**CITATION:** *Tat v. Doe, et al.*, 2024 ONSC 7172
**COURT FILE NO.:** CV-08-00369500-0000
**DATE:** 20241220

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| LAC TAT | ) | *P. Michael Rotondo* and Rotondo Law Firm Professional Corporation, former Lawyers of Record for the Plaintiff (Moving Parties) |
| Plaintiff | ) | |
| **– and –** | ) | |
| | ) | |
| JOHN DOE, VAN VU NGUYEN AND THUS HONG CHAU and ING INSURANCE COMPANY OF CANADA also known as INTACT INSURANCE | ) | *Laura Castellucci*, for, Van Vu Nguyen and Thus Hong Chau, the Defendants (Responding Parties) |
| Defendants | ) | |
| | ) | |
| | ) | **HEARD: December 18, 2024** |

**C. STEVENSON J.**

## REASONS FOR DECISION

### Introduction

[1] This motion is brought by a non-party, a law firm which used to act for the plaintiff in his personal injury claim against the defendants. The law firm wants to enforce a charging order dated February 22, 2017 against the proceeds of settlement of the plaintiff's claim. Those proceeds have already been paid by the defendants, without holdback, to the plaintiff even though the defendants had been served with the charging order. The main issue is whether this was appropriate based on the wording of the order, which says that the lawyer's charge or lien is *subject to* the plaintiff's agreement or assessment. The secondary issue is the remedy.

## Background

[2] The Plaintiff, Lac Tat ("Mr. Tat"), retained the moving party law firm, Rotondo Law Firm Professional Corporation and Michael Rotondo (RLF) on a contingency fee basis as a result of injuries he sustained in a motor vehicle accident that occurred on February 13, 2008.

[3] RLF commenced this action on December 30, 2008, initially naming the Defendants Nguyen and Chau, and John Doe as Defendants. The "John Doe" and other aspects of the amended claim were resolved and are not relevant on this motion.

[4] The action against the Defendants Nguyen and Chau was defended through a policy of insurance issued by Wawanesa Insurance Company which retained the law firm of Bell Temple LLP ("Defence Counsel"). A statement of defence was delivered on September 14, 2009.

[5] Examinations for discovery were completed and the action was set down for trial. Numerous experts were retained at RLF's expense. RLF attended various motions and prepared for a 10-day jury trial scheduled to proceed from September 28 to October 8, 2015, but which was adjourned.

[6] At that stage there was a breakdown of the lawyer and client relationship. RLF's motion to be removed as lawyers of record was granted by Order dated November 10, 2016.

[7] On a motion brought by RLF on notice to the Defendants Nguyen and Chau and to Mr. Tat, Master Muir granted the Charging Order, which is the subject of this motion, on February 22, 2017 pursuant to section 34 of the *Solicitors Act.*

[8] Paragraph 1 of the Charging Order states:

> **1. THIS COURT ORDERS** that P. Michael Rotondo and Rotondo Law Firm Professional Corporation are entitled to a charge for reimbursement for disbursements incurred to the date of any settlement, damage award, funds or judgment recovered by the Plaintiff through the within action, as well as on any deposits paid by the Defendants / Third Party to the Plaintiff for disbursements charged and incurred in the amount of $49,496.33, *subject to the agreement of the Plaintiff or assessment*. (Italics added)

[9] The disbursements are particularized in RLF's statement of account dated November 24, 2016. They are expenses paid on Mr. Tat's behalf, as well as accounts of experts that RLF agreed to protect from the proceeds of settlement or judgment, some of which have been paid by RLF, while others are outstanding and payable.

[10] On February 28, 2017, a copy of the Charging Order was served on Defence Counsel and Mr. Tat and filed with the Court.

[11] Earlier, on December 16, 2016, Mr. Tat had served a Notice of Intention to Act in Person and he continued to be self-represented as of the date this action was settled by him directly with the Defence Counsel (the latter acting on instructions from the insurer) in late 2017.

[12] After asking Defence Counsel about the status of this action, RLF learned for the first time on June 26, 2024 that the action had settled in 2017. Defence Counsel took the position that the Charging Order was not binding upon them or the defendants, Nguyen and Chau.

[13] The defendants admit that the action was settled on a full and final basis on October 19, 2017, and that a dismissal Order was taken out the following day.

[14] Thus, the settlement was completed within one year of RLF's Statement of Account, dated November 24, 2016, and eight months after the Charging Order was granted on February 22, 2017.

[15] At the return of this motion, I ordered the defendants to disclose how much they had paid the plaintiff in 2017 to settle the action. This amount was somewhat more than $100,000. The defendants say they paid these monies directly to the plaintiff, without holdback, in reliance on his advice to them that he would deal directly with RLF on the issue of the outstanding disbursements.

**The Issue**

[16] The issue on this motion is whether the Charging Order has been breached and if so, what remedies are available to RLF?

