Cabukyuksel v Ascot Props., LLC
2011 NY Slip Op 32316(U)
August 24, 2011
Supreme Court, New York County
Docket Number: 108356/08
Judge: Carol R. Edmead
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SCANNED ON 8/25/2011

[* 1]

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

PRESENT: HON. CAROL EDMEAD PART 55
Justice

Index Number : 108356/2008
CABUKYUKSEL, SULE
vs.
ASCOT PROPERTIES LLC
SEQUENCE NUMBER : 004
ENFORCEMENT PROCEEDING

INDEX NO. 108356/08
MOTION DATE 8/4/11
MOTION SEQ. NO. 004
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

RECEIVED AUG 25 2011 MOTION SUPPORT OFFICE

FILED AUG 25 2011 NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

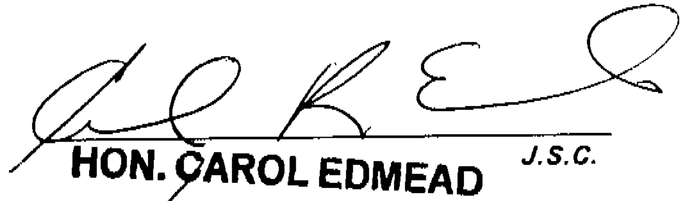
ORDERED that the motion for an Order pursuant to Section 475 of the Judiciary Law to enforce an attorney's lien of Laskin Law P.C. and Levine & Grossman in the amount of $233,333.33 against the proceeds of the settlement in the amount of $700,000 obtained and collected by Eleni and Demetrios Papaioannou in this action, together with such other and relief as this Court may deem just and proper, is granted; and it is further

ORDERED that the cross-motion by Marc E. Verzani to dismiss the motion is denied; and it is further

ORDERED that a hearing shall be held as the amount of the charging lien to which Laskin Law P.C. and Levine & Grossman are entitled, in as much as such settlement pertained to the personal injuries of Eleni, subject to the amount of Marc E. Verzani's fee, if any.

This constitutes the decision and order of the Court.

Dated: 8/24/11



HON. CAROL EDMEAD 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 35

---x

SULE CABUKYUKSEL, ANDREW CEMPA, CAROLYN EVANS and DEMETRIOS PAPAIOANNOU, ELENI PAPAIOANNOU,

Plaintiffs,

-against-

ASCOT PROPERTIES, LLC,

Defendants.

---x

Index No. 108356/08
DECISION/ORDER

FILED

AUG 25 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Eleni Papaioannou ("Eleni") and Demetrios Papaioannou ("Demetrios") are two of the many victims in the East 51st Street Crane Collapse case.

The Crane Collapse case arose from a tragic accident that occurred on March 15, 2008, where a tower crane collapsed at 303 East 51st Street, New York, New York during the construction of a high-rise building. The accident killed seven people, injured more than a dozen, and caused millions of dollars in property damage. As a result of the accident, approximately 60 lawsuits have been filed.

To add to the tragedy is the alleged deception recently uncovered by the instant dispute.

The crux of the instant dispute is as follows: the wife, Eleni, retained Michelle F. Laskin (then at Levine & Grossman, Esqs.) (hereinafter referred to collectively as "Laskin") to prosecute her personal injuries, and unbeknownst to her, her husband, Demetrios, later retained a different set of attorneys, Marc E. Verzani, Esq. of Woods Verzani LLP ("Verzani"), to pursue nonpersonal injury claims resulting from the landlords' failure to restore plaintiffs' apartment which was affected by the accident (the "buy-out action"). However, at some point in the buy-

out action, Verzani amended the buy-out pleadings to assert an emotional injury claim (thereby enabling the landlord and/or landlord's insurer to later pursue a subrogation action against the defendants in the Crane Collapse case), and settled the amended buy-out/personal injury case for $700,000, *all unbeknownst to the wife and the wife's attorney, Laskin.*

At the wife's deposition in the Crane Collapse case three years later, the wife learned for the first time that the husband settled the buy-out case. When this discovery was made during the wife's deposition, the husband's response was "Surprise."

Now, Eleni's attorneys, Laskin, seeks attorneys' fees based on the settlement of the instant case. Specifically, Laskin seeks to enforce an attorneys' lien in the amount of $233,333.33 against the settlement amount. In response, Verzani cross moves to dismiss the application.

Factual Background

On March 15, 2008, the building located at 301 East 50th Street, New York, New York, in which plaintiffs resided was struck by the crane. Believing that her building was under terrorist attack, plaintiff Eleni ran down the stairs, twisted her ankle and fell on the stairs.

On April 10, 2008, plaintiff Eleni signed a retainer agreement, retaining Laskin. The retainer states that

> "The Undersigned residing at 301 East 50th Street, Apt 15, NY, NY 10022 hereby retains you to prosecute or adjust a claim for damages arising from personal injuries sustained by ELENI PAPAIOANNOU, loss of services of DEMETRIOS PAPAIOANNOU on the 15th day of March, 2008 through the negligence of third parties or other persons, and the undersigned hereby gives you the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any manner without your written consent.
>
> In consideration of the services rendered and to be rendered by you, the undersigned

hereby agrees to pay you and you are authorized to retain out of my moneys that may come into your hand by reason of the above claim:

Thirty three and one-third (33 1/3) percent of the sum recovered, whether recovered by suit, settlement or otherwise."

