2010 WL 10900488 (N.J.Super.L.) (Trial Order)
Superior Court of New Jersey, Law Division.
Essex County

SELECT PORTFOLIO SERVICING, INC.,
v.
Lavonne WILEY, et al.

No. ESXL200909.
August 27, 2010.

Letter Opinion

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Thomas R. Vena, Judge.

***1** Dear Counselors,

This matter arises out of a dispute over funds created from a building damage claim made against an insurer after a fire on the subject property. At all times relevant to the action, Defendant NJIUA issued a property insurance covering the Insured's/ Wiley's property located at 188 Vermont Avenue, Newark, New Jersey. Defendant, Wiley is the mortgagor of this property. Defendant Wiley gave the Plaintiff/**Mortgagee**, Select Portfolio, a mortgage on this property to secure a note. In or about September 2007, the subject property suffered a fire loss.

In or about September 27, 2007, Wiley entered into a written fee agreement with Miller for the purpose of preparing the damages claim to the property. The insured/mortgagor, Wiley agreed that in exchange for services rendered, his insurance **adjuster**, M. Miller & Son, LLC (hereinafter referred to as "Miller") would receive a predetermined **contingent** fee - 10% of any settled recovery, from the insurance company - from a specified fund to be created out of the dispute with Wiley's insurer, the New Jersey Insurance Underwriting Association ("NJIUA").

As part of the services Miller rendered to settle the Wiley building damages claim, Miller asserts that it set up an intake file, reported the claim to the insurer, conducted numerous telephonic conferences with the NJIUA adjuster, including setting up on-site meetings to conduct a walk-through inspection of the building, hired a building contractor to estimate the building damage and its replacement cost value with "materials of like kind and quality," Miller hired a contractor to board-up the building twice to secure it. Finally, Miller negotiated an actual cash value settlement with the insurance company representative in the amount of $227,889.62. Miller prepared final settlement documents required by the carrier and under the terms of the insurance policy as a condition of issuing payment. Miller secured tax search by municipal liens required by the insurance carrier and submitted same for final payment. The funds thereafter came into being.

Miller asserts that the Plaintiff **mortgagee** did not pursue recovery of the insurance claim independently by engaging expert appraisers or building contractors to establish the extent of the damage and the amount of the loss. The Plaintiff, according to Miller, did not secure and protect the property, nor did it submit the required statements for proof of loss. Miller contends that Plaintiff did not engage its own independent adjusters to conduct walkthrough inspection, evaluate the loss and submit a claim for purposes of adjustment and settlement. Said tasks were required by the insurance policy in order to submit a claim for damages.

Miller asserts that it has an equitable lien against that fund for the amount due under the agreement. It also asserts that since the lien is based upon services attendant to the creation of the fund, Miller is entitled to a priority over all creditors, judgment or otherwise, in those proceeds. Based on this, Miller moves for summary judgment to enforce this priority lien.

Summary Judgment Framework

***2** Motions for summary judgment are governed by *Rule* 4:46-2, which requires a court to grant summary judgment upon a moving party's showing "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to judgment or order as a matter of law." In *Brill v. Guardian Life Insurance*, 142 N.J. 520 (1995), the New Jersey Supreme Court propounded the standard for granting summary judgment under *R* 4:46-2, holding that the judge must consider,

"whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party." The burden is placed on the movant to exclude any reasonable doubt as to the existence of any genuine issue of material facts and all inferences of doubt are drawn against the moving party in favor of the opponent. *Heller v. Hartz Mountain Industries*, 270 N.J. Super. 143, 149 (Law Div. 1993).

Priority Lien

New Jersey Courts have recognized that one who provides services which are directed to the creation of a fund is to be compensated from that fund before any other claimant can derive any benefit from its efforts. *In Re. Hoffman*, 63 N.J. Super. 69. (1973); *Hedeebeth v. Medford*, 74 N.J; 360, 368-370 (1977). In *First Federal Savings & Loan Association v. Nieder*, 163 N J. Super. 308 (App. Div. 1987) the Appellate Division described what before it was an appeal which posed a

> [r]elatively narrow question regarding the respective rights to a fund in court among the insured mortgagor [Nieder], her attorney and the **mortgagee** [First Federal]. The trial judge held that the fund was first subject to an attorney's lien and that the balance thereof was payable to the **mortgagee**.

Id. at 310. While *Nieder* applied the principle of equitable liens in recognition of the services of an attorney, the principles enunciated there are applicable to other professionals, such as accountants, *In re Hoffman*, 63 N.J. 69 (1973), and licensed public insurance **adjusters** whose fees are **contingent** upon the recovery of insurance proceeds, *In Re Alston*, 322 B.R. 265 (D.N.J. Bnkr. 2005)(where on insured and **adjuster** agree that the **adjuster's** fee would be paid from the fire insurance proceeds and the **adjuster's** efforts created the funds of the insurance proceeds, the **adjuster's** equitable lien on the proceeds of the fire insurance policy must be satisfied first before the **mortgagee** can claim any of it).

In *Nieder*, the Appellate Division affirmed the trial court's holding and held that the fund was first subject to an attorney's lien and accorded priority over the pay down of the mortgage, reasoning that:
With respect to First Federal's [**mortgagee's**] appeal from that portion of the order subordinating its rights to the attorney's lien, we are satisfied that result under these circumstances was dictated by the reasoning of the Supreme Court in *Hedeebeth v. Medford*, 74 N.J. 360, 368-370 (197.7). *See Klacik v. Kovacs*, 111 N.J. Super. 307 (App. Div.), cert. den. 57 N.J. 237 (1970).

In the factual complex here presented it would be unconscionable to permit First Federal [the **mortgagee**] to take the fund without bearing the legal expense incurred in creating it.