[17] It is the defendants' position that the Charging Order did not impose any obligation on them (as opposed to on the plaintiff) because it expressly states it is "*subject to the agreement of the Plaintiff or assessment"*.

[18] The moving party does not suggest there was any collusion between the defendants and the plaintiff to avoid paying RLF.

[19] The defendants do not suggest that the RLF disbursements were incurred for any purpose other than advancing the plaintiff's claim, although they say they do not know if the full quantum claimed is appropriate. The defendants maintain that both the questions of entitlement and quantum were to be determined solely between Mr. Tat and RLF.

**The Nature of a Charging Order**

[20] The Ontario Court of Appeal in *Weenen v. Biadi,* 2018 ONCA 288 (CanLII) at para. 16 described a charging order as a codification of the court's inherent jurisdiction to grant a "lien on the proceeds of judgment where there appears to be good reason to believe that the solicitor would otherwise be deprived of his or her costs".

[21] This statutory lien not only protects lawyers' accounts but facilitates access to justice by enabling clients to switch lawyers without having to pre-pay the account of the former lawyer.

[22] As illustrated in the 1915 Ontario Supreme Court decision of *Dicarllo v. McLean,* 1915 CanLII 1047 (ONSC) it has long been held that an opposing party who has notice of a lawyer's lien for payment over the proceeds of litigation will be held liable to the lien-holding lawyer. The Court held:

> "If a solicitor has a lien upon the proceeds of litigation for his costs, and gives notice of that lien to the opposite party, and after such notice money is paid over to the client, the Court will in general, on motion, compel the party paying to pay the solicitor's costs. As put by Richards, J., in *Brown v. Conant* (1856), 2 P.R. 208, 211: "It is like paying a debt that has been assigned after notice. It is the notice which creates the right." In all cases falling within this class, the plaintiff's position as *dominos litus* is fully recognised, and the amount which the plaintiff has agreed to accept limits the defendant's liability".

[23] Thus, even in the absence of collusion (a different type of case and one which is not in issue here), an opposing party who transfers funds that are subject to a lawyer's lien will be liable to the lien-holding lawyer limited to the amount of the settlement or judgment, which is to be determined by way of a motion. The Court highlighted that it "is the notice which creates the right." Notice was given in this case.

[24] *Dicarllo* has been cited in the Court of Appeal in *Gardiner Miller Arnold LLP v. Kymbo International Inc*., 2007 ONCA 648 (CanLII), at paras. 23 to 25, although that was a collusion case. See also the reference, again *obiter*, in *Garfin v. Mirkopoulos* 2009 ONCA 421 at para. 29.

**Analysis**

[25] In this case, the defendants, Nguyen and Chau were aware of the Charging Order. Master Muir's Order recites that the defendants were served with the motion materials but did not appear at the motion. In addition, under cover of correspondence dated February 28, 2017, they were served with the Charging Order.

[26] The defendants acknowledge that a charging order grants lien rights but argue that the ambit of those rights depends on the express terms of the Order. In this case they say the broad reach of a common or garden variety lien have been limited significantly by the last line in the Order, italicized below for clarity.

[27] Again, paragraph 1 of the Charging Order states:

> **1. THIS COURT ORDERS** that P. Michael Rotondo and Rotondo Law Firm Professional Corporation are entitled to a charge for reimbursement for disbursements incurred to the date of any settlement, damage award, funds or judgment recovered by the Plaintiff through the within action, as well as on any deposits paid by the Defendants / Third Party to the Plaintiff for disbursements charged and incurred in the amount of $49,496.33, *subject to the agreement of the Plaintiff or assessment*. (Italics added)

[28] I do not accept the defendants' interpretation of paragraph 1 of the Order. The addition of the proviso "subject to the agreement of the Plaintiff or assessment" did not create a lien which only applied to Mr. Tat or which was meaningless until the quantum had been agreed or assessed.

[29] The proper interpretation is that this Order imposed a lien against the proceeds of trial or settlement forthwith. The lien protects an amount up to but no more than $49,496.33. The proviso in the Order acknowledged Mr. Tat's wish to dispute or challenge the quantum of the lawyer's account by way of negotiation or an assessment. The existence of the lien is not, however, conditional upon Mr. Tat's agreement or upon an assessment of RLF's disbursements account. The phrase starting, "subject to…" meant that the maximum amount secured by the lien, $49,496.33, may later be reduced on consent or by assessment, but it does not negate the creation of the lien for the maximum amount on the date of the Order.

[30] The defendants say that Master Muir provided no "directives, instructions, obligations, suggestion or rights to the Defendants in respect of the settlement process, including the distribution of settlement funds". This is true in the sense that Master Muir did not order that there had to be an assessment, even though subsection 34(3) expressly provides that the court "may order" an assessment, and that payment be made from the charged property. It was open to either Mr. Tat or RLF to initiate an assessment but the lien was in full force and effect from the date of the Order.