On April 17, 2008, Demetrios signed a letter agreement on behalf of himself and his wife Eleni, retaining Verzani "in connection with the above referenced matter" (the "Verzani retainer letter"). The letter identifies the matter as "Crane Accident 303 East 51st Street, New York, NY Date of Loss: March 15, 2008." Said letter expressly states that "This office will not handle Mrs. Papaionnou's claim for personal injury with regards to her being present in the building at the time of the accident as I have been informed she has retained separate counsel." Plaintiffs agreed to compensate Verzani "Thirty-three and one third (33 1/3%) percent of the sum recovered, whether by suit, settlement or otherwise[.]"

Laskin then filed a Notice of Claim against the City of New York on April 23, 2008 for personal injuries, alleging that the City failed to, *inter alia*, inspect the crane and enforce rules pertaining to the crane's safety and operation.

On June 16, 2008, Verzani, on behalf of the plaintiffs, filed the instant buy-out action against the landlord alleging, *inter alia*, that the landlord failed to repair the building and instead unlawfully attempted to terminate plaintiffs' tenancies. Thus, plaintiffs sought to compel the landlord to repair their apartments, and to enjoin the landlord from terminating their tenancies.

Thereafter, Verzani amended the complaint to add a claim for "Negligent Infliction of Emotional Distress" including but not limited to "loss of sleep, anxiety, nausea, diarrhea, intestinal disorders, loss of appetite, depression, humiliation, nervousness, fright, grief, and shock" as a result of the landlord's "negligent actions" in forcing plaintiffs "to continue to live

outside their Apartments. . . ." (Amended Complaint, First Cause of Action, ¶27-29). Verzani also added a claim for "Intentional Infliction of Emotional Distress," and "pain and suffering" resulting from the landlord's failure to restore their tenancy, or give them access to any of their personal belongings and effects" (*id.*, Second Cause of Action, ¶31-33).

On August 27, 2008, plaintiffs signed a Release, which states as follows:

> WHEREAS on March 15, 2008, a tower crane . . . collapsed ("crane collapse"), and . . . struck the top Easterly portion of the Building causing damage;
>
> * * * * *
>
> WHEREAS as a result of the foregoing, Tenants began to experience physical and emotional injuries including but not limited to loss of sleep, anxiety, nausea, diarrhea, intestinal disorders, loss of appetite, depression, humiliation, nervousness, fright, grief, and shock.
>
> * * * * *
>
> WHEREAS the parties have now desired to settle all claims of the Lawsuit upon the terms and conditions below.

Eleni's signature appears on the 10th page of the Release, and was notarized in Greece.

Eight months later, on April 6, 2009, Laskin commenced an action for personal injuries, *i.e.*, physical and emotional pain and suffering and loss of services, against various defendants (excluding the landlord) (the "Crane Collapse action"). As against the defendants therein (such as Reliance Construction Group, Joy Contractors, and New York Crane & Equipment Corp. and East 51st Street Development Company), plaintiff alleged, *inter alia*, that such defendants improperly constructed and operated the crane and the construction site (the "Crane Collapse action"). Laskin appeared on plaintiffs' behalf at a 50-h hearing on November 16, 2009 and completed discovery and appeared at numerous court conferences.

At a deposition on May 11, 2011 in the Crane Collapse action, Eleni testified that the signature on the Release was hers, but that she never saw the document, in total, before (EBT,

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pp. 233-235).

In support of Laskin's application, Laskin contends that at Eleni's deposition, both plaintiffs went into the hallway and had a discussion. Eleni indicated that although she did read English, it was not her first language and she did not have a complete understanding of the General Release which was prepared by Verzani. At that time, Demetrios admitted that *he* had retained Verzani to prosecute an action for a buy-out of his lease with the landlord, that Eleni had never spoke with Verzani, and that Eleni had no knowledge of the General Release. Further, no one ever read the General Release to her, and no attorney, including Verzani or his partner James Woods, advised her of the meaning and significance of the General Release. Demetrios admitted that he collected the $700,000, and turned to Eleni and said "Surprise." Demetrios admitted he had the money for three years without her knowledge. Demetrios acknowledged that Verzani received 1/3 as an attorney's fee, paid an expert and another attorney, Richard Grimaldi, who had no involvement with the case other than having referred co-plaintiff/tenant Sule Cabukyukesel to Verzani.

Demetrios stated that his understanding of the settlement was that it was related to his landlord's buy-out of the leasehold. However, Laskin explained that the defendants in the Crane Collapse case would argue that any recovery awarded to plaintiffs would be subject to a $700,000 set-off (*i.e.*, that any judgment against said defendants would be reduced by $700,000). Demetrios was never advised of any potential set-off or told that the General Release against the landlord purportedly related to the physical and emotional injuries sustained from the accident. Laskin explained that since she was the retained attorney for any physical and/or emotional injuries arising from the accident, she was entitled to compensation out of the $700,000 recovery,

and he agreed.

