

**Matter of Sim & Park, LLP v Sackstein, Sackstein & Lee, LLP**

2017 NY Slip Op 30342(U)

February 23, 2017

Supreme Court, New York County

Docket Number: 158318/16

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ Justice PART 13

In the Matter of SIM & PARK, LLP, Petitioner,

INDEX NO. 158318 /16

MOTION DATE 02-22-2017

- v -

MOTION SEQ. NO. 001

SACKSTEIN, SACKSTEIN & LEE, LLP,

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this petition pursuant to determine and enforce a charging lien or for a hearing to determine the proper allocation of fees between the parties .

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

Table with 2 columns: PAPERS NUMBERED, values 1-2, 3-4, 5

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that this petition for an order pursuant to Judiciary law 475 adjudging that petitioner is entitled to Fifty(50%) percent of all attorneys fees for its work in the case of Seng Hi Kim v. East Hills Chrysler and Yong Woo Lee (Supreme Court Queens County, Index No.: 22865/10) is granted solely to the extent of setting the matter down for a hearing to determine the proper allocation, if any, of the attorney fees between the parties.

In this dispute between two attorneys the court is asked to determine and enforce a charging lien. Petitioner claims that he is entitled to a percentage of the fee, Respondent claims Petitioner is not entitled to anything because the client discharged Petitioner for cause, the work petitioner performed on the file was erroneous and Petitioner did not file a retainer statement and therefore is precluded from receiving any compensation for legal services.

Petitioner was retained by Seng Hi Kim ( Client) to prosecute an action for damages as a result of personal injuries sustained in an automobile accident. Petitioner represented the Client from the initial investigation of the matter through the filing of the summons and complaint and service of a Bill of Particulars. After Petitioner filed an RJI the client substituted him and retained the Respondent.

The Respondent alleges that it had to Amend the pleadings and the Bills of Particulars to correct mistakes made by Petitioner. They also allege that Petitioner failed to file a retainer statement, which precludes it from receiving any fees, and that Petitioner was discharged for cause due to the errors in the pleadings. In addition Respondent alleges that it responded to the defendant's discovery demands and engaged in negotiations to settle the action. Finally it argues that if this petition is not dismissed then Petitioner should receive no more than five to ten percent of the fee.

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

**Petitioner and Respondent want the court to determine the amount of the charging lien Pursuant to Judiciary Law § 475. Respondent claims that Petitioner was discharged for cause and is not entitled to any part of the fee, or no more than five to ten percent . Petitioner claims it was not discharged for cause and is entitled to fifty percent of the fee. The fee to be recovered is approximately One-third of the settlement amount or approximately \$3447.00 dollars.**

**In accordance with Judiciary Law § 475 from the commencement of an action an attorney has a lien upon his client's cause of action. The Court upon the petition of the client or attorney may determine and enforce the lien. An attorney discharged without cause has three remedies: a retaining lien, a charging lien, and a plenary action in Quantum Meruit ( Levy v. Laing, 43 A.D. 3d 713, 843 N.Y.S. 2d 542 [1<sup>st</sup>. Dept. 2007]). A charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client ( Chadbourne & Parke, LLP, v. AB Recur Finans, 18 A.D. 3d 222, 794 N.Y.S. 2d 349 [1<sup>st</sup>. Dept. 2005]). An attorney does not lose his statutory lien under Judiciary Law § 475 by reason of substitution of a new attorney by his consent (In re Burroughs & Brown 239 A.D. 794, 263 N.Y.S. 772 [2<sup>nd</sup>. Dept. 1933]).**

**Petitioner, being the Client's attorney, obtained a lien on the Client's cause of action from the commencement of the action in 2010. Petitioner represented the Client from August 2010 through the time he was discharged in February 2011, and if he filed a retainer statement with the Office of Court Administration is entitled to a charging lien on the Client's file. This lien is not extinguished by reason of substitution of petitioner by a new attorney.**

**In a dispute between an attorney and a client, on substitution of attorneys all the former attorney is entitled to is a lien upon the proceeds of the action in an amount representing the "reasonable value" of his services as of the date when he was superseded by the new attorney ( Bernstein v. Suchoff, 242 A.D. 784, 274 N.Y.S. 586 [2<sup>nd</sup>. Dept. 1934]. The factors to be considered in ascertaining the "reasonable value" of legal services for purposes of a charging lien are:**

