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

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54

Justice

Coleman

- v -

The Roth Law Firm

INDEX NO. 154848/2013

MOTION DATE 11/7/13

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	19-28
Answering Affidavits — Exhibits	40-41
Replying Affidavits	42-44

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 1/22/14

SHIRLEY WERNER KORNREICH 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 54

----------X Action 1

JOHN COLEMAN,

Petitioner, Index No.: 154848/2013

-against-

THE ROTH LAW FIRM, PLLC,

Respondent.

----------X Action 2

THE ROTH LAW FIRM, PLLC,

Plaintiff, Index No.: 651897/2013

-against-

JOHN COLEMAN, **DECISION & ORDER**

Defendant.

CHRISTIE'S INC.,

Nominal Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion Sequences Numbers 001 and 003 under Index No. 651897/2013, and Motion Sequences Numbers 001 and 004 under Index No. 154848/2013 are consolidated for disposition.

Plaintiff/Respondent, The Roth Law Firm, PLLC (the Firm), seeks an order of attachment (CPLR 6201(a)) on the proceeds of the sale at auction of certain items currently in the possession of nominal defendant Christie's Inc. (Christie's). Index. No. 651897/2013, Seq. 001. Lawrence A. Beckenstein, Coleman's former attorney in these actions, has filed a cross-motion in opposition to this motion and moves for leave to intervene as a party plaintiff and to add The Jockey Club LLC (TJC) as a party defendant.[1] Defendant/Petitioner John Coleman,

[1] Beckenstein represented himself as the counsel for both Coleman and TJC.

moves to vacate a Judiciary Law 475 charging lien placed on the same proceeds by the Firm. Index. No. 154848/2013, Seq. 001. TJC, represented by new counsel, has filed its own motion to intervene in both actions. Index. No. 651897/2013, Seq. 003; Index. No. 154848/2013, Seq. 004. The motions are granted in part and denied in part for the reasons that follow.

I. Procedural History

On May 24, 2013, Coleman, represented by Beckenstein, commenced an action against the Firm by petitioning the court for the discharge of a charging lien filed against proceeds of the sale of certain property in the custody of Christie's. On May 28, 2013, the Firm filed a summons and complaint against Coleman alleging: (1) breach of contract; (2) services rendered; (3) accounts stated; and (4) unjust enrichment. On June 25, 2013, Beckenstein filed a motion to withdraw as counsel for Coleman on both actions, which was granted on August 7, 2013.[2] On September 23, 2013, Beckenstein filed his cross-motion seeking, among other things, his fees. The Jockey Club filed its motions on November 27, 2013.

II. Factual Background

The present dispute has its genesis in a related case, *John Coleman v Crozier Fine Arts, Inc.*, Index No. 650502/2011 (the *Crozier* action). In that litigation, the Firm represented Coleman in his suit against Crozier, a fine arts and antique moving/storage company, which Coleman had retained to move his possessions from his large, Fifth Avenue apartment and to store many of those possessions. Coleman brought the action, in essence, to regain possession of the property the moving company had retained in lieu of payment.[3] Coleman's possessions

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[2] Coleman, presently, is represented by a third law firm, and a fourth law firm represents TJC.

[3] Coleman asserted actions for: violation of GBL 607, violation of GBL 608, a declaration that Coleman was not responsible for Crozier's bill and that Crozier must release Coleman's

included art, furniture, antiques and silver. The parties disputed the approximately $51,000 in moving and storage fees and Crozier's refusal to release the stored property unless it was paid. Indeed, Crozier filed a lien against the property and contended it had the right to auction the stored property to pay Coleman's bill. After much litigation, which included the Firm's successful challenge to the sale of the property and a bench trial, Coleman and the Firm succeeded in reducing the bill to $14,339.37. Once the bill was paid, the stored property was released.

Richard Roth, a partner at the Firm, submitted an affidavit averring that the Firm represented Coleman in the *Crozier* action. Coleman signed a retainer agreement with the Firm on January 9, 2011, which provided for hourly rates of $750-$800 for partners and $300-$575 for associates. Bills were to be issued monthly and paid within twenty days. Coleman was responsible for disbursements and attorney fees should the Firm have to sue for its fees. In August 2012, after Coleman had paid $12,000, only a portion of the Firm's fees, Coleman and the Firm amended the retainer agreement. The amendment reaffirmed the agreement but added, in pertinent part: "[u]pon receipt of the items in storage (that were the subject of the *Crozier* action) You shall immediately sell everything in storage and shall apply the first monies received from said sale to the payment of our fee."