After the deposition, Verzani called Laskin, and Laskin explained the basis for her entitlement to compensation, and Verzani's failure to counsel Eleni or advise Laskin of the General Release. Verzani then sent Laskin a letter the following day, advising that he was "unaware of any legal basis for your position" and to provide him with "legal authority to support" the claim to a share of the fee.

Laskin then discovered that after the General Release was signed and the moneys paid, attorneys Abraham, Lerner & Arnold, LLP, who shared an office suite with Verzani, commenced a lawsuit on the landlord's behalf against the defendants in the Crane Collapse case. Laskin discovered that the reason the General Release contained no mention of a lease buy out, but contained language referencing damages for physical and emotional injuries, was so that the landlord could maintain a subrogation claim against the defendants in the Crane Collapse case.

Laskin then met with Eleni and her nephew for Eleni to sign an affidavit to the above. While she admitted the facts in the affidavit were true and accurate, she was afraid to sign it without her husband's permission. Laskin later met with plaintiffs, and Demetrios advised that he gave some of the settlement to his son in Greece, and deposited the rest in a Greece bank. Demetrios also advised that he had previously met with Verzani, that he would not let Eleni sign the affidavit, and that Laskin would have to obtain her compensation from Verzani.

Laskin then spoke to Verzani, who agreed that Eleni was the only party who suffered a physical and emotional injury, and that Laskin was retained to prosecute the personal injury claim and loss of services. However, Verzani insisted that Laskin was not entitled to a fee. Verzani had no response to Laskin's questions as to why the General Release referred to physical

and emotional damages when the action she filed was for personal injuries.

Therefore, Laskin claims that she is entitled to her 1/3 fee of the settlement amount, and an attorney's lien pursuant to Judiciary Law § 475. Verzani filed a Notice of Claim against the City of New York for property damage only on behalf of Demetrios, and not on behalf of both plaintiffs for personal injuries. Notwithstanding Verzani's knowledge of Laskin's retainer, he prepared a General Release to settle the physical and emotional injuries, which was covered exclusively by Laskin's retainer. Verzani was not entitled to any portion of the attorney's fee as it related to the settlement as he was not the retained attorney. Furthermore, signing the General Release was in violation of Judiciary Law § 477, since no one from Laskin's office consented to the signing of the General Release. Thus, Verzani owes the fee and is the proper party to pay Laskin.

Laskin also contends that Verzani committed numerous ethical violations against it and plaintiffs. Verzani wrongfully obtained Eleni's signature for the General Release. She never signed a retainer agreement with Verzani, was never Verzani's client, and never spoke with Verzani regarding the prosecution her claim for pain and suffering. Verzani never explained that the defendants may seek a set off for the claim paid by the landlord. Verzani knowingly settled a claim for a person who was a client of another law firm. It is questionable whether the landlord would have had a claim for the buy-out of the leasehold. These plaintiff-tenants were all rent controlled and paid very little rent for a building located on 2nd Avenue and 51st Street which is a very desirable section of Midtown Manhattan. In order to sell the building or build a new building, the landlord needed these tenants out. However, rather than put such language in the General Release, the pain and suffering language was used for which the defendant landlord

would later make a claim for subrogation against the crane collapse defendants.

It also seems that Verzani referred the landlord to his office suitemates knowing that the landlord now had a claim for subrogation, and Verzani will benefit from any settlement or verdict obtained in that subrogration action. The General Release jeopardized plaintiffs' interests against the crane collapse defendants. And, Verzani paid an attorney a portion of the fee, even though said attorney performed no work on this action, thereby violating the disciplinary rules.

In opposition, Verzani cross moves to dismiss the petition for failure to state a cause of action, arguing that Laskin failed to allege that she was the attorney of record in this buy-out case for plaintiffs, or that Laskin performed any legal services which contributed to the $700,000 settlement. The charging lien Laskin seeks is solely for the benefit of an attorney of record. Since Laskin did not appear as attorney or record, Judiciary Law § 475 is inapplicable.

Verzani also argues that the petition fails to state a cause of action because there is no allegation that Laskin complied with the mandatory notice of lien provision of Judiciary Law §475-a.

Finally, argues Verzani, because she was not attorney of record, did not represent plaintiffs in this action, performed no legal services in this case, and did not contribute to the $700,000 settlement, Laskin lacks capacity to prosecute the instant claim under Judiciary Law § 475. Also, since Laskin did not appear in this action as plaintiffs' attorney, Judiciary Law § 477 is inapplicable.

In opposition to the cross-motion, Laskin argues that it was at all times the attorneys of record for Eleni and Demetrios. By definition, an attorney of record is the retained attorney who appears for the party. On April 10, 2008, Eleni signed a retainer agreement, and thereafter, on

April 16, 2008, both plaintiffs signed a Notice of Claim against the City of New York and same was served on the City of New York. The Notice of Claim is an appearance by counsel commencing the action. The Notice of Claim signed by the plaintiffs states that "Levine & Grossman" were the claimant's counsel. That neither Laskin Law P.C. nor Levine & Grossman's name appeared on the pleadings to the within action, does not negate Laskin's claim that it was the attorney of record for plaintiffs. Laskin could not be listed on the pleadings as attorneys of record in a lawsuit commenced against a defendant that actually was not responsible for plaintiffs' injuries and about which it had no knowledge. The lawsuit originally commenced by Verzani made no claim of personal injuries. The claim of injuries being attributable to the landlord was only done by a highly suspicious amendment eight days before a Release was signed. Verzani's retainer letter, which is dated one day after plaintiffs signed the Notice of Claim, attests to the fact that they were being represented by Laskin.

