

The Crane Collapse and the Charging Lien

By Richard A. Klass

On March 15, 2008, there was tragic collapse of a crane from the top of a high-rise building being constructed at 303 East 51st Street in Manhattan. The tower crane snapped off and fell, in what was referred to as the worst construction accident in recent New York history. Sadly, several people died and many people were injured. Additionally, many of the surrounding buildings sustained damage from the crane collapse.



In *Cabukyuksel v. Ascot Properties LLC*, 2011 WL 3898067 [Sup. Ct., NY Co. Index No. 108356/08], the Supreme Court Justice decided one of the issues which arose from the approximately 60 lawsuits filed over the crane collapse. The issue which she decided involved an attorney's charging lien.

The alleged pertinent facts recited in the court's decision were as follows: A couple were two of the victims of the crane collapse, with the wife sustaining personal injuries as a result of falling down some stairs and injuring her ankle, and both spouses sustaining damages due to the landlord's failure to restore them to their apartment in the building next door. The wife retained Attorney "A" to represent her and her husband concerning the personal injury claim. The retainer agreement stated that she was retaining Attorney "A" for her personal injury claim and for her husband's loss of services claim.

Unbeknownst to the wife, one week later, the husband retained Attorney "B" to pursue the non-personal injury damages claim. In the retainer agreement with Attorney "B," it stated, "This office will not handle [the wife'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." Attorney "B" then filed an action against the landlord, claiming that "Landlord" failed to repair the building and to restore the couple to their tenancy.

Shortly before settling the action against Landlord, Attorney "B" amended the complaint to include causes of action for negligence and intentional infliction of emotional distress. Then, the claims of the couple were settled for \$700,000. The General Release signed by both of them recited, among other things, that "tenants began to experience physical and emotional injuries"

including loss of sleep, anxiety, shock, etc." The wife executed the Release while in Greece.

Concerning the wife's claim, Attorney "A" commenced an action against the City of New York, contractors and crane operators [but not against Landlord] for personal injuries, including physical and emotional pain and suffering and loss of services. At the deposition in the personal injury action, the wife testified that she signed the Release but never saw the whole ten-page document before. The wife then informed Attorney "A" that, although she read English, it was not her first language and she did not completely understand the Release prepared by Verzani. She claimed that no one read the Release to her or advised her of its meaning and significance. The husband admitted that he collected the \$700,000, and then turned to his wife and said, "Surprise." Attorney "A" then explained that the defendants would argue that any recovery awarded to the wife for her personal injury claim should be reduced by the \$700,000 settlement.

Attorney "A" then took the position that she was entitled to compensation from the \$700,000 recovery in the action prosecuted by Attorney "B" against Landlord, since she had been retained to pursue the claims for physical and/or emotional injuries arising from the crane collapse accident. Attorney "B" disputed the claim.

Accordingly, Attorney "A" brought a petition in the Landlord action, claiming an entitlement of one-third of the settlement amount by virtue of an attorney's charging lien under Judiciary Law §475. Verzani brought a cross-motion to dismiss the petition of Attorney "A," indicating that she failed to allege that she was the attorney of record in the Landlord case or that she performed any legal services which contributed to the \$700,000 settlement.

In deciding the petition and cross-motion, the Supreme Court Justice noted that Attorney "B"'s retainer agreement proved that he knew the wife was pursuing her personal injury claim through Attorney "A" and acknowledged that he would not pursue that claim in the Landlord action. The court, therefore, found that Attorney "B" committed fraud by amending the complaint to include a cause of action for emotional and physical injuries in light of his knowledge that Attorney "A" was retained for this purpose.

First, the Supreme Court decision discussed the nature of an attorney's charging lien, affirming the principle that the "enforcement of a charging lien is

founded under 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 its own officers.'" Citing to *Tunick v. Shaw*, 45 AD3d 145, 148,842 NYS2d 395 [1 Dept. 2007].

The Supreme Court then went on to analyze the situation at hand under Judiciary Law §475, which provides as follows:

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, 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, award, settlement, 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.¹

Finding that Attorney "A" maintained a charging lien in the one-third legal fee portion of the \$700,000 settlement [namely \$233,333.33], the Supreme Court specifically held that, "Based on [Attorney "A"'s] Retainer Agreement, the Notice of Claim filed by [Attorney "A"], and [Attorney "B"'s] own letter agreement, Attorney "B" is precluded from disputing that Attorney "A" was the attorney of record for any claim involving physical and emotional injuries."

On appeal, the First Department unanimously reversed the decision of the Supreme Court. In *Cabukyuk-sel v. Ascot Properties LLC*, 99 AD3d 405, 952 NYS2d 3 [1 Dept. 2012], the court held that Attorney "A" could not have a charging lien on the settlement proceeds in the action against the City and other contractors.

In reversing the decision, the First Department emphasized the language of the above statute which states, "from the commencement of an action...the at-

torney who appears for a party..." Attorney "A" could not have had a charging lien on the settlement proceeds under Judiciary Law §475 where she never commenced an action against Landlord and was, thus, never the attorney of record. Rather, the remedy available to Attorney "A" is a plenary action. See, e.g., *Rodriguez v. City of New York*, 66 NY2d 825, 498 NYS2d 351, 489 NE2d 238 [1985] [where the attorney's name "never appeared on any of the pleadings, motion papers, affidavits, briefs or record in plaintiff's action," "it is clear that [he] is not entitled to seek an attorney's lien under Judiciary Law §475 and must enforce such rights as he may have in a plenary action"]; see also *Weg and Myers v. Banesto Banking Corp.*, 175 AD2d 65, 66, 572 NYS2d 321 [1 Dept. 1991] [Judiciary Law §475 grants a charging lien to an attorney only when there has been an appearance by the attorney in the action]; *Max E. Greenberg, Cantor & Reiss v. State of New York*, 128 AD2d 939, 512 NYS2d 587 [3 Dept. 1987], *lv. denied* 70 NY2d 605, 519 NYS2d 1028, 513 NE2d 1308 [1987] (while the firm was the attorney of record in the state court action and provided legal services to a client for which it may be entitled to compensation, the firm was not entitled to a lien under Judiciary Law §475 for proceeds of a settlement in a federal court action, where it was not the attorney of record and not the firm which produced the settlement).

In this case, Attorney "A" is now free to commence a plenary action against the wife, husband, Attorney "B," and any other parties she believes may be liable to pay legal fees to her.

The important points to get from the *Cabukyuk-sel* case are, perhaps, three-fold: (1) explicit, detailed retainer agreements with clients about the nature and scope of legal services to be performed by the attorney should be used, envisioning situations that may seem murky; (2) attempting to keep informed of the client's overall strategy concerning a particular event or litigation (realizing that not everything can be known); and (3) understanding the extent to which an attorney's charging lien may or may not protect the attorney, depending on the claims asserted.

Endnote

1. Section 475 was recently amended to include alternative dispute resolution fora, including mediation and arbitration, as one of the proceedings to which an attorney's charging lien may apply.

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