First Federal Savings & Loan Association v. Nieder, 163 N.J. at 313.

Select Portfolio argues that Miller's reliance on *In re Alston* and other caselaw is misplaced. According to Select Portfolio, the Alston court limited its decision to cases in which the **mortgagee** had only a derivative right of recovery…instead of an independent right as a named insured **mortgagee**. For this assertion, Select Portfolio points to footnote 4 in the *Alston* opinion, which states,
This opinion is "limited to the facts of this case, since a different result might be reached if the **mortgagee** had been named on the insurance policy. See *Public Adjustment Bureau Inc. v. Bankers Federal Savings & Loan Assoc*., 83 Misc2d 317, 371 N.U.S.2d 347 (Civil Ct. 1975), aff'd 61 A.D.2d. 930, 403 N.Y.S.2d 19 (App.Div. 1987) (standard mortgage clause creates an independent insurance of **mortgagee's** interest without "inconsistent or repugnant conditions imposed by the policy upon the owner of the insured property"). *See also Stanziale v. Finova Capital Corp. (In re Tower Air. Inc.)*, 397 F.3d 191 (3d Cir. 2005).

***3** First, the *Alston* decision is not binding on this Court. Second, while the footnote limits the decision to those facts, it merely suggests in dicta that a result may be different when the **mortgagee** has an independent right and does not preclude a finding that the result would be the same. Furthermore, the footnote cites to a New York decision, *Public Adjustment Bureau*, in which the holding did not turn on whether the adjuster had an equitable lien, but whether the adjuster had a cognizable cause of action for breach of contract or quantum meruit against the **mortgagee**.

Hedgebeth, the case *Nieder* found controlling, also involved a similar question of priority, namely whether under the statutory scheme governing the disposition of a tort claim on behalf of a Medicaid recipient which gave the State a lien on such recovery, the State could be compelled to contribute its pro rata share of the counsel fees out of the amount it was otherwise entitled to out of the recovery. There, the State argued that the statute intended that it have "an independent right of recovery," which the Court acknowledged. Notwithstanding such "independent right, of recovery," the Supreme Court in *Hedgebeth* concluded that under New Jersey law such right was tempered by equitable principles, and under the appropriate

circumstances, i.e. where the State had remained passive, and not actually pursued a recovery independently, equity demanded that the payment of fees of the attorney, through whose efforts the funds were created from which it sought to effect its recovery, should be given priority. The Court in *Hedgebeth* stated that the rule regarding the right of subrogation carrying an equitable component, “is based on the equitable principle that a carrier should not be entitled to enjoy the fruits of the assured’s judgment against a tortfeasor without contributing in any way to the costs or burdens of litigating that claim.” *Id*. at 369.

Indeed, the concept of an equitable lien has long been venerated in New Jersey, Such a lien “raised ex aequo et bono, according to the dictates of equity and conscience…is a right of a special nature in a fund and constitutes a charge or incumbrance upon the fund. 4 *Pomeroy, Equity Jurisprudence* (5th Ed. 1941), quoted with approval in *In re Hoffman*, 63 N.J. 69, 77 (1973). The applications of the concept have been many, but all have in common a recognition on the part of New Jersey Courts that in order *to* prevent *an* inequitable result, the “independence” of a claimant in a fund, or the beneficiary of another’s efforts from one whose efforts were responsible for creating that fund or that benefit, will not insulate the claimant or beneficiary from being equitably charged in order that they not be “unjustly” benefited [through efforts which would otherwise go unrewarded].” *Cohen v. Sheridan*, 218 Super. 565, 570 (Ch. Div. 1987).

In this case, Miller argues that the **mortgagee**, Select Portfolio, remained passive and did not actually pursue a recovery independently, thus, despite its “independent right of recovery” Miller has a priority equitable Hen on the funds. Miller asserts that the **mortgagee** did not engage experts or building contractors to establish the extent of the damage and the amount of the loss, as required by the policy; the **mortgagee** did not secure arid protect the building as required by the policy; it did not submit the require sworn statements in proof of loss, as required by the policy; it did not appoint its own independent adjusters to conduct a “walk-through” inspection and it did not even submit a claim. These are all things that the insured’s adjuster - Miller - did. The Court finds that there exists no evidence that Select Portfolio actively sought to pursue its independent right of recovery.

***4** Select Portfolio argues that the impact of concluding that Miller is entitled to a priority Hen is that there would be nothing to prevent a defaulted borrower from entering into an exorbitant **contingent** fee agreement with public **adjusters** knowing full well they are not entitled to the proceeds. Such an event, according to Select Portfolio, would be inherently unfair to innocent **mortgagees** making an independent and not a derivative claim. However, this hypothetical scenario is not the case at hand; there is nothing to suggest that the 10% **contingency** fee is exorbitant. In addition, were it the case that an exorbitant fee agreement was made, undoubtedly the Court would decrease the fee to be fair and reasonable as the Court is operating under the principles of equity.

Even when viewing the evidence in the light most favorable to Plaintiff, the Court finds that the **mortgagee’s** rights, if any, to the insurance proceeds is subordinate to Miller’s lien for professional services. Without Miller’s efforts there would be not be a fund against which a Hen may attach. No genuine issue of material fact remains in this matter. Accordingly, Select Portfolio’s claim against the entirety of the fund fails and the Court grants the release of funds to Miller in the amount of $22,788.96 representing the amount agreed to in the retainer and fee agreement.

For the foregoing reasons, Miller’s motion for reconsideration to alter or amend the Court’s Order of Jully 9, 2010 is granted and Miller’s Cross motion to release funds is granted.

SO ORDERED

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THOMAS R. VENA, J.S.C.

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