- (1) the difficulty of the matter;**
- (2) the nature and extent of the services rendered;**
- (3) the time reasonably expended on those services;**
- (4) the quality of the performance of counsel;**
- (5) the qualifications of counsel;**
- (6) the amounts at issue; and**
- (7) the results obtained.**

**( Casper v. Lew Lieberbaum & Co, Inc., 182 F. Supp. 2<sup>nd</sup>. 342 [2002]).**

**However, where the dispute is between plaintiff's current and former counsel, the former counsel has the option of receiving the "reasonable value" of his services or a contingent percentage fee based on the proportionate share of the work he performed on the whole case ( Braider v. 194 Riverside Owners Corp., 237 A.D. 2d 147, 654 N.Y.S. 2d 755 [1<sup>st</sup>. Dept. 1997]; Smerda v. City of New York, 7 A.D. 3d 511, 776 N.Y.S. 2d 86 [2<sup>nd</sup>. Dept. 2004]; Tutarashvili v. Barzilay, 39 A.D. 3d 851, 832 N.Y.S. 2d 810 [2<sup>nd</sup>. Dept. 2007]; Russo v. New York, 48 A.D. 3d 540, 853 N.Y.S. 2d 87 [2<sup>nd</sup>. Dept. 2008]).**

**The dispute herein does not arise between Petitioner and the Client, but between the Client's current and former attorneys. Prior to Petitioner turning over the file to the Client and his current counsel they acknowledged that there were disbursements owed and that Petitioner would retain a "charging lien...to be determined by the court at the conclusion of the case...on the gross legal fees..."[see Petition Exhibit B ]. Petitioner is not foreclosed from electing as its fee a contingent percentage on the proportionate share of the work he performed. ( Lai Ling Cheng v. Modansky Leasing Co., 73 N.Y. 2d 454, 539 N.E. 2d 570, 541 N.Y.S. 2d 742 [1989]).**

**Respondent alleges that Petitioner is disqualified from receiving a fee in this matter because he was discharged for cause. An attorney who is discharged for cause or misconduct has no right to the payment of fees or a lien, notwithstanding the existence of a retainer agreement ( Williams v. Hertz Corp., 75 A.D. 2d 766, 427 N.Y.S. 2d 825 [1<sup>st</sup>. Dept. 1980]); However, the Client does not allege that Petitioner neglected to properly represent him, committed a legal impropriety amounting to a significant breach of a legal duty or violated any legally or professionally imposed duty with regards to the Client. The sole reason for the discharge stems from a mistake in the complaint by listing an incorrect plate number of the offending vehicle, which Petitioner immediately corrected.**

**Respondent has not provided a sufficient basis for this court to determine that Petitioner was discharged for cause or to warrant a hearing on that matter. The only issue left to be determined is the contingent percentage of the fee Petitioner is entitled to receive from the gross legal fees, based on the proportionate share of the work Petitioner performed on the case.**

**Accordingly, it is ORDERED that the Petition is granted and it is further**

**ORDERED, that a hearing is ordered to determine the amount of the contingent percentage fee Petitioner is entitled to receive from the gross legal fees based on the proportionate share of the work petitioner performed on the case, and it is further**

**ORDERED, that Petitioner is to serve a copy of this order with Notice of Entry upon Respondent and upon the General Clerk's Office Trial Support Clerk ( Room 119), who is directed to refer this matter to the Special Referee Clerk( Room 119M) for placement at the earliest possible date upon the calendar of the Special Referees Part, which in accordance with the Rules of that Part shall assign this matter to an available Special Referee to hear and report as specified above, and it is further**

**ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part, and it is further**

**ORDERED, that the hearing will be conducted in the same manner as a trial before a Justice without a jury and , except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issue specified above shall proceed from day to day until completion.**

Enter:

Dated: February 23, 2017

**MANUEL J. MENDEZ**  
J.S.C.

  
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Manuel J. Mendez  
J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST X REFERENCE