

DiMauro v United LLC
2013 NY Slip Op 33855(U)
June 17, 2013
Supreme Court, Westchester County
Docket Number: 58165/2012
Judge: Joan B. Lefkowitz
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

-----X
JOSEPH DIMAURO and JOSEPH DIMAURO, AS
TRUSTEE OF THE DIMAURO TRUST UNDER
AGREEMENT DATED SEPTEMBER 28, 1984, AS
AMENDED BY AMENDED AGREEMENT OF
TRUST, DATED June 11, 1987,

Plaintiffs,

DECISION & ORDER

-against-

Index No. 58165/2012
Motion Date: 6/17/13

UNITED LLC, AGNES NANCY VARSAMES,
PAUL A. VARSAMES, LOUIS VARSAMES,
JOHN VARSAMES, JEAN VARSAMES,
INDIVIDUALLY AND AS BENEFICIARY OF THE
JEAN VARSAMES IRREVOCABLE TRUST,
PAUL VARSAMES DEVELOPMENT, LLC and
ANV ESTATES, LLC,

Seq. No. 2

Defendants.

-----X

LEFKOWITZ, J.

The following papers were read on this motion by defendants for an order compelling the law office of DelBello Donnellan Weingarten Wise & Wiederkehr, LLP (the DelBello firm) to provide substitute counsel, Hodges, Walsh & Slater, LLP (the Hodges firm) with the complete file in this matter together with costs related to this motion.

- Order to Show Cause - Affirmation - Exhibit
- Affirmation in Opposition by Patrick Reilly, Esq. - Exhibit
- Affirmation by Andrew Kazin, Esq. - Exhibits - Memorandum of Law

Upon the foregoing papers and the proceedings held on June 17, 2013, this motion is determined as follows:

The Hodges firm was substituted for the DelBello firm as counsel for defendants pursuant to a consent to change attorney that was mailed to the DelBello firm on May 2, 2013 (Defendants' Exhibit A). Defendants argue substitute counsel has been provided with attorney briefs on a prior motion to dismiss and a discovery response which plaintiffs' counsel argues is incomplete. Defendants seek the entire file to prepare a record for appeal on the motion and a

supplemental discovery response pursuant to plaintiffs' request. The DelBello firm is asserting a retaining lien on the file for unpaid attorneys' fees. Defendants argue an attorney discharged without cause has a common law retaining lien on the file. Defendants argue an attorney should not be compelled to surrender the client's file until a hearing has been held to determine whether the discharge was made for cause and to set the amount of the attorney's fees. Defendants seek an order directing the former attorneys to disclose all materials, including discovery demands, responses, bills and other materials, upon which former counsel may rely to justify their fees were reasonable and set the matter down for a hearing to determine whether the discharge was for cause.

In opposition, the DelBello firm argues it has asserted a retaining lien on the file as a result of an unpaid balance in the amount of \$28,449.49. Former counsel argues that as of May 9, 2013 defendants advised that the remaining balance would be paid by May 24, 2013. Counsel argues that all documents needed to perfect the appeal can be obtained on NYSCEF or from the County Clerk's file. All documents needed to respond to discovery requests are reportedly in defendants' possession. The DelBello firm has no objection to delivering the file to new counsel as soon as the outstanding balance is paid by the defendants. DelBello seeks a hearing to determine the amount of outstanding fees and objects to producing the file in advance of the hearing.

Plaintiffs submit an affirmation in response seeking an order striking defendants' answer based on defendants' attempt to delay the action by withholding counsel fees, or in the alternative, compelling defendants to post security for the release of the file from the DelBello firm. Plaintiffs seek an order striking defendants' answer for failure to comply with the preliminary conference order dated February 11, 2013 and the compliance conference order dated May 10, 2013, or in the alternative, compelling defendants to provide document responses and interrogatory responses within ten days, and directing defendants to pay attorneys' fees and costs related to the instant motion. The Court has not considered the branches of the motion seeking to strike defendants' answer, as such relief was not sought at the pre-motion conference or in an order to show cause and defendants have not had an opportunity to submit answering papers related to the relief sought. Plaintiffs argue Courts must not permit an attorney to insist on a retaining lien when it is unfair and inequitable. Plaintiffs argue that by refusing to pay the DelBello firm, defendants are engaging in a delay tactic. Plaintiffs contend that a hearing is not needed because there is no dispute regarding the amount of attorneys' fees claimed. To the extent there is a dispute as to the amount due, defendants should be required to post a bond and the action should be permitted to proceed.