Roth avers that, throughout the *Crozier* action, Coleman told him that he would deliver the stored property to Christie's upon its release and use the proceeds to pay the Firm. Indeed, throughout the litigation and when Coleman testified at trial, the property was represented as belonging to Coleman; TJC was never mentioned. Subsequent to the release of his property, in

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property, breach of contract, and violation of GBL 349.

April 2013, Coleman consigned several pieces of silver, which had previously been held in storage by the moving company, to Christie's for auction. While Christie's initially believed that the silver belonged to Coleman personally, in May 2012, Coleman contacted Christie's asserting the Silver actually belonged to TJC.

In his May 24, 2013 affidavit annexed to the motion in his action, Coleman asserts that a portion of the property stored by Crozier belonged to TJC, that the silver objects consigned to Christie's belonged to TJC, but that Coleman was in dire financial shape and about to be evicted from his apartment at ***The Essex House*** and that ***he "was scheduled to receive a substantial portion"*** of the Christie's proceeds. Coleman Aff. Paras. 3, 5, 6. The auction took place in May 2013 and grossed $102,300[4] in sold items; silver objects worth $32,300 were not sold. Christie's is holding the auction proceeds and the unsold silver objects pursuant to the charging lien.

In a May 22, 2013 certified letter sent by Coleman and TJC to Christie's, Coleman, individually and as manager of TJC, directed Christie's to pay Beckenstein $15,000 from the sale proceeds of the Silver "due and owing to" TJC. The letter conferred "an irrevocable lien to Beckenstein that JOHN COLEMAN Individually and/or as Manager of and on behalf of THE JOCKEY CLUB, LLC may not later revoke, amend, alter or change." The letter stated the lien was to compensate Beckenstein for legal services and was signed by Coleman individually and as manager of TJC.

Coleman also submitted an affidavit on the Firm's motion. Coleman averred that he had been engaged in the hospitality industry for many years and acquired the Fairfax Hotel in Washington, D.C. and the Jockey Club restaurant, a prominent restaurant located in the hotel, in

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[4] Beckenstein has asserted that $89,000 is being held by Christie's for TJC/Coleman.

1977. According to Coleman, he operated the restaurant until it closed in 2001, and owned and operated the Jockey Club restaurant at the Ritz Carlton Hotel in New York until 1998. In the 1980s, Coleman stated that he formed TJC in order to run the restaurant. Since 2001, TJC's primary purpose has been the exploitation of various registered trademarks associated with the restaurant. Presently, he avers, he, his five children and Robert Spielman are the members of TJC. He does not state when his children or Spielman became members or how. Coleman claims that the silver items at Christie's were owned by TJC and displayed in the restaurant from the 1980s until 2001. When the restaurant closed, the TJC Silver and other property that had been on display in the restaurant were stored in Coleman's home.

Coleman recounts that a number of TJC's pieces of property were sold at Christie's and at Sotheby's in 2010 and annexes some documents from Sotheby's indicating that the items were listed as belonging to "The Jockey Club LLC, Mr. John B. Coleman". The documents submitted are not signed. He does not explain who was paid the proceeds of either Christie's or Sotheby's 2010 auction. Nor does he include any documents from Christie's.

Coleman further avers that TJC is a Delaware LLC, remains operational and exploits its trademarks. He submits no documentation proving this. He contends that a number of trademarks were registered in April 2012 and that the silver objects at Christie's were to be sold to pay for trademark counsel and to pay Ogilvy and Mather, a marketing firm. He alleges that 10% of the items stored at Crozier belonged to TJC and the remainder belonged to him and that his personal items "remain[] in storage at Christie's." However, in an email annexed to Coleman's affidavit, a Christie's representative mentions items stored in Palm Beach and Washington.