First, Verzani's retainer letter proves that he knew that Eleni had retained an attorney to represent her for the injuries she sustained from the crane collapse accident. Second, Verzani acknowledged that he would not bring an action with regard to the injuries she sustained as a result of the crane collapse accident. Third, Verzani used the word "you" to refer to Demetrios only, implying that the letter is only being seen by Demetrios and not Eleni. And, while Demetrios signed his name twice, one indicating his agreement to the terms, and the other indicating Eleni's agreement to the terms, there is no indication that Demetrios had the authority to sign on Eleni's behalf.

Also, Verzani committed fraud by amending the complaint to include a cause of action for emotional and physical injuries in light of his knowledge that Laskin was retained for these

causes of action. That Laskin did not serve a Notice of Lien is irrelevant. The original summons and complaint in the within action was for specific performance of the Lease and failure to restore the tenants to their apartments. Verzani then amended the within action to include the causes of action for emotional injuries, in spite of his acknowledgment that Eleni had retained a separate attorney to prosecute an action for her physical and emotional pain and suffering. Then, eight days later, Verzani had plaintiffs execute a General Release which Verzani had prepared. The General Release provided language that the tenants suffered physical and emotional injuries, and that the parties were settling all claims of the lawsuit. At such time, Laskin had no knowledge of this lawsuit. It is self evident that no work or discovery or otherwise could have been done by Verzani regarding the pain and suffering claim of Eleni since his complaint was only amended to add this cause of action a mere eight days before the settlement. It is also self-evident that the settlement was, in actuality, in connection with the lease buy out claim against landlord only, and not for any claim of negligence or personal injuries attributable to landlord. The proper defendants as to the injuries caused by the crane collapse were those defendants named in the lawsuit commenced by Laskin. The inclusion in the settlement papers of claims for personal injuries never sued upon or processed by Verzani a mere eight days after the amendment demonstrates the fraudulent nature of the inclusion.

Eleni had no knowledge that there had been a separate case started by Verzani alleging physical and emotional injuries. Eleni was not even aware that there had been a settlement of that action. If Eleni didn't know, Laskin could not have known and filed a Notice of Lien.

By amending the complaint to include a claim for pain and suffering, Verzani tortuously interfered with the contractual agreement that plaintiffs had with Laskin, in that there is (1) a

Retainer Agreement had been signed by Eleni; (2) Verzani knew of this Retainer Agreement; (3) the General Release has created the possibility of a set-off in the crane collapse action (4) the damages are in the amount of $700,000.

Furthermore, Verzani committed an ethical violation by amending the complaint to include causes of action which he knew were already asserted in a separate case. Obviously, the purpose of the amendment was a collusive effort between Verzani and landlord to allow the landlord to make a claim in subrogation and recoup some of its payout.

Other than calling the ethical violations "hysterical," Verzani failed to address the ethical violations which he committed in the settlement of the within action.[1] Had the settlement been paid for a lease buy-out, the landlord would not have a claim for subrogation as a lease buy-out is a cost of doing business.

Eleni was the only party in the building at the time of the crane accident, who sustained physical and emotional injuries. Eleni was being represented by Laskin for those injuries at all times. Verzani acknowledged said representation. However, in spite of this knowledge, Verzani amended the complaint to include the claims for emotional injuries, prepared the General Release to include language regarding physical and emotional injuries and failed to put language in regarding the lease buy-out. Verzani fraudulently represented himself to be the attorney of record in this matter in preparing these documents with that language.

Verzani who performed absolutely no services in connection with the injury claims. Laskin performed substantial legal work in an effort to obtain a favorable resolution for Eleni's

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[1] Laskin points out that Verzani's attorney currently shares office space with Abraham, Lerner & Arnold, LLP, attorneys for the landlord, the defendant to the within action, which is more than mere coincidence and speaks volumes of Laskin's contention of collusion.

claims against the crane collapse case defendants. Pleadings were prepared and served; medical records were obtained and exchanged; a 50h Hearing was held and attended to by Laskin; extensive discovery has been ongoing; the deposition of Eleni was held (which lasted a whole day and is to be continued at a later date). Motions for summary judgment have been made, and Orders have been issued and reviewed. Laskin attended numerous court conferences.

There can be no claim Laskin was required to file a Notice of Lien, as this action was commenced by the service of the Notice of Claim upon the City of New York. Section 475-a of the Judicial Law regarding filing of a Notice of Lien has no relevance to the instant case as it applies to a claim of a lien when another attorney brings a claim on behalf of one's client. In the instant case, neither Laskin, nor indeed Eleni had knowledge of the assertion of an injury claim by Verzani until it was revealed to Eleni's surprise. Further, it seems disingenuous for Verzani to argue that a Notice of Lien be required when he acknowledges in his own letter that with regard to Eleni's claim for personal injury, she has retained separate counsel.

