

Dominguez v Zinnar

2012 NY Slip Op 30138(U)

January 19, 2012

Supreme Court, New York County

Docket Number: 116709/06

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

DOMINGUEZ, SOLEDAD, ETAL.

INDEX NO. 116709/06

MOTION DATE _____

- v -

ILAN ZINBAR, ETAL.

MOTION SEQ. NO. 18

MOTION CAL. NO. _____

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 determined in accordance with the ~~above~~ annexed decision and order.

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 12 2012

[Signature]
HON. JOAN A. MADDEN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

SOLEDAD DOMINGUEZ, LUGENE KEYS, IRENE TERRELL, MARCELINA CASTILLO, LEROY JONES, DELROY JONES, CLAUDIA MCEACHIAN, CEASRIODE LOS SANTOS, IRENE FALCON, MARGARITO TONY VEGA, GLADIS VEGA, GEORGE MADISON, JOSE A. RAMOS, LAVERNE JOSEPH, JOSE ALVAREZ, JOSE E. RAMOS, LOUISE MCCLEMME, GILDARDO GARCIA, ELSIA VASQUEZ, LUCIA AYALA, ALTAGRACIA QUESADA, GERNIMO SANTANA, CORA GORDON, JOSELUIS GARCIA, MARIA DELGADO, ROSA DE LOS SANTOS, MIKHAIL MAMEDOV, MARIA GONZALEZ, ALVARO GONZALEZ, SCOTT PATERSON, KENNY BENTLY, ANA RAMOS, VIRGINIA (LUISA) AGUIRRE, LEONOR LEIVA, PAULETTE BURTON, ALEJO BENITO SUAREZ, MANUEL JUAREZ, FLOR OLMEDO, MILLOR PENZO, HENRY KOFFA, ROMEO RAMOS, JOSE ROSA SARAVIA, GODOFREDO RAMOS, MARGARITA A LA TORRE, ANA OLMEDO, MELVIN ALAS, NATASHA ROBERTS, MAMADOU CAMARA, LANISE HERMAN, DENISE HERMAN, PATRICK HAGGREN, THOMAS REIVINGE, ETHEL JOHNSON, REBECCA BOSSELAIT, PAMELA BOSSELAIT, PHILORA GHARIB and NAKIA L. BRUSTER,

INDEX NO. 116709/06

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs,

-against-

ILAN ZINNAR, ISAAC NESHALAM, ROYAL ESTATE, 412 EAST 9TH STREET REALTY CORP., 225 W. 146 ST REALTY LLC, LKH ASSETS LLC, and AI HOLDINGS LLC,

Defendants, and

CHASE GROUP ALLIANCE LLC, VINTAGE VENTURES LLC and ESQUIRE GROUP ESTATES LLC,

Defendants-Intevenors.

-----X

JOAN A. MADDEN, J.:

Plaintiff's counsel Grimble & LoGuidice, LLC ("Grimble & LoGuidice") moves for an

order: 1) “directing a turnover of such portions of any settlement or buy-out proceeds to, for the benefit of, or in accordance with the directions of plaintiff Elsia Vasquez or her agents”; 2) restraining the release of any such proceeds payable to Elsia Vasquez, or any organization under her direction and control, including P.A.L.A.N.T.E. Harlem, pending a determination as to the amount chargeable as an attorney’s lien on said proceeds; and 3) directing Intevenors and plaintiff Elsia Vasquez “to disclose completely” the terms of any arrangement for the surrender and/or forgiveness of rent and/or payments relating to the surrender of Apartment 21B and Apartment A at 225 West 146th Street, New York, New York, or any other apartment occupied by plaintiff Vasquez at 225 or 235 West 146th Street, New York, New York. Counsel also seeks a conference with the court for the purpose of resolving any procedural and disclosure issues relating to the determinations as to the amount of its attorney’s charging lien, and for an “accounting of any settlement and/or buyout proceeds paid heretofore to, on behalf of or at the direction of Elsia Vasquez or her agents.”

