

Anderson Kill P.C. v Activist Special Advisory Servs. LLC
2016 NY Slip Op 32314(U)
November 22, 2016
Supreme Court, New York County
Docket Number: 157035/2016
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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ANDERSON KILL P.C.,

Petitioner,

-against-

ACTIVIST SPECIAL ADVISORY SERVICES
LLC, EDUCATION INVESTMENT AND FINANCE
CORPORATION, PHOENIX REAL ESTATE
SOLUTIONS LTD.,

Respondents.

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DECISION AND ORDER

JEFFREY K. OING, J.:

Background

Petitioner law firm, Anderson Kill P.C., commenced this special proceeding, pursuant to Judiciary Law § 475, for an order fixing the amount of its attorney's charging lien and enforcing the lien for unpaid attorney's fees and disbursements owed by its former clients, respondents Activist Special Advisory Services LLC ("Activist") and Education Investment and Finance Corporation ("EIFC") (collectively, "former clients").

Petitioner claims that Raza Kahn ("Kahn") retained it on November 4, 2013 to represent the former clients in a claim against respondent Phoenix Real Estate Solutions Ltd. ("Phoenix"). Kahn was the controlling principal of the former clients at the time he retained petitioner and Vishal Garg ("Garg") controlled Phoenix. Petitioner commenced an arbitration proceeding with the American Arbitration Association ("AAA") on October 28, 2014 on behalf of the former clients against Phoenix

(the "arbitration") for unfair competition, account stated, breach of contract, and conversion (Petition, ¶ 5).

Petitioner alleges that the former clients incurred substantial attorney's fees as a result of Phoenix's refusal to abide by the arbitration process, including its alleged failure to participate in discovery leading to motions to compel, motions for summary judgment, and pre-trial briefs (Petition, ¶¶ 6-7). Petitioner claims that pursuant to its engagement letter with the former clients it regularly billed for fees and disbursements incurred from the arbitration and the former clients regularly made payment in full without objections (Petition, ¶ 9).

On March 4, 2015, this Court granted Garg full operational control of the former clients, as well as additional entities (Petitioner, Ex. B). Petitioner asserts as a result of this Court's decision to place Garg in control of the former clients it was compelled to withdraw as counsel to the former clients in the arbitration. The arbitration settled on June 11, 2015. Petitioner claims that the arbitration settlement required that Phoenix make a \$250,000 payment to the former clients. By letter dated June 18, 2015, petitioner informed the former clients' new counsel, as well as Phoenix's counsel, that petitioner was asserting a lien against the former client's causes of action in the arbitration (Petition, Ex. C). Petitioner contends that the June 18, 2015 lien letter sought payment for its final bill for

fees and disbursements for services rendered to the former clients in February and March 2015 in the amount of \$204,824.66 (Id.). Petitioner annexes the invoices for its services it claims are due and owing (Petition, Ex. D).

In a decision and order dated August 10, 2016, this Court denied Kahn's motion to, among other things, reject the settlement in the arbitration (Petition, Ex. E; Kahn v Garg and Education Investment Finance Corporation, Index No. 652334/2013). Therefore, petitioner claims that its former clients are entitled to be paid \$250,000 by Phoenix in the settlement. As such, petitioner sent another letter on August 11, 2016 to the former clients' counsel and Phoenix again asserting its entitlement to an attorney's lien and requesting immediate payment (Petition, Ex. F).

In opposition to the petition, respondents argue that petitioner's purported attorney's lien either does not exist or was abandoned because petitioner has not provided respondent EIFC with invoices for the legal services it is claiming it performed. As such, respondents claim that they cannot determine whether the services charged were proper. In addition, respondents argue that even if an attorney's lien did exist, it was abandoned by petitioner when it voluntarily withdrew from its representation of the former clients.

Respondents also claim that petitioner represented to this Court that it was capping its fees and would bill no more than a \$233,000 additional retainer in connection with the arbitration. In support of this claim, respondents quote from the March 4, 2015 transcript of a status conference on the record wherein the Special Master assigned to this case stated:

Anyway in light of the amounts of money that were paid by EFIC, the lawyers who are ramping for the arbitration, which is ... a major, major aspect of its existence, or continued existence, I'll put it that way, and the escrowing, or the deposits with Anderson Kill of some sum of money -- I think it was a pretty substantial ... sum of money that was going to be used for the experts who were going to ... have testified to damages, models and things like that, and the intellectual property issues in the arbitration, there was very little money left in EFIC.

(Petition, Ex. B, Transcript, pp. 6-7).

Respondents further argue that in the event this Court finds that the attorney's lien is proper the attorney's fees petitioner seeks should be reduced. In that regard, respondents claim that petitioner ran up attorney's fees for an intellectual property claim that an independent expert found to lack merit (Opp'n, ¶ 5). Respondents argue that the legal fees should be reduced because the invoices submitted in support of the petition contain block billing and possible charges for duplicative work (Opp'n, ¶¶ 8-9).

Finally, respondents assert that the attorney's lien against EIFC is moot because the Internal Revenue Service had a pre-

existing tax lien against EIFC's bank account. Respondents claim that EIFC has no remaining settlement funds because such funds were used to pay EIFC's outstanding tax lien (Opp'n, ¶ 10).

Discussion

First, contrary to respondents' argument, petitioner did not abandon its lien by virtue of its voluntary withdrawal from representing the former clients. The principle is well settled "that attorneys who terminate their representation for just cause continue to be entitled to enforce their liens" (Klein v Eubank, 87 NY2d 459 [1996] [emphasis in original]). Absent a claim that an attorney engaged in misconduct, was discharged for just cause, or unjustifiably abandoned the client, an attorney's right to enforce the charging lien is preserved (Id.).

Here, respondents do not claim that petitioner engaged in misconduct or was terminated by the former clients for just cause, and their attempt to argue that petitioner unjustifiably abandoned the former clients is without merit. Petitioner's explanation for its withdrawal, i.e., that it faced an obvious conflict of interest when this Court gave Garg full operational control of the former clients constitutes "just cause" for its withdrawal.

As for respondents' claim that petitioner capped its fees, the quoted language from the March 4, 2015 transcript that respondents rely upon does not support this argument. And, with

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regard to the claim that the settlement proceeds were used to pay an outstanding tax lien against EIFC, that claim does not affect petitioner's entitlement to pursue its charging lien.

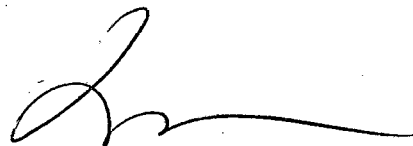
Accordingly, it is hereby

ORDERED that this matter is respectfully referred to the Clerk of the Special Referee to assign to a Special Referee or JHO to hear and report, or if the parties so agree to hear and determine, the amount of petitioner's charging lien, and it is further

ORDERED that counsel for petitioner shall, within fourteen (14) days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/22/16



HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.