

Cohen Goldstein, LLP v Markowitz
2017 NY Slip Op 30605(U)
February 22, 2017
Supreme Court, New York County
Docket Number: 653369/2016
Judge: Lucy Billings
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
-----x

COHEN GOLDSTEIN, LLP,
Plaintiff

Index No. 653369/2016

- against -

DECISION AND ORDER

JEFFREY MARKOWITZ,
Defendant
-----x

LUCY BILLINGS, J.S.C.:

Plaintiff law firm, defendant Jeffrey Markowitz's former attorney in his former wife Hillary Markowitz's divorce action, moves for a preliminary injunction restraining the distribution of \$354,510.00 in proceeds from the sale of the couple's residence, held in escrow by a receiver. C.P.L.R. §§ 6301, 6312(a). Plaintiff and defendant agree that his former wife is entitled to only \$8,500.00 of those funds and that the receiver is entitled to his accrued fees of at least \$1,500.00 plus any future fees.

On December 5, 2016, defendant's attorney in the divorce action, a successor to plaintiff, agreed on the record in the Supreme Court in Westchester County to the receiver holding \$257,335.05 of the funds in escrow until this court determines whether defendant owes plaintiff all or part of that amount as attorneys' fees and expenses, plus interest. Memmo v. Perez, 63 A.D.3d 472, 472 (1st Dep't 2009); Resnick v. Resnick, 24 A.D.3d 238, 239 (1st Dep't 2005). While these funds originally were

held pending resolution of Hillary Markowitz's claimed entitlement to defendant's entity JSM Capital LLC, which held investments, the agreement December 5, 2016, following that resolution was expressly for the new purpose: pending resolution of plaintiff's claim against defendant for fees and expenses.

Plaintiff contends that it is entitled to a charging lien, N.Y. Jud. Law § 475, against the entire \$354,510.00, requiring all those funds to be held in escrow because, when interest on each of its \$257,335.05 in bills to defendant is added pursuant to its account stated claim, he owes at least \$354,510.00. Tunick v. Shaw, 45 A.D.3d 145, 149 (1st Dep't 2007). A charging lien applies to a fund generated by plaintiff attorney's services. Id. at 148; Resnick v. Resnick, 24 A.D.3d at 239; Chadbourne & Parke, LLP v. AB Recur Finans, 18 A.D.3d 222, 223 (1st Dep't 2005). If the attorney's services do not create any proceeds, but simply preserve a client's interest in a fund or other asset, no charging lien applies to the fund or other asset. Banque Indosuez v. Sopwith Holdings Corp., 98 N.Y.2d 34, 44 (2002); Memmo v. Perez, 63 A.D.3d at 472-73; Rothfeder v. City of New York, 48 A.D.3d 234, 235 (1st Dep't 2008); Chadbourne & Parke, LLP v. AB Recur Finans, 18 A.D.3d at 223.

Thus, if plaintiff's services accomplished more than preserving defendant's 50% share of the proceeds from the sale of the marital residence, by increasing his share to 50% from a lower percentage or increasing the price at which the residence was offered for sale and hence sold, the charging lien applies to

those proceeds. It applies, however, only for the unpaid value of plaintiff's services devoted to increasing the proceeds. At this preliminary juncture, plaintiff has not shown that all or what part of its bills to defendant pursuant to its account stated claim are attributable to its services in increasing his share or increasing the sale proceeds.

If those proceeds accrue interest, the charging lien also applies to that interest. The interest that accrues on plaintiff's bills for its services, in contrast, is generated not by plaintiff's services, but by operation of the law. C.P.L.R. §§ 5001(a) and (b), 5004; Spodek v. Park Prop. Dev. Assocs., 96 N.Y.2d 577, 581 (2001); Eisen v. Feder, 47 A.D.3d 595, 596 (1st Dep't 2008); Richard Friedman Assoc., CPA PC v. Jereski, 26 A.D.3d 296, 297 (1st Dep't 2006); Tesser v. Allboro Equip. Co., 73 A.D.3d 1023, 1027-28 (2d Dep't 2010). Plaintiff well may be entitled to interest on its bills for its services, but is not entitled to a charging lien for this interest until it at least shows what bills are attributable to its services in increasing defendant's recovery and the accrued interest attributable to those bills. Tunick v. Shaw, 45 A.D.3d at 149. Defendant, moreover, contends that plaintiff agreed to defer the date by which \$225,000.00 of the outstanding fees would be due, thus postponing the date at which interest begins to run.

In sum, even though plaintiff may be entitled to all the attorneys' fees and expenses claimed against defendant and interest on those fees and expenses from the original date they

were due, plaintiff has shown neither that all those fees and expenses, nor that the interest accrued on them, are attributable to plaintiff's services in increasing defendant's recovery.

C.P.L.R. §§ 6301, 6312(a); Nobu Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d 839, 840 (2005); Al Entertainment LLC v. 27th St. Prop. LLC, 60 A.D.3d 516, 516 (1st Dep't 2001); Metropolitan Steel Indus., Inc. v. Perini Corp., 50 A.D.3d 321, 322 (1st Dep't 2008); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d 151, 154-55 (1st Dep't 2007). Insofar as plaintiff fears it will be unable to collect an ultimate judgment for more than \$257,335.05 against defendant, who resides outside New York, the remedies provided by C.P.L.R. § 6201(1) or (3) are available to plaintiff. Hotel 71 Mezz Lender LLC v. Falor, 14 N.Y.3d 303, 311-12 (2010); VisionChina Media Inc. v. Shareholder Representative Servs., 109 A.D.3d 49, 59-60 (1st Dep't 2013).

For purposes of the preliminary injunction plaintiff now seeks, it has not shown a probable entitlement to a charging lien for the full amount of its billed fees and expenses or for interest on each of its bills, nor shown irreparable harm attributable to the loss of immediately available funds that would not be compensable by monetary damages. C.P.L.R. §§ 6301, 6312(a); Zodkevitch v. Feibush, 49 A.D.3d 424, 425 (1st Dep't 2008); OraSure Tech., Inc. v. Prestige Brands Holdings, Inc., 42 A.D.3d 348, 348-49 (1st Dep't 2007); U.S. Re Cos., Inc. v. Scheerer, 41 A.D.3d at 155; Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d 223, 228-29 (1st Dep't 2004). See Nobu

Next Door, LLC v. Fine Arts Hous., Inc., 4 N.Y.3d at 840.

Consequently, the court grants plaintiff's motion for a preliminary injunction only to the extent of ordering the receiver to hold \$257,335.05 in escrow, based on defendant's agreement, until this court determines whether defendant owes plaintiff all or part of that amount as attorneys' fees and expenses, plus interest. C.P.L.R. §§ 6301, 6312(a). Given that defendant agreed to this relief and that the funds in escrow accrue interest, plaintiff shall provide an undertaking limited to \$5,000.00 within 10 days after entry of this order. C.P.L.R. § 6312(b). The receiver may disburse the amounts owed to Hillary Markowitz and to himself for his fees and the remainder of the funds currently held in excess of \$257,335.05 to Jeffrey Markowitz.

DATED: February 22, 2017

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.