In its motion to intervene, TJC's counsel states that TJC is an LLC in good standing,

whose principal assets are trademarks associated with the Jockey Club restaurants which had been located in New York and Washignton, D.C. He states that John Coleman is the managing member of the LLC. According to counsel, TJC owns "works of art of substantial value, including paintings and silver." Counsel claims that TJC never engaged the Firm and that TJC never received any bills addressed to it. Counsel, then, alleges: "on information and belief, [the Firm] is seeking to attach, and ultimately to execute any judgment against Mr. Coleman on, the proceeds of the sale of property that [TJC] had consigned to Christie's." Counsel further contends that the property, at all times, belonged to TJC. Counsel never states that the facts cited by him are known by him from personal knowledge.

Robert Spielman, the only alleged member of TJC who is not Coleman or either the Coleman children or trusts set up for them, has submitted an affirmation, not an affidavit. Spielman states that: he is a lawyer and an accountant; that he "provided financing" to TJC in mid-2012 (subsequent to the commencement of the underlying *Crozier* action and the Firm's representation); and "based upon representations to me, and my belief in the representations, that [TJC] owned the [silver] items that were offered for sale at Christie's in April, 2013, as well as certain intangible properties. My expectation was that [TJC] and its principals would use that loan and the money from the sale of those items to exploit its trademarks." Spielman Aff., Index. No. 154848/2013, Seq. 004. Spielman does not state whether he was a member of TJC prior to mid-2012, does not claim that he has ever seen the silver items or could identify them as belonging to TJC, and does not state who made the alleged representations to him.

Coleman, in an affidavit annexed to TJC's intervention motion, avers that he is not the trustee of the trusts for his five children. However, as noted above, in his affidavit, Coleman contended that his children, not trusts in their names, are members of TJC. Again, no

documentation is submitted showing who the members of TJC are and when they obtained their membership interests.

III. Discussion

A. Order of Attachment

CPLR 6201 provides that an order of attachment may be granted where the plaintiff is entitled to a monetary judgement when:

> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts;

Attachment is "considered a harsh remedy and the statute is strictly construed in favor of those against whom it may be employed." *Glazer & Gottlieb v Nachman*, 234 AD2d 105 (1st Dept 1996). In order to prevail under CPLR 6201(3), the plaintiff must show "(1) that the defendant has, or is about to conceal his or her property in one of the enumerated ways, and (2) that defendant has acted or will act with the intent to defraud his or her creditors or to frustrate the enforcement of a judgment for the plaintiff." *Societe Generale Alsacienne De Banque, Zurich v Flemingdon Dev. Corp.*, 118 AD2d 769, 772 (2d Dept 1986). Moreover, a plaintiff must demonstrate its right to an attachment with factual assertions establishing that the defendant had the intent to defraud his creditors at the time that the property transfer was made either by direct or circumstantial evidence. *Eaton Factors Co. v Double Eagle Corp.*, 17 AD2d 135, 136 (1st Dept 1962); *Arzu v Arzu*, 190 AD2d 87, 92 (1st Dept 1993). Finally, the plaintiff must demonstrate probable success on the merits. *Societe Generale*, 118 AD2d at 773.

In addition, to prove intent to defraud, it is not sufficient to merely show that the

defendant has transferred or liquidated assets. *Computer Strategies, Inc. v Commodore Bus. Machs., Inc.*, 105 AD2d 167, 173 (2d Dept 1984). To raise an inference of fraud there must be additional contributing factors accompanying the transfer or liquidation. *Id.* Several factors relevant to a finding of intent to defraud are the timing of the transfer, the extent of the transfer, the relationship between the defendant and the transferees, any misleading statements or misrepresentations made by the defendant about his assets, and any other furtive behavior. *See Societe Generale*, 118 AD2d at 773. Moreover, past fraudulent conduct may support attachment. *Allstate Ins. Co. v Levy*, 478 Fed Appx 688, 691 (2d Cir 2012).

Here, the record supports an attachment. Throughout the *Crozier* action, Coleman represented to Crozier, to the Firm **and** to the court that the property at issue belonged to him personally. Indeed, he testified under oath at trial that the property was his. At the close of litigation, after he had signed an agreement promising to sell the property to pay the Firm, he transferred the property to Christie's for sale, did not inform the Firm and although he originally told Christie's the property was his, later changed ownership to TJC. The timing of Coleman's communication with Christie's "correcting" the ownership status of the silver is, at best, suspicious.

