NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

HANKIN COMMERCIAL CONSTRUCTION COMPANY, INC. T/A HANKIN COMMERCIAL CONSTRUCTION, LTD. T/A EAGLEVIEW COMMERCIAL CONSTRUCTION CO., Appellee v. EAGLE ICE ASSOCIATES, EAGLE ICE ASSOCIATES, INC., AS GENERAL PARTNER OF EAGLE ICE ASSOCIATES, L.P., AND SIANA, BELLWOAR & MCANDREW, LLP, Appeal of: Siana, Bellwoar & McAndrew, LLP, Claimant Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1815 EDA 2012

Appeal from the Order entered May 18, 2012,
in the Court of Common Pleas of Chester County,
Civil Division, at No(s): 2002-05694

BEFORE: GANTMAN, ALLEN, and OTT, JJ.

MEMORANDUM BY ALLEN, J.: Filed: April 9, 2013

Hankin Commercial Construction Company, Inc., et al., (collectively "Hankin"), sued Eagle Ice Associates and Eagle Ice Associates, Inc., ("Eagle Ice"), for breach of contract, and obtained a $2,061,716 judgment. The law firm of Siana, Bellwoar & McAndrew, LLP, ("Appellant"), instituted actions on behalf of Eagle Ice and two other plaintiff groups against, *inter alia,* Joseph Vaughan and Vaughan, Duffy & Connors, LLP, Eagle Ice's former counsel, ("the Vaughan Lawsuits"). The Vaughan Lawsuits culminated in a $450,000

settlement, to be divided equally among Eagle Ice and the two other plaintiff groups. Hankin sought to garnish Eagle Ice's $150,000 portion of the settlement. Appellant filed a statement of claim seeking an equitable attorney charging lien on Eagle Ice's $150,000 portion of the settlement. Appellant appeals from the trial court's order denying the statement of claim. We affirm.

The trial court summarized the factual background as follows:

> The action arises out of an almost 10 year old breach of contract case. This motion, while directly related to the litigation involving Hankin and [Eagle Ice], involves an offshoot of that matter in that [Appellant] agreed to pursue the Vaughan Lawsuits in order to secure a recovery for the Eagle Ice entities.
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> Accordingly, [Appellant] expected to be paid for the services provided to Eagle Ice. As Eagle Ice had a judgment in excess of $2 million pending against it, [Eagle Ice] alleges it had no money to pay [Appellant] for its services. As such, the parties entered into several instruments in order to secure payment of attorneys' fees for [Appellant]. These instruments included an "Open Ended Mortgage" in the amount of $150,000 and two "Open-ended Promissory Notes". The Mortgage and promissory notes are fairly clear in that [Appellant] sought to recover attorneys' fees incurred in pursuing the Vaughan Lawsuits on behalf of Eagle Ice entities by holding a mortgage against Eagle Ice and/or its real estate. [Appellant] then commenced with the lawsuits against Vaughan. When the Vaughan Lawsuits were eventually settled in 2007, after much legal wrangling including a lawsuit in Kansas, the insurance carrier for the Vaughan Defendants deposited $150,000.00 with the Prothonotary of Chester County. [Appellant] now files a statement of claim against the $150,000.00 in the amount of $117,512.73 for fees incurred in pursuing the Vaughan Lawsuits.

Trial Court Opinion, 5/18/12, at 1-2.

On May 18, 2012, the trial court denied Appellant's statement of claim. On June 15, 2012, Appellant appealed. Both the trial court and Appellant complied with Pa.R.A.P. 1925. On August 2, 2012, the trial court issued its opinion pursuant to Pa.R.A.P. 1925(a).

Appellant presents the following issues for our review:

> I. Did the lower court err when it failed to follow well-established law that compensates lawyers for their work in creating a settlement fund?
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> II. Did the lower court err in ignoring the evidence of an agreement that Appellant would be paid from the settlement funds it created for its client?
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> III. Did the lower court err where the lower court failed to provide for an award of any fees and failed to allow for the reimbursement of hard costs to Appellant, but instead awarded the entire fund created by the Appellant to a creditor of the Appellant's client?

Appellant's Brief at 4.

