

**Weinberg v Sultan**

2016 NY Slip Op 30272(U)

February 10, 2016

Supreme Court, New York County

Docket Number: 652273/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
SARAH WEINBERG,

Plaintiff,

Index No. 652273/2013

-against-

**DECISION/ORDER**

LESLIE SULTAN, ET AL.

Defendants.

-----X  
**HON. CYNTHIA S. KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmations in Opposition to the Motion /Cross-motion.....	<u>2</u>
Reply Affidavits.....	<u>3, 4</u>
Exhibits.....	<u>5</u>

Plaintiff's former attorney, Kenneth J. Glassman, has brought the present motion to withdraw as attorney for plaintiff Sarah Weinberg and to allow him to release and pay out of escrow attorneys' fees owed to him by Sarah Weinberg. This court previously granted the motion by Mr. Glassman permitting him to withdraw as counsel for plaintiff and will now address the portion of the motion allowing him to release and pay of escrow attorneys' fees owed to him by Sarah Weinberg. There is also a cross-motion by the Brennan Law Firm PLLC for an order transferring the escrowed funds in the possession of Kenneth J. Glassman to an escrow account under the supervision of movant who is plaintiff's current counsel.

In his affidavit in support of his application for attorneys' fees to be paid to him out of the

funds in escrow, Mr. Glassman alleges as follows. Mr. Glassman was retained by plaintiff pursuant to a written retainer agreement on May 30, 2013. He was originally retained to defend a pending foreclosure action for 371 W. 46<sup>th</sup> St. However, at the time he was retained, the property had already been sold. At the closing, plaintiff's attorney, Leslie Sultan, deposited into her escrow account \$368,474.03 of the net sales proceeds. On September 9, 2014 plaintiff and defendant 22 W. 30<sup>th</sup> St. Properties LLC entered into a so ordered stipulation in which the escrow from Sultan was transferred to the escrow account of Kenneth Glassman as plaintiff's attorney. The stipulation provided that \$368,474.03 plus interest was "to be released to 'Kenneth J Glassman, as Attorney' and held in escrow until further order of the court or plaintiff withdraws with prejudice the cause of action for rescission."

In his moving papers, Mr. Glassman alleges that he has a charging lien on the funds which he is holding in escrow as a result of which the court should issue an order allowing him to release the proceeds in the amount of his outstanding bill. Judiciary Law § 475 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 clients 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.

Under New York law, a charging lien under Judiciary Law § 475 "is a security interest in the favorable result of litigation (citation omitted), giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect 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, 223 (1<sup>st</sup> Dept 2005). A charging lien is only enforceable against the

fund created in that action as there must be proceeds from the litigation upon which the lien can affix. *Id.*

In the present case, Mr. Glassman does not have any charging lien in the funds which are being held in the escrow account as the funds were not created as part of the litigation which Mr. Glassman commenced on behalf of plaintiff. There has been absolutely no “verdict, report, determination, decision, judgment or final order” in favor of plaintiff in this action which resulted in the funds in escrow being created. To the contrary, the escrowed funds were generated as a result of the sale of plaintiff’s building to Leslie Sultan, which is the very transaction that plaintiff is challenging in the present action and which occurred before Mr. Glassman represented plaintiff. The sole reason that the funds were placed in escrow in the first instance and that plaintiff has not obtained the funds when they were released by Leslie Sultan is that she is still pursuing an appeal of this court’s decision dismissing her claim for rescission of the sale of her building. However, the proceeds from the sale of the building were not generated as a result of any actions taken in this litigation as a result of which plaintiff does not have a charging lien in these proceeds.

In his opposition to the cross-motion by plaintiff’s current counsel to have the escrowed funds transferred to her, Mr. Glassman argues that he has a retaining lien in the escrowed funds. Whether or not this is a new argument that should have been raised in Mr. Glassman’s moving papers or an argument that only needed to be raised in response to the motion by new counsel to have the escrowed funds transferred to her, the court finds that Mr. Glassman does not have a retaining lien in the escrowed funds. The Second Department has held that an attorney may not impose a retaining lien upon funds which it is holding in escrow on behalf of its client because it

holds the funds in a fiduciary capacity on behalf of its client. *Golberg & Connolly v. Graystone Constr. Corp.*, 65 A.D.3d 1082, 1084 (2<sup>nd</sup> Dept 2009). *See also Scheltér v. Schelter*, 206 A.D.2d 865 (2d Dept 1994) (funds held in escrow by an attorney for a client are not subject to an attorneys’ retaining lien). Since it is undisputed that Mr. Glassman is holding the funds in an escrow account on behalf of his former client, he has no right to impose a retaining lien on these funds.

Based on the foregoing determination that Mr. Glassman does not have a charging lien or a retaining lien on the escrowed funds, plaintiff’s new counsel is entitled to have the funds transferred to her to be held in escrow. However, these funds cannot be released from escrow pursuant to the stipulation and order of this court until there is a final determination of plaintiff’s claim for rescission of the sale of the building, including any appeal she may take of this court’s determination dismissing her claim for rescission. The foregoing constitutes the decision and order of the court.

Dated: 2/10/15

Enter:                     CK                    

J.S.C.  
**CYNTHIA S. KERN**  
 J.S.C