Nor is it clear from this record, that Coleman is not the true owner of the property and that TJC is merely a means of concealing assets. There are statements on the record by Coleman that the proceeds of the auction were to be used to pay his personal rent. Coleman is the managing member of TJC and had full control of the property at issue. In fact, he promised proceeds from the sale of the property to both the Firm and Beckenstein. In addition, there is no documentation demonstrating the membership interests of TJC and whether the remaining members received their interests prior to or after the debt to the Firm was incurred. Spielman

indicates that he received his interest after the debt to the Firm was incurred and perhaps as a means to evade that debt. What is clear is that Coleman is the primary member of TJC, that he has always controlled TJC's assets, that although a businessman, he has repeatedly and flagrantly signed contracts and failed to abide by them and that those to whom he becomes indebted – be it his high-end mover, his landlord at the Essex House or his expensive lawyers – have difficulty finding his assets in order to get paid. Where, as here, Coleman has repeatedly either misrepresented or hidden facts surrounding his assets and serious questions about his willingness or financial ability to satisfy a judgment are raised, an attachment is appropriate. Particularly in a case such as this where the Firm is clearly entitled to some, if not all, of their legal fees.

That being said, central to this motion is ownership of the assets to be attached. To justify an attachment, "'the property removed or secreted must be the property of the defendant' (10 Carmody-Wait, New York Practice, p. 50)." *Eaton,* 17 AD2d at 136. Coleman, by his own admissions, has indicated that he would receive a portion, if not all, of the sale proceeds. Therefore, the court issues an attachment upon Coleman's interest in the assets and refers the issue of what that interest is to a Special Referee to hear and report.

B. Motion to Vacate Charging Lien

Judiciary Law § 475 provides:

> the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her 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.

An attorney's charging lien was created by the courts to protect attorneys "by disabling clients from receiving the fruits of recoveries without paying for the valuable services by which the recoveries were obtained." *Banque Indosuez v Sopwith Holdings Corp.*, 98 NY2d 34, 37 (2002). The common law right of an attorney to a lien upon his client's judgment was enlarged by statute to include a lien on the client's cause of action. *LMWT Realty Corp. v Davis Agency*, 85 NY2d 462, 467-68 (1995). With the signing of a retainer agreement, an attorney acquires a vested property interest in the cause of action. *Id.* "The client's property right in his own cause of action is only what remains after transfer to the attorney of the agreed-upon share." *Id.*

Further, the charging lien comes into existence without notice or filing, but is limited "to outcomes where 'proceeds' have been obtained 'in [a] client's favor.'" *Banque Indosuez*, 98 NY2d at 43. The litigation, therefore, must result in proceeds to which the lien can affix. *Id.* at 44. A charging lien depends upon the existence of identifiable proceeds of the litigation and may be enforced against third parties with knowledge. *Kaplan v Reuss*, 113 AD2d 184, 186 (2d Dept 1985).

Although the Court's judgment in the *Crozier* action did reduce the moving/storage bill, a major thrust of the action was retrieval of Coleman's property. The cause of action for a declaratory judgment focused on this, and a good part of the litigation involved the stored property, preventing its sale and recovery of the property. That property was worth hundreds of thousands of dollars – far more than Crozier's bill, and clearly was the impetus behind Coleman's commencing the *Crozier* action. The Firm did prevent sale of the property, and when the action resulted in a reduction of the Crozier's bill, Coleman paid the reduced bill and retrieved the property.

Obviously, reduction of the Crozier bill did not produce proceeds to which a lien can attach. *See City of Troy v. Capital Dist. Sports, Inc.*, 305 AD2d 715, 716 (3d Dept 2003) (debt reduction cannot generate charging lien because "the reduction did not produce proceeds in an identifiable fund."). However, the silver, paintings, antiques and other items belonging either to Coleman or the Jockey Club, on this record, are identifiable proceeds of the *Crozier* action, to which a lien may attach. *See Kaplan, supra.* As Coleman argues, the Court of Appeals has long held that a charging lien is not viable where it is based on a judgment that would give the "client no money or property which she did not posses before the attack was made and repulsed." *Ekelman v Marano*, 251 NY 173, 176 (1929); *Goldstein, Goldman, Kessler & Underberg v 4000 E. Riv. Rd. Assoc.*, 48 NY2d 890 (1979). However, this rule has been modified in recent years. In *Tunick v Shaw*, 45 AD3d 145, 148 (1st Dept 2007), the Appellate Division held that a series of valuable photographic images which existed prior to an attorney's involvement in a dispute could be attached under a charging lien because the attorney's efforts "culminated in the settlement resolving conflicting rights to the possession and commercial exploitation of those images." Many of the cases that Coleman relies on involve disputes over real estate where physical possession was never lost. The simple maintenance of possession is distinguishable from the reclamation of possession.[5]