Plaintiff Elsia Vasquez opposes the motion and cross-moves for an order pursuant to Part 130 of the Court Rules sanctioning Grimble & LoGuidice for frivolous conduct. In opposing the motion, Vasquez appears by counsel, Timothy L. Collins, who states that he is appearing “solely for the purpose of representing Elsia Vasquez and P.A.L.A.N.T.E. Harlem in connection with the pending OSC.”

Plaintiffs are rent stabilized tenants in the buildings located at 225 and 235 West 146th Street, and 301 West 141st Street, in Manhattan; defendants and defendant Intevenors are the former and current owners and landlords of the buildings. On November 8, 2006, plaintiffs, as represented by Grimble & LoGuidice, commenced the instant action. The Second Amended

Complaint, filed on November 20, 2009, asserts claims for rent overcharges, conversion of security deposits, breach of the warranty of habitability, piercing the corporate veil, fraudulent conveyance and legal fees. Also in October, November and December 2006, and early 2007, plaintiffs, as represented by Grimble & LoGuidice, commenced HP and 7A proceedings in Civil Court, which resulted in the appointment of a 7A Administrator to manage the buildings.

With the exception of the instant motion, this action is settled, leaving only the issue as to whether Grimble & LoGuidice is entitled to a statutory charging lien pursuant to Judiciary Law §475 in connection with plaintiff Vasquez's settlement. Grimble & LoGuidice asserts that pursuant to the terms of its engagement letter dated September 20, 2006, it is entitled to a contingency fee of one-third of the proceeds of Ms. Vasquez's buyout, which includes an outright payment, as well as a waiver or forgiveness of rent. Specifically, counsel alleges that Ms. Vasquez, with the assistance of attorney Collins, negotiated and secured a settlement involving a buyout, in which she received a payment of approximately \$70,000 or \$95,000, as well as a waiver of approximately \$21,000 in unpaid rent arrears, in exchange for surrendering possession of apartment 21B and ground floor apartment A. Counsel also alleges that Ms. Vasquez used ground floor apartment A as an office for her community organization known as "P.A.L.A.N.T.E. Harlem," pursuant to a commercial lease which expired on June 30, 2011, and since that apartment was not occupied as a residence, it was not protected by rent stabilization and "any purported buyout payment as to that apartment is actually a payment made for the surrender of rent stabilized apartment 21B," so as "to avoid our attorneys lien." Grimble & LoGuidice further alleges that the amount of the rent waiver for the two apartments "was deliberately represented as lower than the actual waiver . . . to avoid paying the 1/3 contingency

due under our agreement.” Counsel concedes that it may be necessary for the court to conduct a hearing to resolve these issues, and seeks “full disclosure” of the settlement agreement, including the “buyout waivers and payments to Ms. Vasquez,” and the financial statements of the 7A Administrator, which purportedly state the “accurate” amount owed by Ms. Vasquez in rent arrears for the two apartments.

In opposing counsel’s motion and cross-moving for sanctions for frivolous conduct, Ms. Vasquez argues that the court lacks subject matter jurisdiction “to resolve a legal fees dispute in matters unrelated to the case before this court,” and that the surrender of the two apartments and “the legal fees which may be generated therefore, are completely disconnected with anything before this court.” Specifically, Ms. Vasquez asserts that the agreement which led to the payment of the buyout proceeds is “not legally subject to or connected with the litigation before this court, which involved rent overcharge claims,” and that the “only link is in the fact that the owner . . . insisted upon a ‘global’ settlement of all matters involving the dissenting tenants, Ms. Vasquez and P.A.L.A.N.T.E Harlem.” Ms. Vasquez further argues that the “purported retainer relied upon to make this claim was never signed by any tenant,” and that the retainer is “unclear as to its terms and . . . predates the existence of P.A.L.A.N.T.E. by two years.”

Grimble & Loguidice are seeking a charging lien pursuant to Judiciary Law § 475, which provides as follows:

From the commencement of an action, special or other proceeding in any court . . . the attorney who appears for a party has a lien upon his 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 hands 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.