Appellant's issues relate to the trial court's exercise of its equitable powers, and therefore, we will not disturb the trial court's denial of Appellant's statement of claim absent a misapplication of the law or a clear abuse of discretion by the trial court. ***See Boatin v. Miller***, 955 A.2d 424, 427 (Pa. Super. 2007); ***see also In re Estate of Cherwinski,*** 856 A.2d 165, 167 (Pa. Super. 2004). An abuse of discretion exists where the trial court's determination overrides or misapplies the law, its judgment is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will. ***See Majczyk v. Oesch,*** 789 A.2d 717, 720 (Pa. Super. 2001).

Appellant contends:

> Despite the clear record that the elements for an attorney charging lien were met, the lower court denied [Appellant's] claim to its fees and reimbursement of costs. The lower court's ruling delivers the entire $150,000 to Hankin, a third party creditor who did nothing to generate the money.
>
> The lower court has ill-considered the evidence, misapplied the law and entered an inequitable result.

Appellant's Brief at 8. We disagree.

The trial court determined:

> It is clear from the long, involved litigation surrounding this issue, that [Appellant] [was] well aware of the financial status of their client, [Eagle Ice]. It is also clear from the facts that Hankin secured a writ of execution prior to any evidence of the "charging lien" asserted by [Appellant] in February 2007. Pursuant to *Recht v. Urban Redevelopment Authority of the City of Clairton*, 168 A.2d. 134, 402 Pa. 599 (Pa. 1961), an attorney has an equitable right to secure a lien upon funds made available through his or her efforts. *Id*. 168 A.2d at 136-37. However, *Recht* sets forth five criteria which must exist for a law firm to assert and succeed in a charging lien. The criteria are as follows:
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> > It must appear (1) that there is a fund in court or otherwise applicable for distribution on equitable principles, (2) that the services of the attorney operated substantially or primarily to secure the fund out of which he seeks to be paid, (3) that it was agreed that counsel look to the fund rather than the client for his compensation, (4) that the lien claimed is limited to costs, fees or other disbursement incurred in the litigation by which the fund was raised and (5) that there are equitable considerations which necessitate the recognition and application of the charging lien. (Emphasis Added). *Id*. at 138-39.
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> The record is clear that [Appellant], from the beginning, intended to secure a mortgage to get the fees it incurred in prosecuting the Vaughan Lawsuits. In addition, there was no

mention of securing fees from any settlement or award that might arise from the Vaughan Lawsuits until January 9, 2007, when [Appellant] referenced a charging lien.

In January 2007 and February 2007, Hankin filed Writs of Executions against Lentz Cantor & Massey, Ltd., Joseph E. Vaughan, Duffy Connors, LLP[,] and Westport Insurance Company as garnishees in an effort to collect against the $2 million plus judgment they held. As a result, any money payable to Eagle Ice as a result of the Vaughan Lawsuits was deemed attached. On February 26, 2007, the Eagle Ice entities and Vaughan parties entered into a settlement. Thereafter, Westport deposited $150,000.00 with the Prothonotary of Chester County.

A principal of [Appellant], Stephen V. Siana, Esquire, was not only a principal of the various Eagle Ice entities, but was the driving force behind those entities. From concept to disastrous conclusion, his fingerprints were everywhere. Unfortunately for the Eagle Ice entities, the Hankin entities had more staying power and persistence than the usual party to a failed transaction. The Hankin entities were <u>never</u> going to walk away from any opportunity to recover their judgment as the underlying litigation had morphed from a contract action into a contest of wills. Stephen V. Siana, Esquire, had complete awareness of the Eagle Ice entities' precarious financial situation both pre and post-breach. He knew that the Hankin entities were after every asset of Eagle Ice and, I believe, well knew that the sum of those assets, actual and potential, were less than the Hankin judgment. Certainly it was prudent of [Appellant] to attempt to secure its position as even hardcore stances sometimes change. This case is <u>not</u> one of the "sometimes" ones.

When I consider the equities of the parties' claims, they favor [Hankin]. [Hankin] entered into a relationship with the Eagle Ice entities and fully performed. It was unaware of the machinations going on between the investors and had no reason to anticipate that there would be litigation between them and their respective counsel. The Hankin entities took every step available to secure their judgment and ought not now be denied a recovery otherwise attainable by a fee agreement entered into by a principal of the Eagle Ice entities and the law firm representing them. In reaching this equitable result, I have considered the fact that [Appellant] has received in excess of $261,943.00 in attorneys' fees, plus additional costs from the

> settlements secured by the other plaintiffs involved in the Vaughan Lawsuits, ie, Warwick Ice entities and PowerPlay Rinks.

