

Seymour v Hovnanian

2023 NY Slip Op 33433(U)

October 3, 2023

Supreme Court, New York County

Docket Number: Index No. 154579/2016

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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WHITNEY SEYMOUR, CATRYNA TEN EYCK SEYMOUR,

Plaintiff,

- v -

ARA HOVNIANIAN, RACHEL LEE HOVNIANIAN,

Defendant.

-----X

ARA HOVNIANIAN, RACHEL LEE HOVNIANIAN

Plaintiff,

-against-

AUTUN CONTRACTORS, WILLIAM F. O'NEILL
ARCHITECTS, GILSANZ MURRY STEFICEK LLP, PILLORI
ASSOCIATES, PA, SIGNATURE INTERIOR DEMOLITION,
INC., JG CONSTRUCTION OF QUEENS, INC., SUPER JC
CONSTRUCTION CORPORATION, MITCHELL IRON
WORKS, INC.

Defendant.

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INDEX NO. 154579/2016
MOTION DATE 07/17/2023,
07/17/2023
MOTION SEQ. NO. 017

**INTERIM
DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595896/2016

The following e-filed documents, listed by NYSCEF document number (Motion 017) 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1140, 1141, 1142, 1143, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171

were read on this motion to/for ENFORCEMENT.

In Motion 17, plaintiff's prior counsel, Tarter Krinsky & Drogin LLP (TKD), moves for an order enforcing its statutory charging lien for unpaid invoices. Plaintiffs oppose the motion.

Background

Plaintiffs retained TKD in February 2017 to represent them in this case. TKD submits a copy of a retainer agreement, dated 2/17/17 (Doc 1134). However, only TKD signed this copy of the retainer agreement (*id.*). While none of the plaintiffs countersigned this copy agreement,

plaintiffs concede that they signed a retainer agreement with TKD in 2017 (*see e.g.* Doc 1145 at 6-7 [mem. in opposition to MS 17]).

In any event, TKD represented the plaintiffs in this litigation until September 2018. Citing “a fundamental disagreement between Plaintiffs and the Firm” (Doc 148 [Scudari Aff., MS 03]), TKD moved to withdraw its representation (*see* Docs 148-149 [OSC to withdraw, MS 03]). In response, plaintiffs filed a cross motion seeking, *inter alia*, an order: (1) “Ruling that [TKD] and [its] attorney Sean Scuderi . . . were disqualified from appearing in this action as counsel for plaintiffs *ab initio* due to violations of NYS Rules of Professional Conduct”; and (2) granting plaintiffs a litany of assorted discovery and deadline related relief (*see* Docs 152-156).

In its 12/4/18 decision and order, the court explained that “[t]he parties resolved the derivative issues presented in the motion sequence during the status conference of the same day” [i.e., the issues relating to plaintiffs’ cross motion] (Doc 171 [decision and order resolving MS 03]). As noted in that decision, “Plaintiffs, who are the clients, do not oppose the motion [to withdraw]” (*id.*). Thus, the plaintiffs withdrew the cross motion in MS 03. The court then granted TKD’s motion to withdraw (*id.*).

After plaintiffs obtained an interlocutory judgment after partial summary judgment, TKD filed this motion to establish and enforce its charging lien against plaintiffs pursuant to Judiciary Law § 475.

Discussion

Charging liens have priority over funds created by the attorney's efforts (*see LMWTRealty Corp. v Davis Agency Inc.*, 85 NY2d 462, 468 [1995]). Judiciary Law § 475 applies to funds obtained in connection with an interlocutory judgment. Further, “[a]n attorney's right to enforce a charging lien is preserved even where the attorney's representation terminates,

as long as there has been no misconduct, discharge for just cause, or justified abandonment by the attorney” (*Baltic Fourth LLC v Stern*, 2022 WL 742936 [Sup Ct, New York County 2022], citing *Klein v Eubank*, 87 NY2d 459, 464 [1996]).

TKD’s motion is granted to the extent that payments to plaintiffs arising from the interlocutory judgment shall be held in escrow with plaintiffs’ current attorney pending the determination of a hearing as to: (1) whether TKD’s charging lien is enforceable and (2) the amount of TKD’s attorney’s fees.

Here, TKD moved to withdraw in 2018, citing “irreconcilable differences” (Doc 148 [aff. in support of MS 03]). Specifically, TKD asserted that there was a

“fundamental disagreement between Plaintiffs and the Firm as to the handling of this matter and criticism by Plaintiffs of the Firm’s handling of this litigation. The Firm has diligently attempted to overcome these issues, but without success. The result has been a breakdown of the attorney-client relationship, which the Firm has concluded will prevent the Firm from properly representing the Plaintiffs in the future as required by the Rules of Professional Conduct”

(*id.*, ¶ 3).