[31] A plaintiff's solicitor has an unqualified lien against the proceeds of litigation. There is no need to discuss here the distinctions between a charging lien and a statutory lien. See *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming* 2012 ONSC 2182 at paras. 88-90. More importantly for present purposes, this is not a case where a condition had to be satisfied before the lien or Charging Order comes into effect.

[32] There was no requirement, nor indeed any practical reason, for the lawyer to initiate an assessment, or sue, given that he reasonably understood his account was protected while Mr. Tat either retained new counsel or, as he did, proceeded self-represented. RLF did not know if or when the action might settle. RLF was not the lawyer of record and had no notice of the actual settlement.

[33] As of the date of the settlement RLF's disbursements account could have been assessed by Mr. Tat or RLF by obtaining a reference for an assessment with special circumstances within the one-year post-account period, as provided by section 4(1) of the *Solicitors Act*. An assessment would not have been a complicated matter given that this lien protected only an account for disbursements and did not attempt to secure any fee for all the services rendered by RLF leading up to the settlement. The assessment of RLF's disbursement account would not have entailed an examination of time or rates. The account is supported by documentary proof that the expenses were incurred for the sole purpose of advancing Mr. Tat's interests in the underlying action.

[34] In the meantime, the lien should have been respected and protected by notifying RLF of the settlement and retaining settlement funds to allow for the account to be discussed with Mr. Tat and, if required, to be assessed.

[35] The settlement in 2017 was facilitated, undoubtedly, both by RLF's work and advice, and the experts' reports produced at RLF's expense.

[36] It was not up to RLF to obtain an Order for the defendants to pay the settlement funds into court, as suggested now by the defendants. RLF already had the protection of the charging order.

[37] The defendants submit that, without a court Order providing some such direction, "restricting access to the Plaintiff's funds would have constituted an unlawful act, including, but not limited to, the tort of conversion". The defendants say they did not have any right to unilaterally dictate the use of the funds. This is not the correct perspective. The defendants were not depriving the plaintiff of anything to which he was automatically entitled. The defendants could have brought an interpleader motion and paid the disputed sum into court, as discussed in *Will Davidson LLP v. Sztogryn* 2018 ONSC 1243; *Morse Shannon LLP v. Fancy Barristers P.C.*, 2016 ONSC 3950 at para. 50; affirmed 2017 ONCA 82.

[38] The defendants, with full knowledge of the charging order, negotiated a settlement with the plaintiff and agreed to pay him an amount which the defendants considered to be a reasonable sum for them to pay (around $100,000). In doing so they relied on Mr. Tat's assurance that he would respect the Charging Order and deal with RLF's outstanding account. This was naïve at best. The settlement dynamics were obvious. The parties must have considered that settlement was occurring at this settlement number even though someone with an interest in the outcome (RLF) was not participating in the settlement discussion, and, more importantly, the court order which RLF had obtained to protect its interest was not being respected.

[39] It is true, as the defendants say, that Mr. Tat is subject to this charging order. But so too are the defendants. Mr. Tat and the defendants have breached the Order. RLF is entitled to have that order enforced or to damages for breach of the Order. *Prima facie* the amount is $49,496.33 but I accept that Mr. Tat and the defendants may challenge that amount.

[40] An assessment hearing would, however, be disproportionate and inappropriate at this late stage. Rule 1.02(1) and 1.04 (1), (1.1) and (2) are applicable.

[41] RLF is directed to provide Mr. Tat and the defendants, within 30 days, a copy of the materials RFL relies on to support its outstanding disbursement account. The parties shall then have a settlement meeting (by zoom is acceptable) within another 14 days. If the matter is not resolved at that stage, either of Mr. Tat or the defendants may then submit up to three pages of written submissions to my judicial assistant stating their objections to the account. RLF shall then have 7 days to make its written submissions (three pages) in response. I will then determine the appropriate quantum. That will be the amount payable, whether described as damages or the "*in rem*" amount payable from the settlement proceeds pursuant to the charging order (i.e., a property right; *Fancy Barristers LLP v. Morse Shannon LLP* 2017 ONCA 82 at para. 9).

[42] This sum is payable jointly and severally by the plaintiff and the defendants.

[43] RLF waited seven years before pursuing this matter. I appreciate that a charging lien is not subject to any time limit (*Will Davidson LLP supra* at para. 2) but in the circumstances, I do not award pre-judgment interest.

[44] RLF is, however, entitled to its costs of this motion. The parties shall try and settle costs as part of the process set out above for determining the amount owed. If they cannot agree, the parties may also submit two written pages plus a costs outline in support of their position on costs.

Digitally signed by Colin Stevenson
Date: 2024.12.20 12:13:53 -05'00'

Justice C. Stevenson

Released: December 20, 2024

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Plaintiff

**– and –**

JOHN DOE, VAN VU NGUYEN AND THUS HONG CHAU and ING INSURANCE COMPANY OF CANADA also known as INTACT INSURANCE

Defendants

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**REASONS FOR JUDGMENT**

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C. STEVENSON J.

**Released: December 20, 2024**