[* 6]

“A charging lien is a security interest in a favorable result of litigation . . . giving the attorney equitable ownership interest in the client’s cause of action and ensuring the attorney can collect a 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 (1st Dept 2005). “[A] charging lien extends to settlement proceeds . . . [and] is enforceable against the fund created by that action.” Id.

“[E]nforcement of a charging lien is founded upon the equitable notion that the proceeds of a settlement are ultimately ‘under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done to its own officers.’” Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 AD2d 183, 187 (1st Dept 2002) (quoting Rooney v. Second Ave R. Co, 18 NY 368, 369 [1858]). Thus, where the parties reach a settlement before judgment or trial, the charging lien “attaches to the amount agreed upon in the settlement the instant that the agreement is made, and if the defendant pays over to the client without providing for the lien of the attorney, he violates the rights of the latter and must stand the consequences.” Id. at 189 (quoting Fischer-Hansen v. Brooklyn Heights R.R., 173 NY 492, 502 [1903]). The charging lien, however, extends only to fees arising out of the attorney’s services in a specific action or proceeding in which they were incurred, and does not include fees due to an attorney for other matters. See In the Matter of Rosenblum, 121 AD2d 546 (2nd Dept 1986); 7 NYJur2d Attorneys at Law § 295.

Based upon the undisputed record, the court concludes that Grimble & LoGuidice is entitled to a charging lien on the proceeds of plaintiff Vasquez’s settlement. On the record presented, however, the court is unable to determine the amount of such lien, and a hearing is necessary to resolve certain issues as discussed below.

* 7]

At the outset, plaintiff Vasquez does not dispute that she received an engagement letter from Grimble & LoGuidice, dated September 20, 2006, detailing the terms of its representation as follows:

This will confirm our agreement with regard to representation of the Association and its members.

We are being engaged to represent the Association and its members with regard to [the] dispute with the landlord and owners of 225-235 West 146th Street and 301 West 141st Street Tenants Association. Initially, the scope of our service will be to bring an HP proceeding and to represent tenants with regard to non-payment cases arising from the rent strike at the building. We have agreed that we will bring the HP proceeding for a flat fee of \$1,500, and that we will represent tenants in non-payment proceedings for a contingency fee equal to 33 1/3 % of any abatement or other recovery we obtain. The contingency fee applies whether the recovery is by means of an offset to rent, payment from the landlord, or receipt of any other thing of value. These fees cover representation through trial or settlement of these matters, and does not include any appeals or subsequent proceedings. As a condition to representing tenants in non-payment proceedings, we require that the rent be deposited in a tenants association escrow account. Additionally, if you request us to hold the rent moneys in our client trust (escrow) account, we are willing to do so.

The contingency fee will also apply to any recovery for rent overcharges, and reimbursement for legal fees, and, should any tenant wish to take a buyout – move in exchange for payment – to the proceeds of the buyout.

Our normal hourly rate is \$350 per hour. If any tenant association member wishes to retain us to represent them in a related matter, where a contingency fee does not apply, during the pendency of the rent strike, this rate will be reduced to \$250 per hour. We are open to discussing other fee arrangements as to matters not covered by this letter. This rate will continue if we are required to take steps for the Tenant's Association to obtain control of the building(s) through the TIL program or otherwise.

The association and its members are also responsible for any out of pocket expenses incurred by us in the representation, although we do not anticipate any substantial expenses at this time; the filing fees for the HP proceeding are included in the flat fee set forth above.

We will send a copy of this letter to tenants as we begin representing them in nonpayment cases, to ensure that they understand the fee arrangement.

The court finds that the foregoing engagement letter satisfies 22 NYCRR § 1215.1, which requires an attorney either to provide a client with a written engagement letter, or to enter into a

signed written retainer agreement, before or within a reasonable time after the representation commences. The absence of Ms. Vasquez’s signature or the signature of any tenant on the engagement letter, does not render it ineffective, as Rule 1215.1 does not require the client’s signature. See Pechenik & Curro, P.C. v. Weaver, 24 Misc3d 1246(A) (Sup Ct, Rensselaer Co, 2009). As reasoned in Pechenik, the “plain wording of the regulation supports this conclusion and also the fact that the regulation provides in the alternative that an attorney may enter into a signed written retainer agreement with the client in order to comply with the regulations.” Id.