Verzani should not now be allowed to benefit from his fraudulent representation of plaintiffs. At all times Verzani knew that Eleni had already retained attorneys for her claims for pain and suffering as a result of her physical and emotional injuries. In spite of that knowledge, Verzani Amended the Complaint to include causes of action for these very injuries and prepared a General Release which contained language "physical and emotional injuries" but failed to include language that it was for a lease buy-out. The timing of the amendment, just eight days before the settlement, and the omission of the lease buy out claim, which was the original claim in their complaint, is suspicious at the very least.

The fact that Verzani listed himself as the attorney of record in his pleadings and in the

General Release as to injuries should not even be considered in light of this conduct.

The caselaw Verzani cites is distinguishable, in that the petitioner therein was not the attorney of record as to the claims involved.

In reply, Verzani argues that Laskin's opposition establishes that she was not the attorney of record at any time in this case. Laskin has not provided any document establishing that the attorney of record in this case was a law firm other than Verzani. Laskin's engagement letter with Eleni is not an appearance in this lawsuit on behalf of plaintiffs.

Filing a filing a notice of claim against an entity, *i.e.*, the City of New York, which is not a defendant in this case, does not constitute an "appearance" so as to make Laskin the attorney of record in this case. And, the tortious interference claim is meritless and irrelevant, as the instant proceeding is governed only by Judiciary Law § 475 and § 475-a, with which Laskin has failed to comply. And, the alleged ethical violation is another red herring.

Further, Judiciary Law § 477 is inapplicable because no evidentiary proof has been furnished by Laskin that "services" were "performed" by her in this case and that she "...appeared for the person or persons having or claiming to have a right of action for such injury...."

Discussion

The Court begins by affirming that the "enforcement of a charging lien is founded upon the equitable notion that the proceeds of a settlement are ultimately 'under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done to its own officers'" (*Tunick v Shaw*, 45 AD3d 145, 148, 842 NYS2d 395 [1st Dept 2007]).

Judiciary Law § 475, "which is a statutory codification of the common-law charging lien," provides:

> From the commencement of an action, special or other proceeding in any court . . . the *attorney who appears for a party has a lien upon his client's cause of action*, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his 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. The court upon the petition of the client or attorney may determine and enforce the lien.

Based upon a strict reading of Judiciary Law § 475, an attorney has a lien upon his or her "client's cause of action" from the commencement of the action. It has been stated that "[t]he statutory lien attaches to the cause of action from the commencement of the suit. This merely means that the attorney receives additional protection; the charging lien secures his suit for reasonable services and guards him against a settlement between the parties" (*In re Coleman*, 87 F2d 753 [2d Cir 1937]).

And, Judiciary Law § 477 provides:

> If, *in an action commenced to recover damages for a personal injury . . . an attorney having or claiming to have a lien for services performed or to be performed who shall have appeared for the person* or persons having or claiming to have a right of action for such injury . . . no settlement or adjustment of such action shall be valid, unless consented to in writing by such attorney *and by the person or persons for whom he shall have appeared*, or approved by an order of the court in which such action is brought.

A plaintiff's attorney in a personal injury action which is settled before trial without attorney's consent could file a petition to have his lien fixed by court under Judiciary Law § 477 (*In re Jacobs*, 169 Misc 893, 9 NYS2d 206 [1938]).

What is troubling in this case is that while Laskin was the initial attorney retained to exclusively prosecute Eleni's personal injury claim, Laskin's complaint for personal injuries against *the crane collapse defendants* was filed *after* Eleni's personal injury claim had been filed and settled against *the landlord* by Verzani. The Court failed to uncover any cases discussing the

applicability of Judiciary Law § 475 under these circumstances.

However, the Court of Appeals has held that "because a cause of action is a species of property, *with the signing of a retainer agreement that expressly assigns a portion of the proceeds of a cause of action to the attorney*, the attorney 'acquires . . . a vested property interest *which cannot subsequently be disturbed by the client or anyone claiming through or against the client*'" (*LMWT Realty Corp. v Davis Agency Inc.*, 85 NY2d 462, 467, 649 NE2d 1183 [1995] (emphasis added));[2] *cf.*, *In re Lubin*, 213 NYS2d 143, 147 [Sup. Ct. Kings County 1961] (the"lien of an attorney attaches from the time of the commencement of the action and not the time of the presentment of a notice of claim to an alleged debtor")). Thus,"[t]he charging lien does not merely give an attorney an enforceable right against the property of another[;] it gives the attorney an equitable ownership interest in the client's cause of action. . . ." *(LMWT Realty Corp. v Davis Agency Inc.*, 85 NY2d 462, 649 NE2d 1183 [1995] *citing Matter of City of New York (United States-Coblentz)*, 5 NY2d 300, 307-308, 184 NYS2d 585, 157 NE2d 587, *cert. denied sub nom. United States v Coblentz*, 363 US 841, 80 SCt 1606, 4 LEd2d 1726). "Manifestly, then, an attorney's charging lien is something more than a mere claim against either property or proceeds; an attorney's charging lien 'is a vested property right created by law and not a priority of payment' (*LMWT Realty Corp., supra* at 467-468, *citing Matter of City of New York*, 5 NY2d at 306, *citing People v Keefe,* 50 NY2d 149 [1980]). The lien which attaches in the attorney's favor cannot be impaired by a collusive settlement (*Haser v Haser*, 271 AD2d 253, 707 NYS2d 47 [1st Dept 2000] ("a plaintiff's attorney may enforce her statutory charging lien