A retaining lien permits counsel to retain the legal file of the client until all outstanding fees and disbursements are paid or security has been posted (*Wankel v Spodek*, 1 AD3d 260 [1st Dept 2003]; *Cohen v Cohen*, 183 AD2d 802 [2d Dept 1992]). Unless and until it has been judicially determined that former counsel was discharged for cause and no attorney's fees are warranted, former counsel has a common law retaining lien on the papers in his or her possession on a quantum meruit basis (*Artim v Artim*, 109 AD2d 811 [2d Dept 1985]; *Roskind v Brown*, 29 AD2d 549 [2d Dept 1967]).

The DelBello firm argues it has a retaining lien on the file as a result of an unpaid balance in the amount of \$28,449.49. As neither the defendants nor the Hodges firm argue the DelBello firm was discharged for cause, the DelBello firm is entitled to the retaining lien.

The court, however, is unable to fix the amount of the lien at this time as it appears that Part 137.6(a)(1) of the Rules of the Chief Administrator of the Courts (22 NYCRR Part 137) may be applicable to the present case. If applicable, Part 137.6(a)(1) would require the DelBello firm to serve a "Notice of Client's Right to Arbitrate" on the defendants prior to the amount of the retaining lien being determined. If said notice is required but not served, an attorney cannot recover a fee. There is no indication in the record that such notice is required or has been properly served. If required, once the notice is served, if defendants fail to file the request for arbitration within 30 days of the service of the notice, the DelBello firm can apply to the court for a hearing to determine the amount of the liens (*cf. Julien v Machson*, 245 AD2d 122 [1st Dept 1997]).

Insofar as the amount of the retaining lien will be determined by arbitration or a hearing, defendants may obtain their legal file in this action from the DelBello firm upon posting a bond as security for the lien. On this motion, the DelBello firm contends that its total outstanding legal fees in this action are \$28,449.49 and defendants may post a bond in that amount to protect the firms' ability to collect the retaining lien.

In view of the foregoing, it is

ORDERED that the motion is granted to the extent that DelBello Donnellan Weingarten Wise & Wiederkehr, LLP shall provide Hodges, Walsh & Slater, LLP with a defendants' legal file in this action upon defendants paying the DelBello firm's attorneys' fees, in an amount determined in arbitration or a hearing, or posting a bond in the amount of \$28,449.49; and it is further

ORDERED that the DelBello firm shall serve a written "Notice of Client's Right to Arbitrate" and a "request for arbitration" form on defendants as required by Part 137.6(a)(1) of the Rules of the Chief Administrator of the Courts within 10 days; and it is further

ORDERED that in the event defendants timely file a request to arbitrate and attorneys' fees are fixed in arbitration, the retaining lien shall be fixed in that amount; and it is further

ORDERED that in the event that defendants fail to timely file a request to arbitrate, the DelBello firm may apply to the court for a hearing to determine and fix the amount of the retaining lien; and it is further

ORDERED that insofar as plaintiffs and defendants seek costs related to the motion these requests are denied; and it is further

ORDERED that the movants shall serve a copy of this order with notice of entry upon

plaintiffs' counsel and the DelBello firm within 10 days of entry; and it is further

ORDERED that all counsel are directed to appear for a conference in the Compliance Part, Courtroom 800, on July 1, 2013 at 9:30 a.m.

The foregoing constitutes the decision and order of this Court.

Dated: White Plains, New York
June 17, 2013


HON. JOAN B. LEFKOWITZ
J.S.C.

TO: Stagg, Terenzi, Confusione & Wabnik, LLP (by NYSCEF)
401 Franklin Avenue
Suite 300
Garden City, New York 11530

Hodges Walsh & Slater, LLP (by NYSCEF)
55 Church Street, Suite 211
White Plains, New York 10601

DelBello Donnellan Weingarten Wise & Wiederkehr, LLP (by NYSCEF)
One North Lexington Avenue, 11th Floor
White Plains, New York 10601

cc: Compliance Part Clerk