The court also finds that by its clear and express terms, the engagement letter covers the representation provided by Grimble & LoGuidice to the plaintiffs in the instant action, which originally asserted claims on behalf of more than 50 rent stabilized tenants, including Ms. Vasquez, for affirmative relief relating to their tenancies, including damages and injunctive relief based on breach of the warranty of habitability, rent overcharges and violations of the rent stabilization laws. The engagement letter explicitly states that the one-third contingency fee would apply to “any recovery” for rent overcharges and to the proceeds to any buyout, where the tenant agreed to “move in exchange for payment.” Notably, shortly after the date of the engagement letter, Grimble & LoGuidice commenced this plenary action in Supreme Court, as well as the HP and 7A proceedings in Civil Court.

Moreover, contrary to Ms. Vasquez’s argument, her settlement, consisting of the buyout payment and wavier of rent arrears in return for her surrendering the two apartments, is directly related to the instant action. The fact that she “separately” negotiated the settlement on her own with the assistance of attorney Collins, does not alter this conclusion, as the undisputed record clearly establishes that she did not discharge Grimble & LoGuidice from representing her in this

action. A client generally has a absolute right to discharge an attorney at any time, with or without cause. See Friedman v. Park Cake, Inc., 34 AD3d 286 (1st Dept 2006). No special formality is ordinarily required to effect a discharge, so “[a]ny act of the client indicating an unmistakable purpose to sever relations is enough.” Costello v. Bruskin, 58 AD2d 573 (2nd Dept 1977) (quoting 3 NY Jur, Attorney and Client, § 5); accord Hawkins v. Lenox Hill Hospital, 138 AD2d 572 (2nd Dept 1988).

Here, plaintiff Vasquez submits an affidavit in support of her cross-motion for sanctions stating as follows: “*With the exception of completion of the negotiations in this Supreme Court matter, Grimble and LoGuidice were discharged by me long ago*” (emphasis added). Based on this statement, Ms. Vasquez admits that Grimble & Loguidice continued providing legal services to the plaintiffs in this action, including Ms. Vasquez, through the completion of the negotiations which ultimately resulted in all plaintiffs, including Ms. Vasquez, agreeing to the settlement. The conclusory statement that she “discharged” the firm “long ago” is inconsistent with such admission, and is belied by the documentary proof.

At best, the record shows that Grimble & LoGuidice was discharged in the Civil Court proceedings, as the attorneys for several individual tenants. Specifically, on April 11, 2011 Ms. Vasquez wrote to Grimble & LoGuidice “on behalf of the tenants living at 225 and 235 West 146 Street,” stating that “[w]e no longer wish to be represented by you.” On April 29, 2011, Housing Court Judge Timmie Elsner issued a short form order stating that “[f]or the reasons set forth in the record, the firm of Grimble & Loguidice is hereby discharged as attorneys for the following tenants: Mikhail Mamedov, Margarito Tony Vega, Jose Ramos, Elsia Vasquez, Maria Gonzalez, Cora Gordon and Laverne Joseph.”

In the instant action, Ms. Vasquez submitted a sworn affidavit dated June 2, 2011, *opposing* the motion by Grimble & LoGuidice to withdraw as counsel for the eight dissenting tenants, and “ask[ing] that Grimble & LoGuidice continue to professionally pursue this litigation.”¹ Ms. Vasquez explained that “[w]hen Mr. Collins was first retained to advise us on our attempt to discharge Grimble & LoGuidice in the Housing Court action . . . he subsequently advised us to continue retaining Grimble & LoGuidice and to work with them in this proceeding.” She further explained that she and the other dissenting tenants had not yet agreed to the settlement because Grimble & LoGuidice had simply told them the settlement was “beneficial” or “favorable” without an explanation as to why it was advisable, and without an explanation as to the firm’s fees. Ms. Vasquez stated that “[u]nder the totality of the circumstances, I respectfully request that this court compel Grimble & LoGuidice to meet with their remaining tenants at a mutually convenient time and location to review the various questions we have raised regarding the settlement and their fees, and we further request that, in the absence of a settlement, that Grimble & LoGuidice be directed to *continue* their representation until this matter comes to a proper conclusion” (emphasis added). Based on the foregoing, it is clear that Ms. Vasquez’s actions evinced an unmistakable intention to continue the attorney-client relationship with Grimble & LoGuidice, rather than sever it.