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[2] Although an "attorney's charging lien may be lost if he voluntarily withdraws or is discharged for misconduct, among other ways" (*People v Keefe*, 50 NY2d at 156) these factors are not present herein.

against the defendant's own assets, if he still possesses the settlement proceeds or knowingly paid them to the plaintiff so as to deprive the attorney of her compensation")).

It is uncontested that Laskin was the first attorney retained by Eleni and performed legal services in the Crane Collapse case to assert claims for Eleni's personal injuries, and Eleni and Laskin did not consent for Verzani to represent her to pursue or settle Eleni's personal injury claims.

The Court notes that the General Release refers to the two original causes of action filed by Verzani for specific performance and failure to restore:

> WHEREAS . . . the City released the Building back to the Landlord for restoration,
>
> WHEREAS the Tenants, then homeless and unable to gain access to their Apartments and belongings, *demanded the Landlord restore the Apartments* and make the Building habitable; the Landlord *failed to take any action to make repairs* instead served a Notice of Termination upon the Tenants of each of the Apartments;
>
> WHEREAS as a result of all of the foregoing, Tenants began to experience physical and emotional injuries, including but not limited to loss of sleep, anxiety, nausea, diarrhea, intestinal disorders, loss of appetite, depression, humiliation, nervousness, fright, grief, and shock.
>
> WHEREAS the Tenants brought suit . . . (the "Lawsuit") seeking damages for their injuries as well [as] requesting] the court force the Landlord to take action and restore their homes and Apartments
>
> WHEREAS the parties have now desired to settle all claim of the Lawsuit . . . .

It bears repeating that the complaint was amended to add "Negligent Infliction of Emotional Distress" only eight days prior to the settlement.

Thus, based on the language in the General Release, and the amended complaint, the reference in the General Release to Eleni's personal injuries is inclusive in what is covered in

Laskin's retainer agreement, *to wit*: "claim for damages arising from *personal injuries* sustained by ELENI PAPAIOANNOU . . . on the 15th day of March, 2008 *through the negligence of third parties or other persons*" (emphasis added). Laskin's retainer agreement with Eleni was not limited to Eleni's personal injuries arising from her fall and/or from the alleged negligence of the defendants in the Crane Collapse case. And, upon her signing the retainer with Laskin, Eleni assigned a portion of the proceeds of her cause of action for personal injuries to Laskin, giving rise to a colorable claim for a charging lien against the proceeds stemming from such claim.

The Court acknowledges that, as Verzani points out, it has been uniformly held that a "charging lien is available only to an 'attorney of record'" who appeared in the action (*see Rodriguez v City of New York*, 66 NY2d 825, 827 [1985]; *Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442 [2d Cir 1998] (the charging lien provided for by Section 475 is for the benefit of an "attorney of record" only); *Jaghab & Jaghab v Marshall*, 256 AD2d 342, 681 NYS2d 330 [2d Dept]; *Max E. Greenberg, Cantor, Reiss v State of New York*, 128 AD2d 939, 512 NYS2d 587 [3d Dept]).

In the case of *Rodriguez v City of New York* (66 NY2d 825, 498 NYS2d 351, 489 NE2d 238 [1985]), an attorney asserting a charging lien was originally retained by the plaintiff as counsel in the action. This attorney then retained a second attorney as "of counsel" and both agreed to evenly split the fee. The second attorney handled all of the pleadings in the case and the trial. The court held that the first attorney was *not* entitled to a charging lien because his "name never appeared on any of the pleadings, motion papers, affidavits, briefs or record in plaintiff's action." (*Id.* at 827, 498 NYS2d at 353). The second attorney was considered the "sole" attorney of record in the case "because he was the only one who ever appeared in the

case." "The fact that the initially retained attorney's name appeared on a retainer statement in a negligence case, filed pursuant to the rules of the Appellate Division, was insufficient to qualify him as an attorney of record. The absence of his name anywhere in the record showed that he was not, as he claimed, an attorney of record."

Max E. Greenberg, Cantor & Reiss v State of New York (128 AD2d 939, 512 NYS2d 587 [3d Dept 1987]) is also instructive. In *Greenberg*, Albin Construction Corporation ("Albin") retained Max E. Greenberg, Cantor & Reiss ("Greenberg") as counsel to sue the State for monies due and owing (the "Court of Claims suit"). Albin was also represented by Christian X. Kouray in two lawsuits in Federal court, of which Greenberg had no involvement. The Federal suit involved Internal Revenue Service tax lien foreclosures, disputes with sureties, and a claim against the State identical to Albin's claim in the Court of Claims. "The Federal litigation was settled, the money distributed according to the settlement terms, and Albin's Court of Claims suit was discontinued by Albin *without the knowledge or consent of claimant* [Greenberg]" (emphasis added). Claimant was not compensated for the work it did for Albin in the Court of Claims suit.