Trial Court Opinion, 5/18/12, at 2-4.

In a subsequent opinion, the trial court added:

> Further, … [Appellant's] contention that the charging lien was established on January 7, 2007, is simply not supported by the record. In the January 7, 2007 letter, [Appellant] makes reference to a previous understanding regarding a charging lien. The only evidence of an established charging lien was in the settlement documents dated February 26, 2007. Hankin filed writs of executions against the various entities involved in the Vaughan lawsuits in September 2006, January 2007 and February 2007. Further, and perhaps more importantly, Hankin filed the praecipe to enter judgment against Eagle Ice on December 27, 2004. Therefore, the judgment existed prior to any charging lien referenced by [Appellant]. In reviewing the criteria set forth in *Recht*, I also consider *Shenango v. Microsystems*, 887 A.2d 772 (Pa. Super. 2006). While not identical to the facts at hand, I found *Shenango* instructional. As of December 27, 2004, Hankin had already secured a judgment against Eagle Ice. This judgment predated the alleged charging lien by at least two years. The amount of the judgment was in excess of $2,000,000.00, far more than the settlement amount deposited with the prothonotary. Therefore, pursuant to *Shenango*, there was no fund from which to secure attorneys fees, since the amount was already claimed by Hankin when it filed its judgment in December 2004.

Trial Court Opinion, 8/2/12, at 3-4. Our careful review of the record supports the trial court's analysis and denial of Appellant's statement of claim.

The record confirms the interrelationship between Appellant, Eagle Ice, and the other plaintiff groups involved in the Vaughan Lawsuits. Appellant admitted that Attorney Siana was "the President of [Eagle Ice]…[and]

[Appellant's] Executive Partner…" Appellant's Brief in Support of its Statement of Claim, 7/21/11, Exhibit C - Affidavit of Stephen V. Siana, 6/15/11, at 1. Appellant does not dispute that Attorney Siana served as "president and 25% owner of Eagle Ice…president and a 50% owner of PowerPlay Rinks, Inc.,...[and] president and partial owner of Warwick Ice Associates and…of Warwick Ice Associates, Inc.,…co-plaintiff[s] in the Vaughan Lawsuits." Hankin's Brief at 6 (citations to the record omitted).

The record supports the trial court's determination that "[Appellant] did not provide ANY proof that when they initiated the suits against the Vaughan defendants, [Appellant's] intention was to secure payment from whatever funds they were able to obtain." Trial Court Opinion, 8/2/12, at 3. On March 2, 2005, Attorney Siana was deposed "in aid of execution" of the Hankin judgment. Deposition of Stephen Siana, Esquire, N.T., 3/2/05, at 3. Attorney Siana conceded that Appellant would continue prosecuting the Vaughan Lawsuits "without payment" despite it being an "unfortunate situation" necessitated by Appellant "attempting to do its best to satisfy obligations, both professional and otherwise, to [the plaintiffs of the Vaughan Lawsuits]." *Id.* at 80. Attorney Siana testified that "[t]he [open-ended] mortgage [and the promissory] note [from Eagle Ice] was executed to provide [Appellant] **with some assurance of payment and in order to secure that promise for repayment** given the fact that [Appellant] has continued to carry on the litigation notwithstanding the inability of Eagle Ice to pay." *Id.* at 78 (emphasis supplied).

Attorney Siana testified that prior to the trial of the underlying Hankin action against Eagle Ice, Appellant informed Hankin's counsel that:

> Eagle Ice was not going to be able to satisfy any judgment that [Hankin] obtained and we offered to resolve and even give a consent judgment to [Hankin] so [Hankin] would not have to incur the costs associated with that litigation, and that was declined. We stand in no better position. We stand in a worse position today. **Eagle Ice has more accrued fees which may be evidence by – or the obligation to pay those fees may be evidenced by notes. Whether those notes will ever turn into anything is another question**. **And when you asked me do I see any potential for [Hankin's] judgment to be satisfied, the only place that that would come from would be a recovery under the [Vaughan] lawsuits that are pending**.

Id. at 83 (emphasis supplied).

