

**Rosen Livingston & Cholst, LLP v De Corcho**

2017 NY Slip Op 30295(U)

February 14, 2017

Supreme Court, New York County

Docket Number: 159138/2016

Judge: Carol R. Edmead

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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. CAROL R. EDMOND, J.S.C. Justice

PART 35

ROSEN LIVINGSTON & CHOLST, LLP.

INDEX NO. 159138/16
MOTION DATE 12-22-2016
MOTION SEQ. NO. 001

-v-

PEREZ DE CORCHO, ALAIN et al.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

The petition to enforce a charging lien pursuant to Judiciary Law 475 is decided as follows:

By way of background, petitioner, Rosen Livingston & Cholst, P.C., a law firm, represented respondents Alain Perez De Corcho and Roberto Aldrete (two roommates) (collectively, "respondents") in a non-payment Housing Court proceeding commenced by co-respondent L.A.L. Little Italy Mgmt. Co., LLC ("Little Italy"). In that proceeding, petitioner (on behalf of respondents) sought to recover against Little Italy \$20,756.42 in attorneys' fees respondents incurred in defense of the proceeding. After a hearing, the Court (Hon. Michael J. Pinckney) issued an order dated January 5, 2016, awarding respondents \$9,500.00 in reasonable attorneys' fees (the "January 5 Order").

When petitioner did not receive payment from respondents for legal expenses due and owing, petitioner served respondents with a notice to commence arbitration proceedings. Neither respondent responded to the notice.

Thus, this action to enforce a charging lien pursuant to Judiciary Law 475 ensued.

Little Italy opposes the application, arguing that Little Italy was later granted an award for \$14,500 for the rent due under the subject lease. By a subsequent order dated March 31, 2016 (the "March 31 Order") the Bronx Housing Court awarded Little Italy possession of the subject premises and \$14,500 for rent arrears. Such amount is in excess of the award petitioner obtained,

Dated: \_\_\_\_\_, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: [ ] CASE DISPOSED [ ] NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER
3. CHECK IF APPROPRIATE: [ ] SETTLE ORDER [ ] SUBMIT ORDER
[ ] DO NOT POST [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

and Little Italy's award and right of set off maintain priority over counsel's lien because both claims arise out of the same transaction or instrument. Little Italy takes no position as to petitioner's entitlement to the charging lien (first cause of action), except to argue that the first cause of action is conclusory and unsupported by any documentary evidence. However, Little Italy opposes its enforcement (second cause of action). If enforced, Little Italy would be forced to pay respondents' attorneys' fees under the Lease when it has already been awarded rent due to it under the lease in excess of the amount allegedly due from respondents. The circumstances of both awards arising out of the same instrument (*to wit*: the Lease) present an exception recognized by the Court of Appeals.

In reply, petitioner points out that as to its first cause of action, its charging lien was set by the January 5 Order at \$9,500.00.

As to the second cause of action, petitioner argues that because the \$10,423.86 that it recovered for the respondents in the January 5 Order is not a "competing claim arising out of" the lease between Little Italy and respondents that served as the basis for Little Italy's subsequent recovery against respondents in the March 31, 2016 Order. Rather, the basis for the monetary award in the January 5 Order was expenses incurred by respondents as a result of the unlawful eviction that took place therein, in the amount of \$923.24, and legal fees, pursuant to Real Property Law ("RPL") § 234. In the January 5 Order, the Court cited RPL § 234 as the basis as its award of legal fees because the Lease had a unilateral legal fees recovery provision (see ¶ 18), thus triggering implied reciprocal covenant for Little Italy to pay respondents' attorney fees and expenses based on the respondents' successful defense of Little Italy's first Bronx Housing Court proceeding against the respondents. Further, as to Little Italy's claim that both the January 5 Order and the March 31 Order arose out of the same "transaction or instrument," each separate month represents an independent obligation to pay rent under a lease. Therefore, the amounts Little Italy was awarded in the March 2016 Order did not arise out of the same "transactions" as the rent amounts Little Italy unsuccessfully sought in the initial proceeding.

### *Discussion*

It is uncontested that Judiciary Law § 475 provides for an attorney's lien as follows:

From the commencement of an action, special or other proceeding . . . 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; . . . The court upon the petition of the client or attorney may determine and enforce the lien.

As pointed out by petitioner, the Court of Appeals in *Banque Indosuez v Sopwith Holdings Corp.* [98 NY2d 34, 37 [2002]], held that an attorney's charging lien maintains superiority over a right of setoff where the setoff is unrelated to the judgment or settlement to which an attorney's lien attaches. (*Id.* at 43). And the parties agree that there is an exception to such rule, "where competing claims arise out of the same transaction or instrument, an attorney's

charging lien under section 475 will be recoverable against the client's net recovery, if any, after offsetting the parties' judgments" (*Id.* at 44-45). The parties disagree as to the applicability of the exception to the facts herein.

Here, the Court's January 5 Order cited to RPL § 234, as follows:

*"whenever a lease . . . shall provide that in any action or summary proceeding the landlord may recover attorneys fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease . . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant . . . in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease."*  
(*Emphasis added*).

The Court continued:

"Respondents were the prevailing party in the instant proceeding to the extent they were restored to possession and thus entitled to reasonable attorneys fees.  
(January 5 Order, Pages 6-7)

The record demonstrates that the competing claims between the petitioner herein and Little Italy arise out of the lease. Indeed, the lease served as basis for the award of attorneys' fees therein.

RPL addresses the terms of a lease in regards to attorneys' fees in favor of the landlord, and provides the mechanism under which a tenant may recover reasonable attorneys' fees when such provision exists in a lease. Therefore, it cannot be said that the award giving rise to petitioner's lien does not arise out of the lease. Petitioner's arguments to the contrary lack merit.

*Conclusion*

Based on the foregoing, it is hereby

ORDERED that the first cause of action in the petition seeking an order granting it a charging lien against \$10,423.84 awarded to respondents Alain Perez De Corcho and Roberto Aldrete in the January 5, 2016 Order pursuant to Judiciary Law § 475 is granted; and it is further

ORDERED that the second cause of action in the petition seeking an order directing respondent L.A.L. Little Italy Mgmt. Co., LLC to make payment to petitioner in the amount of \$10,423.8, together with costs, disbursements, and interests thereon, is denied, and the second cause of action is severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly; and it is further ORDERED that petitioner shall serve a copy of this order with notice of entry upon respondents within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 2.14.2017

*[Handwritten Signature]*

J.S.C.

HON. CAROL R. EDMEAD  
J.S.C.

1. CHECK ONE :

2. CHECK AS APPROPRIATE :

3. CHECK IF APPROPRIATE :

DO NOT POST

CASE DISPOSED

MOTION IS:  GRANTED  DENIED

SETTLE ORDER

FIDUCIARY APPOINTMENT

NON-FINAL DISPOSITION

GRANTED IN PART  OTHER

SUBMIT ORDER

REFERENCE