Thereafter, Greenberg commenced a claim alleging that *the State* wrongfully paid out the settlement without recognizing his alleged statutory lien under Judiciary Law § 475 for counsel fees on Albin's Court of Claims suit. The Appellate Division affirmed the dismissal of Greenberg's claim for failure to state a cause of action, stating that while Greenberg "did provide legal services to Albin for which claimant may be entitled to compensation, . . . claimant was not Albin's counsel in the Federal proceedings which produced the settlement." According to the Appellate Division, Judiciary Law § 475 did not apply because the proceeds of the Federal settlement were not created through Greenberg's efforts. Thus, the State violated no "duty" to

Greenberg because he "was not entitled to a lien under Judiciary Law § 475."

However, in a concurring opinion, it was reasoned that Greenberg "was still the attorney of record in the pending Court of Claims action and thus entitled to proper notice of his discharge" and "a proper substitution of counsel, whether by court order or the filing of a consent to the change, was never effectuated." Thus, under "these circumstances, the State was remiss in participating in the discontinuance of the Court of Claims suit in derogation of claimant's charging lien under Judiciary Law § 475. That the settlement was effectuated in the context of the Federal proceedings does not ipso facto preclude recovery, for the lien attaches to the client's cause of action (*see, Neimark v Martin*, 7 AD2d 934, 935; see also, 7 NY Jur 2d, Attorneys at Law, §185, at 113). Significant in this regard is the fact that the ultimate settlement amount agreed to in the Federal proceedings was the exact amount of money damages demanded in the first cause of action in the Court of Claims suit."

Upon review of the caselaw on this topic, the Court finds that decisions in *Rodriguez* and *Greenberg*, as well as the cases cited by Verzani are factually distinguishable and are not dispositive, since Laskin seeks a charging lien against the attorneys' fees that were generated from the very cause of action for which Laskin was exclusively retained, there was no agreement between Laskin and Verzani regarding Eleni's personal injury claim, Laskin performed legal services related to such cause of action, albeit in another action, and Verzani expressly agreed not to pursue the personal injury clam (*see In re E. C. Ernst, Inc.*, 4 BR 317 [Bkrtcy. N.Y. 1980] (holding that on a claim for a charging lien, counsel was not entitled to payment out of fund in connection with any unrelated matters); *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 442).

None of such cases restricting the protections of Judiciary Law § 475 to the "attorney of record" include the additional equitable factors which are dispositive here: that Verzani had no authority to assert or settle Eleni's personal injury claims in the separate buy-out action, as such authority was expressly granted to and remained with Laskin, and Verzani did not perform any substantive legal services to generate the settlement of Eleni's personal injury claims, which were added to the buy back complaint a mere eight days before the settlement (*see LMWT Realty Corp., supra*, (considering equitable factors in determining whether an attorney is entitled to a charging lien against certain proceeds to which the City of New York claimed priority)).

In any event, Verzani is estopped from denying that Laskin was the attorney of record in this action (*cf. Rodriguez v City of New York*, 66 NY2d 825, 489 NE2d 238 [1985]). Verzani's own letter concedes that his "office will *not handle Mrs. Papaionnou's claim for personal injury* with regards to her being present in the building at the time of the accident" and he acknowledged that he was "informed [that] *she has retained separate counsel.*" According to his letter agreement, Verzani was to be compensated "Thirty-three and one third (33 1/3%) percent of the sum recovered, whether by suit, settlement or otherwise[.]" Thus, by virtue of his own letter agreement, Verzani is estopped from claiming that the "separate counsel" referred to in his letter was not the counsel of record for Eleni's personal injury claim. It is noted that on the second page of Verzani's letter, underneath his signature line, are two signature lines: the first signature line is for the signature of Demetrios, signed by him; the second signature line states "Terms of retainer acknowledged and agreed to Eleni Papaionnou by her husband, Dimitrios Papaionnou" also signed by Demetrios. Thus, while Demetrios signed this second line, there is no indication on the document, in opposition to the instant motion, or in the record, that

Demetrios had the authority to sign on Eleni's behalf or that she was aware that he was signing such a document. As pointed out by Laskin, Verzani does not represent that Demetrios had a Power of Attorney or any legal authority to sign a retainer on behalf of Eleni. And, this is not an instance where Laskin was advised or put on notice in any manner that another attorney was asserting the personal injury claim of Eleni (*cf. Rodriguez v City of New York, supra*). Moreover, it cannot be said that Verzani is entitled to the 33 1/3% of the sum recovered in connection with Eleni's personal injury claim, since his retainer agreement was limited to nonpersonal injury claims.

And, even if Laskin were not the "attorney of record" in connection with Eleni's personal injury claim, cases indicate that Laskin would nevertheless have been an equitable assignee of the cause of action by virtue of Laskin's retainer agreement and Verzani's letter.