On July 18, 2006, Attorney Siana was deposed again in aid of the execution of the Hankin judgment. *See* Deposition of Stephen Siana, Esquire, N.T., 7/18/06, at 4. Attorney Siana testified that "in the event the [Vaughan Lawsuits] reach[ed] a verdict or settle[d] for…only three or $400,000…," Attorney Siana **"d[id] not know" how "that money would be apportioned**[.]" *Id.* at 17-18 (emphasis supplied). Attorney Siana was questioned concerning "the priority of obligations of Eagle Ice vis-à-vis creditors such as [Hankin]" regarding the apportionment of any proceeds from the Vaughan litigation. *Id.* Attorney Siana answered that he did not "know off-hand." *Id.* He further testified, "I know that [Hankin] has a judgment. I don't know what other obligations are out there." *Id.* at 18. Attorney Siana did not testify that the proceeds were subject to a

contingency fee agreement between Eagle Ice and Appellant, despite Attorney Siana's testimony that "there's significant monies owed to the law firm…" *Id.*

Our review of the record confirms the trial court's assessment that "[i]t appears that the charging lien was an afterthought as the potential settlement [of the Vaughan Lawsuits] loomed." Trial Court Opinion, 8/2/12, at 3. The Vaughan Lawsuits were settled on February 26, 2007. *See* Settlement Agreement, 2/26/07, at 1. Appellant's corporate designee, Andrew Bellwoar, testified that he sent a letter to the Eagle Ice entities on January 9, 2007 to "inform" the clients of the upcoming settlement negotiations, and to "confirm that [Appellant] would look to any moneys [sic] that were gained in settlement to pay the fees…that had accumulated to date [in Appellant's handling of the Vaughan Lawsuits]." Deposition of Andrew Bellwoar, Esquire, N.T., 12/9/10, at 16-17. However, Attorney Bellwoar indicated that he was "not aware of any" document "confirming any type of engagement or fee agreement **prior** to the letter…dated January 9, 2007[.]" *Id.* at 20 (emphasis supplied). Attorney Bellwoar conceded that Appellant did not have "any notes, any memoranda, [or] writing that would memorialize that first conversation between [Appellant] and the clients" concerning the fee arrangement referenced in the January 9, 2007 letter, nor could he "think of any" conversations regarding the foregoing arrangement between Appellant and Eagle Ice that were reduced to writing. *Id.* at 24. Attorney Bellwoar could not "tell" or "recount …any of the

conversations" regarding the "specific terms…percents [that] would be paid as in a contingent case" for Appellant's handling of the Vaughan Lawsuits. *Id.* at 25.

Our review of the record also supports the trial court's determination that "the equities of the parties' claims …favor [Hankin]…[when the trial court] considered the fact that [Appellant] has received in excess of $261,943.00 in attorneys' fees, plus additional costs from the settlements secured by the other plaintiffs involved in the Vaughan Lawsuits…" Trial Court Opinion, 5/18/12, at 4. Attorney Bellwoar agreed that there was only "one billing file created" for Appellant's handling of the Vaughan Lawsuits on behalf of the "three clients." *Id.* at 44. Attorney Bellwoar acknowledged that Appellant's work on the Vaughan Lawsuits "was…an unified presentation of [the] case on behalf of [the three] clients[.]" *Id.* at 45. He noted "just the fact that we did not file three separate causes of action, three separate complaints, leads me to believe there was a unified approach by the sets of plaintiffs, and thus, a unified approach by our firm." *Id.* He was "not aware of" any work that was done on behalf of one client that was not done on behalf of all three during the course of the Vaughan litigation." *Id.*

Given all of the foregoing, we find no trial court error of law or abuse of discretion, and affirm the trial court's denial of Appellant's statement of claim. ***See Shenango v. Microsystems,*** 887 A.2d 772 (Pa. Super. 2006) (where monies were already subject to prior lien from judgment creditor no fund was created to which attorney charging lien could be attached); ***see***

also Recht, 168 A.2d 134 (Pa. 1961); ***Turtle Creek Bank & Trust Co. v. Murdock,*** 28 A.2d 320 (Pa. Super. 1942) (the payment of an attorney charging lien will be honored provided that "payment thereof does not unduly interfere with established procedure or the rights thereof of the third party" and considering "factual matters").

Order affirmed.