In opposition to TKD’s motion to withdraw, and in support of plaintiffs’ cross motion, plaintiffs stated:

“[W]e welcome the withdrawal of Mr. Scuderi [and TKD], because under the NYS Rules of Professional Conduct he was disqualified *ab initio*, and his conduct under the rules is and has been unethical. . . . Plaintiffs do object to the grounds for withdrawal that Mr. Scuderi and the members of his firm advance in his affirmation, because the bases are specious and appear simply to be a ploy for withdrawal. . . . [T]he purported “disputes” and “fundamental disagreements” never occurred and were never discussed with his clients . . .”

(*see* Docs 153-155).

Essentially, plaintiffs contended that TKD had violated ethical obligations by failing to discover or disclose TKD’s conflicts of interest (*see id.*). In response, TKD asserted that it could

no longer proceed as plaintiffs' attorneys because they disagreed as to the viability of plaintiffs' emotional distress claim and plaintiffs' desired new direct claims against insurers. TKD denied any ethical violation but acknowledged that it might be economically harmed by pursuing direct claims against the insurers (Doc 160 ["the Firm felt that there might be a potential economic impact . . . if . . . the Firm was pursuing frivolous claims against the insurers. Of course, prosecuting claims that . . . lacked merit . . . is ethically improper for the Firm."])).

Although plaintiffs withdrew their cross motion and opposition to TKD's motion to withdraw, plaintiffs continue to dispute TKD's invoices for largely the same reasons they asserted in their opposition to TKD's motion to withdraw. Plaintiffs again assert that TKD violated their ethical obligations and, therefore, forfeited their right to collect any unpaid fees. Plaintiffs also assert that TKD misled them about raising the direct causes of action against the insurers, and later refused to move to amend the complaint to assert those claims to not unsettle the insurers. However, there is no dispute that plaintiffs' interlocutory judgment resulted from claims that TKD advanced and prosecuted on plaintiffs' behalf in this action.

Thus, because the nature of TKD's discharge is disputed, a hearing is needed to determine whether TKD has an enforceable charging lien (*see e.g.* 1B Carmody-Wait 2d § 3:581 ["Where a charging lien is asserted, the attorney is entitled to a prompt hearing to fix the amount of the lien."])). The hearing must also determine the amount of attorneys' fees TKD is due, if any. Plaintiffs did not countersign the retainer agreement that TKD submitted in support of this motion and, in any event, plaintiffs disputed the invoices when they were sent and continue to dispute those invoices now.

The court rejects TKD's argument that it is entitled to recover its fees under an account stated theory. First, TKD did not commence a separate plenary proceeding to recover the unpaid

fees, although it could have done so under Judiciary Law § 475. Instead, it interposed this application in the parties' long-delayed lawsuit. TKD is entitled to recover its reasonable attorneys' fees in quantum meruit, if at all, following an evidentiary hearing (*see Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005]; *see also e.g. Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 44 [1990] ["Where that discharge is without cause, the attorney is limited to recovering in quantum meruit the reasonable value of the services rendered."]).

The court also rejects plaintiffs' argument that any attorneys' fees awarded should be paid by the defendants' insurance companies pursuant to the underlying license agreement. Judiciary Law § 475 states that "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." Here, the lien, if it is enforceable, attaches to the interlocutory judgment entered in favor of plaintiffs.

Finally, the court denies TKD's request for its costs and fees in making this motion. "Where an attorney brings a motion to establish and enforce a charging lien under the Judiciary Law, the court has no power to award the attorney counsel fees for the sums expended in bringing the action" (1B Carmody-Wait 2d § 3:579, citing *Ajar v Ajar*, 207 AD2d 469, 471 [2d Dept 1994] [holding that fees cannot be recovered for a motion to establish and enforce a charging lien pursuant to Judiciary Law § 475]).

The parties are strongly encouraged to resolve the issue of attorneys' fees prior to the evidentiary hearing so as to avoid further expending unnecessary resources.

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that MS 17 is granted in part to the extent set forth in this decision and order; and it is further

ORDERED that an evidentiary hearing is scheduled for **January 30, 2024 at 9:30 a.m.** over **Microsoft Teams**. The parties must serve and submit to the court all witness lists and exhibit books by **December 18, 2023**, otherwise waived. The parties must serve and submit to the court all **exhibit charts**, including all objections to proposed exhibits (*see* Part Rule 11 [b]), by **December 29, 2023**, otherwise waived; and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference.

10/3/2023

DATE


MELISSA A. CRANE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: