second remedy available is a charging lien against any judgment or settlement in favor of the client in an action in which the discharged attorney formerly was the attorney of record for the client. Unlike the first remedy, the charging lien does not provide for an immediately enforceable judgment against all assets of the former client. All it provides to the discharged attorney is security against a single asset of the client, i.e., any judgment or settlement reached in favor of the former client in the action in which the discharged attorney was formerly attorney of record . . . The amount of the charging lien may be determined and fixed prior to the outcome of the underlying suit. While the eventual payment of the lien is contingent upon a favorable outcome for the client in the litigation, the amount of the lien is not dependent upon the result reached in the underlying suit. The third remedy is the retaining lien,

which permits the attorney to retain all of the client's papers and files until all fees are paid

(*Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, 218-219 [1997] [citations omitted]).

Initially, the Court notes that by the plain language of Goldinger's retainer agreement with plaintiffs, Goldinger's legal fee "will be 40% of any sum recovered, whether by suit, settlement or otherwise, after deducting all costs and expenses." As such, the Court finds that Goldinger was retained by plaintiffs on a contingency fee basis. Next, in the Order of January 21, 2009 (Baisley, J.), the Court found that the Order of April 16, 2004 provided that the amount of Goldinger's charging lien would be determined by the Court upon the submission of papers by counsel, which is precisely what the Court determined in the Order of January 21, 2009. Moreover, in footnote 2 of that Order, the Court held that:

Whether the amount of the fee to which an outgoing attorney is entitled is presently payable or secured by a lien on the plaintiffs' cause of action rests in the sound discretion of the Court. That matter was implicitly determined in this Court's April 16, 2004 order, which granted Goldinger a charging lien. A charging lien provides the discharged attorney with a contingent security interest in a favorable outcome of his former clients' litigation. It does not result in a judgment, immediately enforceable against the former clients' assets, which requires the commencement of a plenary action.

The Court concluded that Order by holding "the Court determines the amount of Goldinger's charging lien to be the sum of \$37,150.00." Moreover, on appeal from that Order, the Second Department held that "the Supreme Court's determination to grant the unopposed application of [Goldinger] only to the extent of awarding him a charging lien against the plaintiffs in the sum of \$ 37,150 was not an improvident exercise of discretion" (*Scardace v Mid-Island Hosp.*, 71 AD3d 1117, *supra* at 1117).

Based upon the foregoing case law and prior Orders in this matter, the Court finds that Goldinger had only been granted a charging lien herein,

which does not result in a judgment immediately enforceable against his former clients' assets. It is undisputed that Goldinger has not commenced a plenary action against plaintiffs in *quantum meruit* seeking a judgment for the value of his services, which would be enforceable against all of the clients' assets (see *Micro-Spy, Inc. v Small*, 69 AD3d 687 [2010]; *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183 [2002]; *Butler, Fitzgerald & Potter v Gelmin*, 235 AD2d 218, *supra*).

Accordingly, plaintiffs' motion is **GRANTED** to the extent that the Judgment dated February 9, 2010, and entered on March 9, 2010, is hereby vacated and the Clerk of the Court is directed to do so, and Goldinger's cross-motion is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: July 14, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION