

[Cite as *Devis v. Pineview Court Condominium Assn.*, 2015-Ohio-2704.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102147

JERRY L. DEVIS, ET AL.

PLAINTIFFS-APPELLEES

vs.

**PINEVIEW COURT CONDOMINIUM ASSOCIATION,
ET AL.**

DEFENDANTS

[Appeal By Eugene I. Selker and
Selker & Associates]

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-08-646202

BEFORE: E.T. Gallagher, J., Keough, P.J., and Boyle, J.

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EILEEN T. GALLAGHER, J.:

{¶1} Appellants, Eugene I. Selker and Selker & Associates (collectively “Selker”), appeal the denial of their motion to intervene to enforce their attorney charging lien against their former clients, appellees Jerry Devis and Michael Duvall (collectively “appellees”). Selker assigns the following two errors for our review:

1. The trial court erred by denying appellant’s motion to intervene to assert an attorney’s charging lien on a settlement award to his former client, which award resulted from the services of appellant.
2. The trial court erred in denying appellant an opportunity for an evidentiary hearing on whether the claim for an attorney’s charging lien was appropriate as a matter of right, and if so what was the amount of the attorney fee secured thereby.

{¶2} We find merit to the appeal, reverse the trial court’s judgment, and remand the case to the trial court for a hearing on Selker’s charging lien.

I. Facts and Procedural History

{¶3} Selker represented appellees in a lawsuit seeking recovery from defendants Pineview Court Condominium Association, its officers, and various contractors (collectively “Pineview”) for their alleged failure to properly repair and maintain appellees’ condominiums. Throughout years of litigation, appellees were represented by six different lawyers, who either withdrew or were terminated by appellees.

{¶4} Appellees hired Selker two months before trial, and Selker spent considerable time studying the case that had, by that time, been pending for several years. Selker

attended a settlement conference approximately one month before the trial date where Pineview agreed to pay appellees \$600,000 in consideration for appellees' full release and title transfer of their condominium units to Pineview. The parties filed a "Stipulation of Dismissal and Journal Entry" that indicated the parties had reached a settlement agreement, and that a more detailed dismissal entry would be forthcoming. Selker also negotiated a settlement with various contractors, who agreed to pay appellees \$105,000.

{¶5} The parties subsequently contested the terms of the settlement agreement, and the court held attorney conferences to resolve the dispute. Despite Selker's work and the fact that appellees signed off on the settlement agreement, appellees discharged Selker and refused to pay his attorney fees. Consequently, Selker filed a motion to intervene to assert an attorney charging lien against the settlement funds. The trial court denied the motion, and Selker now appeals from that judgment.

II. Law and Analysis

{¶6} In the first assignment of error, Selker argues the trial court erred in denying his motion to intervene to assert his charging lien. In the second assignment of error, Selker argues the trial court erred in denying his motion to intervene without a hearing. We discuss these assigned errors together because they are interrelated.¹

¹ Appellees' brief fails to comply with App.R. 16(A) and 16(B). Instead of responding to Selker's assignments of error with legal authorities, appellees assert that Selker's claim is moot because he can file a counterclaim in the legal malpractice case against him for his attorney fees. Appellees attached a copy of the malpractice complaint to their appellee brief. We cannot consider this evidence from outside the record. *State ex rel. Brantley v. Ghee*, 80 Ohio St.3d 287, 288, 685 N.E.2d 1243 (1997). For the reasons set forth in this opinion, Selker's claim is not moot.

{¶7} A charging lien in favor of an attorney is an equitable lien on the judgment or other proceeds awarded to a client to secure the attorney's fees for the work he or she performed to obtain the judgment for the client. It has been described as "a device to protect counsel against 'the knavery of his client,' whereby through his effort, the attorney acquires an interest in the client's cause of action." *In re City of New York*, 5 N.Y.2d 300, 307, 157 N.E.2d 587 (1959). In the seminal case of *Cohen v. Goldberger*, 109 Ohio St. 22, 141 N.E. 656 (1923), paragraph one of the syllabus, the Ohio Supreme Court explained:

[T]he right of an attorney to payment of fees earned in the prosecution of litigation to judgment, though usually denominated a lien, rests on the equity of such attorney to be paid out of the judgment by him obtained, and is upheld on the theory that his services and skill created the fund.

{¶8} As previously stated, Selker filed a motion to intervene pursuant to Civ.R. 24(A) to assert his charging lien. Regardless of whether a party pursues intervention as of right under Civ.R. 24(A) or permissive intervention under Civ.R. 24(B), the party must comply with the procedural requirements of Civ.R. 24(C). *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995). Civ.R. 24(C) outlines the procedures to be followed by applicants wishing to intervene in actions, and states:

A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention *and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought.*

(Emphasis added.)

{¶9} Selker filed his motion to intervene with a memorandum in support, but failed to include a pleading with the motion. Therefore, Selker's motion to intervene failed to comply with the mandatory requirements of Civ.R. 24(C). Nevertheless, the defects in Selker's motion to intervene are not fatal to his right to assert his charging lien on the settlement funds because the pursuit of charging liens by intervention is merely one "alternative procedural option." *First Bank of Marietta v. Roslovic & Partners, Inc.*, 10th Dist. Franklin Nos. 03AP-332 and 03AP-333, 2004-Ohio-2717, ¶ 44.

{¶10} An attorney may pursue a charging lien on a final judgment as long as the attorney gives timely notice to the client-debtor of his interest therein. *Cuyahoga Cty. Bd. of Commrs. v. Maloof*, 197 Ohio App.3d 712, 2012-Ohio-470, 968 N.E.2d 602, ¶ 18 (8th Dist.). Moreover, where an attorney files a motion to enforce an attorney charging lien on a final judgment, the trial court in which the judgment was rendered *must* entertain the attorney's motion. *Fire Protection Resources, Inc. v. Johnson Fire Protection Co.*, 72 Ohio App.3d 205, 211, 594 N.E.2d 146 (6th Dist.1991).

{¶11} Selker's motion to intervene put appellees on notice of his interest in the settlement funds. *Maloof* at ¶ 22. Appellees retained Selker shortly before trial, and Selker spent hours reviewing the file, which had been pending for several years. Selker also represented appellees at several court appearances and was instrumental in procuring a settlement totaling \$705,000 for appellees. Therefore, Selker meets all the requirements for prosecuting a charging lien under *Cohen*, 109 Ohio St. 22, 141 N.E. 656,

and the trial court should have provided Selker an opportunity to demonstrate the extent to which his efforts helped produce the settlement funds. *Maloof* at ¶ 24.

{¶12} The first assignment of error is overruled and the second assignment of error is sustained.

III. Conclusion

{¶13} The trial court erred in failing to hold a hearing on Selker's charging lien where the record demonstrates appellees had notice of his interest in the settlement fund Selker procured on appellees' behalf.

{¶14} The trial court's judgment is reversed, and the case is remanded to the trial court for a hearing on Selker's charging lien.

It is ordered that appellants recover from appellees costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
MARY J. BOYLE, J., CONCUR