In *Woodbury v Andrew Jergens Co.*, 69 F2d 49 [2d Cir 1934] (L. Hand), the court held that, under plaintiff's agreement to pay one third of the amount recovered from the defendant to his attorneys, one of whom was not an attorney of record, the attorney who was not of record "became by the law of New York an equitable assignee of the cause of action *pro tanto*," though he had no charging lien for fees (*Id.* at 50; *see also, Louima v City of New York*, 2004 WL 2359943, *58 [EDNY 2004]). Moreover, the court held that "it can scarcely be that an equitable assignee is in a weaker position than a statutory lienor, who is often referred to as such an assignee." (*Id.*) As noted in *In re Coleman* (87 F2d 753 [2d Cir 1937]), "[w]hile the statute refers to the 'attorney who appears for a party,' and it has therefore been said that the attorney of record alone is entitled to a lien, it has been held by the lower state courts that the lien may be transferred or assigned." (*Id.* at 754).

[* 23]

The Court recognizes that each theory under estoppel or assignment is a thin reed. However, this decision does not preclude Laskin from pursing a plenary action under alternative tort theories, including but not limited to, interference with business/contractual relations.[3]

It is noted that section 475-a of the Judiciary Law provides for an attorney's charging lien prior to the commencement of an action (*Glassberg v All City Ins. Co.*, 72 Misc 2d 651, 340 NYS2d 6 [Civ.Ct. 1972]). Judiciary Law § 475-a, entitled Notice of attorney's lien prior to commencement of action; service and contents, provides:

> *If prior to the commencement of an action*, special or other proceeding, *an attorney serves a notice of lien upon the person or persons against whom his client has or may have a claim or cause of action, the attorney has a lien upon the claim or cause of action from the time such notice is given, which attaches to a verdict, report, determination, decision or final order in his client's favor* of any court or of any state . . . and to any money or property which may be recovered on account of such claim or cause of action in whatever hands they may come; *and the lien cannot be affected by any settlement between the parties after such notice of lien is given.* The notice shall, (1) be served by either personal service or registered mail; (2) be in writing; (3) state that the relationship of attorney and client has been established, the nature of the claim or cause of action, and that the attorney claims a lien on such claim or cause of action; (4) be signed by the client, or by a person on his behalf whose relationship is shown, and which signature shall also be witnessed by a disinterested person whose address shall also be given; and (5) be signed by the attorney. A lien obtained under this section shall otherwise have the same effect and be enforced in the same manner as a lien obtained under section four hundred seventy-five of this chapter.

A law firm that fails to file a proper notice of lien pursuant to Judiciary Law § 475-a prior to the commencement of an action is not entitled to a charging lien under the Judiciary Law (*Jaghab & Jaghab v Marshall*, 256 AD2d 342, 681 NYS2d 330 [2d Dept 1998]; *O'Grady v*

[3] In order to state an actionable claim for tortious interference with business relations, a plaintiff must allege: (1) the existence of a business relation with a third party; (2) that the defendant, having knowledge of such relationship, intentionally interfered with it; (3) that the defendant either acted with the sole purpose of harming the plaintiff or by means that were dishonest, unfair, or improper, and (4) a resulting injury to the plaintiff's business relationship (*Empire One Telecommunications, Inc. v Verizon New York, Inc.*, 26 Misc3d 541, 558, 888 NYS2d 714 [Sup. Ct. ,2009).

Schmidt, 22 Misc 2d 974, 192 NYS2d 985 [Sup. Ct., New York County 1959]). However, Verzani is estopped from asserting that Laskin failed to serve a proper notice of lien pursuant to Judiciary Law § 475-a. Verzani conceded in his letter that Eleni's personal injury claim was being handled by another attorney.

Based on Laskin's Retainer Agreement, the Notice of Claim filed by Laskin, and the Verzani own letter agreement, Verzani is precluded from disputing that Laskin was the attorney of record for any claim involving physical and emotional injuries. Laskin is entitled to the 1/3 fee on the $700,000 settlement in as much as it was for the personal injuries of the plaintiff Eleni that is the subject of the suit commenced by Laskin on Eleni's behalf. Thus, Verzani's cross-motion to dismiss the Laskin's application for a charging lien is denied.

Finally, while it appears that Verzani's conduct raises an issue as to whether he colluded with the landlord (and/or landlord's insurer) to settle a purported personal injury claim without the authority of Eleni, resulting in his receipt of hundreds of thousands of dollars in legal fees, the Court declines Laskin's request to address such ethical issues herein, and leaves those issues to be addressed, if at all, by the appropriate disciplinary committee.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion for an Order pursuant to Section 475 of the Judiciary Law to enforce an attorney's lien of Laskin Law P.C. and Levine & Grossman in the amount of $233,333.33 against the proceeds of the settlement in the amount of $700,000 obtained and collected by Eleni and Demetrios Papaioannou in this action, together with such other and relief as this Court may deem just and proper, is granted; and it is further

ORDERED that the cross-motion by Marc E. Verzani to dismiss the motion is denied; and it is further

ORDERED that a hearing shall be held as the amount of the charging lien to which Laskin Law P.C. and Levine & Grossman are entitled, in as much as such settlement pertained to the personal injuries of Eleni, subject to the amount of Marc E. Verzani's fee, if any.

This constitutes the decision and order of the Court.

Dated: August 24, 2011

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

AUG 25 2011

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