[5] Coleman notes that the attorney's efforts in *Tunick* also resulted in "the obtaining of an interest in hundreds of thousands of additional images." However, this does not limit the applicability of *Tunick* to the present facts. Coleman claims that the firm's efforts "neither resulted in resolving conflicting rights to possession of any property nor recovered one iota of property that was not already owned by Petitioner or his LLC in the first instance." This is an unnecessarily formalistic reading of the outcome of the *Crozier* action. While it is true that the Court's decision never directly addressed Coleman's request for a declaration that Crozier must release Coleman's property, the action itself and the result were otherwise.

C. Motions to Intervene

Both Beckenstein and TJC have filed motions to intervene in this action. CPLR 1012(a)(3) confers the right to intervene in any action where "the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment." The Firm argues that TJC has no right to intervene because there is no question that the subject property belongs to Coleman personally. However, as noted above, ownership is in question. As a result, TJC's motion to intervene is granted.

Beckenstein, on the other hand, rather than claiming a right to intervene, seeks intervention by permission under CPLR 1013, which states, "any person may be permitted to intervene in any action...when the person's claim or defense and the main action have a common question of law or fact." Beckenstein contends that common questions of fact and law exist as to the disposition of the auction proceeds. Beckenstein argues and submits documentation to support his argument that on May 22, 2013, the day after the auction of the silver at Christie's, Coleman granted Beckenstein, both personally and on behalf of TJC, an irrevocable lien of $15,000 to be paid from the proceeds of the sale. Once again, the Firm opposes intervention, arguing that no question of law or fact exists since the proceeds from the sale to it under its retainer agreements. But, this argument presumes that the property auctioned belongs only to Coleman, not TJC, a question of fact. Moreover, even if TJC has an interest, questions of law exist as to Coleman's capacity as manager of TJC or agent to engage the Firm and the Firm's potential claims of unjust enrichment or quantum meruit. Accordingly, it is

ORDERED that The Roth Law Firm, PLLC's motion seeking an order of attachment is granted in accordance with this decision, and the following issue is referred to a Special Referee to hear and report: whether the Silver auctioned and held by Christie's on May 21, 2013 was

rightfully the property of John Coleman or of the Jockey Club, LLC prior to May 2012; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119) to arrange a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing before the Special Referee; and it is further

ORDERED that within 10 days of the entry of this order on the NYSCEF system, counsel shall meet and confer as to necessary discovery regarding this issue to be decided by the Referee and shall submit their discovery agreement to the Special Referee Clerk; and it is further

ORDERED that John Coleman's motion to vacate the discussed Judiciary Law 475 charging lien is denied; and it is further

ORDERED that the motions to intervene by the Jockey Club, LLC and Lawrence A. Beckenstein are granted as follows: (1) the Jockey Club, LLC is permitted to intervene as a petitioner in the Coleman action, Index No. 154848/2013, and as a defendant in the Roth Action, Index No.: 651897/2013; (2) that Lawrence A. Beckenstein is permitted to intervene as a plaintiff in the Roth action, Index No. 651897/2013; and (3) that said intervenors must file the appropriate pleadings within 14 days of the entry of this order on the NYSCEF system; and it is further

ORDERED that within 7 days of the filing of such pleadings, the intervenors shall email this order along with their new pleadings to the County Clerk (cc-nyef@courts.state.ny.us) and the Trial Support Office (trialsupport-nyef@courts.state.ny.us), who are directed to note in their

records that the above captioned actions shall now bear the captions in said new pleadings.

Dated: January 22, 2014

ENTER:

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C