

**Sacco & Fillas, LLP v David J. Broderick, P.C.**

2013 NY Slip Op 34029(U)

March 21, 2013

Supreme Court, Queens County

Docket Number: 24991712

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable DENIS J. BUTLER IAS PART 12  
Justice

**ORIGINAL**  
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SACCO & FILLAS, LLP,

Index No.: 249912

Petitioner,

Motion Date:  
January 28, 2013

-against-

DAVID J. BRODERICK, P.C.,

Cal. No.: 101  
Seq. No.: 1

Respondent.

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The following papers numbered 1 to 33 read on this order to show cause by plaintiff and cross-motion by defendant, both seeking to resolve all issues arising from the substitution of plaintiff's counsel in the matter of Salguero v. Fernandez & A.J. McNulty & Co, Inc. pending in this Court, under Index Number 26612/08.

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Upon the foregoing papers, it is ordered that this application and cross-motion are determined as follows:

Pursuant to an Order of this Court, dated February 1, 2013, this motion, originally submitted before Centralized Motion Part on January 28, 2013, was set down for oral argument on February 13, 2013 was adjourned to and oral argument was conducted on March 19, 2013.

Plaintiff, outgoing counsel for plaintiffs in the underlying personal injury action ("Salguero action"), moves by order to show cause for, inter alia, attorney's fees and disbursements

with respect to the Salguero action due to a change of attorneys on that matter. Defendant, incoming attorney for plaintiffs in the Salguero action, cross-moves for, inter alia, summary judgment denying plaintiffs a lien on the proceeds of the Salguero action and a turnover of the Salguero file.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (Lopez v. Beltre, 59 A.D.3d 683, 685 [2 Dept. 2009]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted]" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 [1957]; see also, Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 [1978]; Andre v. Pomeroy, 35 N.Y.2d 361 [1974]; Stukas v. Streiter, 83 A.D.3d 18 [2 Dept. 2011]; Dykeman v. Heht, 52 A.D.3d 767 [2 Dept. 2008]; Kolivas v. Kirchoff, 14 A.D.3d 493 [2 Dept. 2005]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Scott v. Long Island Power Auth., 294 A.D.2d 348, 348 [2 Dept. 2002]).

The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 [1988]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320, [1986]; Winegrad v. New York Med. Ctr., 64 N.Y.2d 851 [1985]). Once the proponent has met such burden, the opponent must then produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

On defendant's motion for summary judgment, the evidence should be liberally construed in a light most favorable to the plaintiff (see, Nash v. Port Washington Union Free School Dist., 83 A.D.3d 136 [2 Dept. 2011]; Pearson v. Dix McBride, LLC, 63 A.D.3d 895 [2 Dept. 2009]). Further, the facts alleged by the non-moving party, and the inferences that may be drawn therefrom, must be accepted as true (see, Doize v. Holiday Inn Ronkonkoma, 6 A.D.3d 573 [2 Dept. 2004]). Based on the evidence submitted, questions exist as to, inter alia, whether there was a conflict of interest in the Salguero action; whether that conflict of interest was waived; whether plaintiffs in that personal injury action signed the waiver of potential conflict of interest, dated June 18, 2008, which allegedly bears their signatures (Opposition to Cross-Motion, Ex. E); and whether plaintiffs in that personal

injury action understood the waiver of potential conflict of interest which allegedly bears their signature. The conflicting contentions regarding a conflict of interest which could result in a discharge for cause proffered by plaintiff and defendant cannot be resolved without a determination by a trier of the facts (see, DeJesus v. Alba, 63 A.D.3d 882 [1 Dept. 2009]).

As such, defendant has failed to tender sufficient evidence to show the absence of any material issue of fact and the right to summary judgment as a matter of law (see, Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [1986]; Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851 [1985]; Bridges v. Wyandanch Community Development Corp., 66 A.D.3d 938, 940 [2 Dept. 2009]; Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corporation, 64 A.D.3d 85 [2 Dept. 2009]).

Pursuant to a stipulation dated March 19, 2013 entered into in open court by counsel for both parties, and submitted herein, the parties agreed on the disbursements due to plaintiff in the amount of \$15,747.15 and the transfer of the legal file from plaintiff to defendant upon payment of same by defendant on or before March 27, 2013. As such, those branches of the order to show cause and the cross-motion are resolved pursuant to the terms of said stipulation dated March 19, 2013.

Plaintiff moves for attorney's fees and defendant cross-moves to deny plaintiff attorney's fees in the Salguero action. Judiciary Law §475 provides that an "attorney who appears for a party has a lien upon his client's cause of action ... which attaches to a ... judgment or final order in his client's favor". As such, "a charging lien is a security interest in the favorable result of litigation, giving the attorney equitable ownership interest in the client's cause of action ...." (Chadbourne & Parke, LLP v. AB Recur Finans, 18 A.D.3d 222,223 [1 Dept. 2005]).

Pursuant to Judiciary Law §475, a charging lien may be determined in quantum meruit for the reasonable value of services rendered (see, Schneider, Kleinick, Weitz, Damashek & Shoot v. City of New York, 302 A.D.2d 183 [1 Dept. 2002]), or "[i]f the amount of the charging lien has been fixed by agreement, ... execution is appropriate on the judgment for the amount agreed to by the parties." (Itar-Tass Russian News Agency v. Russian Kurier, 140 F.3d 442, 448 [2d. Cir. 1998]). In this matter, plaintiff has failed to demonstrate any agreement as to the amount of a lien. As such, the branch of motions seeking a determination by the Court setting the amount of the charging lien is denied, as a charging lien attaches only to a settlement, judgment or final order (see, Fischer-Hansen v. Brooklyn Heights R.R. Co., 173 N.Y.492 [1903]). As the subject matter has not been resolved, no final judgment or settlement currently exists

herein. As such, the Court is not able to fix the amount of the charging lien at this time (see, Squitieri v. Squitieri, 77 A.D.3d 428 [1 Dept. 2010]) and the branches of the order to show cause and cross-motion seeking same are denied as premature. Further, plaintiff's request for a "constructive trust for all attorneys fees acquired" in the Salguero action is denied as premature. In the event that the issue of plaintiff's charging lien is not resolved by agreement between the parties hereto prior to a final judgment or settlement of the Salguero action, it is directed that no distribution of judgment or settlement funds is to be made prior to a hearing to determine such charging lien.

Plaintiff's and defendant's remaining contentions and arguments on this order to show cause and cross-motion have been considered and found to be without merit.

Accordingly, the branches of plaintiff's order to show cause and defendant's motion seeking the payment of disbursements and the turnover of the legal file in the Salguero action is granted, pursuant to the terms of the March 19, 2012 stipulation of settlement. The branch of plaintiff's order to show cause seeking a charging lien and the creation of a constructive trust is hereby denied, with leave to move for a charging lien at the appropriate time, pursuant to Judiciary Law §475. Defendant's motion for summary judgment denying plaintiff a lien against attorney's fees in the Salguero action is hereby denied.

Leave is hereby granted to move for joint trial of the instant action with the Salguero action.

This Constitutes the Decision and Order of the Court.

Dated: March 21, 2013

  
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 Denis J. Butler, J.S.C.

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