The court, therefore, finds that Grimble & LoGuidice is entitled to a statutory charging lien pursuant to Judiciary Law §475 in connection with plaintiff Vasquez’s settlement, and the

¹Grimble & LoGuidice was obligated to make that motion, in order to proceed with the settlement on behalf of the tenants who had agreed to it. At oral argument, the court encouraged Grimble & LoGuidice to meet with the dissenting tenants and address their concerns. By letter dated August 2, 2011, counsel advised the court that the dissenting tenants “have joined the settlement,” rendering the motion to withdraw “moot” as to those plaintiffs.

determination of the amount of such lien is referred to a Special Referee to hear and report. The court further finds that Grimble & LoGuidice is entitled to a one-third contingency fee with respect to Ms. Vasquez's settlement which purportedly includes a buyout payment and a forgiveness or waiver of rent arrears. The Special Referee shall hear and report as to the amount of such settlement, including but not limited to the portion of the settlement, if any, attributable to the apartment leased to P.A.L.A.N.T.E Harlem. The Special Referee's report shall include a detailed discussion and analysis of the supporting facts on which the Referee's conclusions and recommendations are based. Ms. Vasquez shall provide Grimble and LoGuidice with copies of her settlement documents detailing the terms of the buyout, the forgiveness or waiver of rent arrears, and any other consideration.

In view of the foregoing conclusions, the cross-motion is denied in its entirety.

Accordingly, it is

ORDERED that the motion by plaintiff's counsel Grimble & LoGuidice for a charging lien pursuant to Judiciary Law §475 in connection with plaintiff Elsie Vasquez's settlement is granted to the extent of referring the matter to a JHO and/or Special Referee to hear and report as to the amount of the one-third contingency fee to which Grimble & LoGuidice is entitled in connection with Elsie Vasquez's settlement including a buyout payment and forgiveness or waiver of rent arrears, and in determining the amount of the settlement covered by the contingency fee agreement, the Special Referee shall determine, *inter alia*, the portion of the settlement, if any, attributable to the apartment leased to P.A.L.A.N.T.E Harlem; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date on the calendar of the Special Referee Part (which is posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), and this matter shall be assigned to an available Special Referee to hear and report as specified above; and it is further

ORDERED that Grimble & LoGuidice shall within thirty (30) days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practicable thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to an adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice with a jury (CPLR 4320(a)) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the JHO/Special Referee

13] shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for Trial Courts; and it is further

ORDERED that within ^{thirty (30)}~~twenty (20)~~ days of the date of this decision and order, plaintiff Elsia Vasquez shall provide Grimble & LoGuidice with copies of the settlement documents detailing the terms of any buyout payment and surrender, and the forgiveness or waiver of rent arrears, in connection with apartment 21B and ground floor apartment A at 225 West 146th Street, and any other consideration; and it is further

ORDERED that any further discovery issues shall be resolved by the Special Referee; and it is further

ORDERED that the cross-motion is denied in its entirety; and it is further

ORDERED that all restraints previously issued shall remain in effect until further order of this court, and it is further

ORDERED that one-third of the settlement proceeds relating to plaintiff Elsia Vasquez's buyout, or surrender or forgiveness of rent, as to apartment 21B and ground floor apartment A, at 225 West 146th Street, New York, New York, shall be held in escrow by Kucker and Bruh in its escrow account, and shall not be paid out of said account until further order of this court.

The court is notifying the parties by mailing copies of this decision and order.

DATED: January 12, 2012

FILED

ENTER:

JAN 19 2012

J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE