IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2187

HENRY DEMAYO,
Petitioner,

v.

DEBORAH CHAMES and
HELLER & CHAMES, P.A.,
Respondents.

REPLY BRIEF OF PETITIONER HENRY DEMAYO

Submitted by:
Sophie DeMayo
9100 SW 115 Terrace
Miami, Florida 33176
305-252-2825
Fl Bar No. 267155

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF FACTS

All facts in DeMayo's Initial Brief are referenced to the Record despite Chames' nonspecific statement to the contrary.

STANDARD OF REVIEW

DeMayo corrects the last sentence in his Standard of Review of his Initial Brief. The last sentence should read as follows: "Whether there can be an effective waiver of homestead is reviewed de novo. If there can be an effective waiver, what standard or indicia constitute an effective waiver is a question of law to be reviewed de nova. Whether Chames sufficiently performed her duties to the client and whether there are sufficient facts to show that her client understood his constitutional rights and the waiver he was told to sign, and if those facts satisfy such standards, is subject to review by abuse of discretion."

DeMayo disagrees with the standards of review submitted by Chames where they are in conflict with those stated by DeMayo. In specific, DeMayo states that the standard of review for determining whether the findings of fact survive challenge is that the findings are presumptively correct unless "clearly erroneous".

Whether the court has jurisdiction to hear the issue of charging lien is a question of law and is reviewed de novo. The case cited by Chames is respectfully submitted to be wrongly decided in stating that review is "abuse of

discretion." DeMayo has offered the correct standard with citations in his argument herein.

As to Chames' Point I, whether parties to a retainer agreement can by mutual assent agree to redefine charging lien and to eliminate required elements for charging lien is a question of law to be reviewed de novo. As to Chames' Point II, the language of a contract is reviewed de novo. As to Chames' Point III, the threshold issue is whether the court had the jurisdiction to order a finding of money judgment which issue is reviewed de novo. If jurisdiction did exist, only the factual determination of entitlement is reviewed by the standard of abuse of discretion. Whether such facts are sufficient under law is reviewed by standard of de novo. The findings of fact are presumptively correct unless clearly erroneous.

As to Chames' Point IV, what criteria constitute an effective waiver of a constitutional right is a question of law and is reviewed de novo. Whether such criteria and facts are in the record and are supported by competent substantial evidence is reviewed by the standard of abuse of discretion.

SUMMARY OF ARGUMENT

DeMayo amends the second paragraph in his Initial Brief under this section to read as follows: "A dispute between lawyer and client as to attorney's fees is a first party dispute to be heard in an action in law with all accompanying appropriate causes of action and defenses. In family law, the court hearing the

underlying cause has jurisdiction to hear a claim of charging lien. If and only if that claim meets the standards of *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So.2d 1383 (Fla. 1983), does the court then have the discretion to order a charging lien. When the hearing does not prove facts which satisfy *Sinclair*, (as here where there was nothing on which a lien might lawfully attach) the court can make no finding of charging lien, attorney's fees or money judgment for such fees. Where there was no notice that the issue of money judgment would be heard, no hearing re money judgment may be heard, and, if entered, must be reversed. Where, as here, a money judgment was entered without notice pursuant to a hearing on charging lien and the appellate court found there was nothing on which to lien, the order for money judgment cannot stand for both reasons. The court has jurisdiction only to issue an order for a charging lien for a particular amount of money. It cannot issue an order for a money judgment. The distinction is basic. Violation of that distinction is a violation of due process notice and due process equal protection."

In response to Chames' summary of argument, DeMayo states that while parties may have the "right" to enter into agreements which allow charging liens on property which do not satisfy *Sinclair*, the parties do not have the power to require the courts to enforce those agreements in contravention and defiance of

Sinclair. Parties, even by mutual assent, cannot convey jurisdiction on a court. Jurisdiction is by constitution, statute, or common law.

In response to Chames' argument, the trial court erred in making a finding of money judgment. Its jurisdiction is only to make a finding of charging lien and then determine the amount. It has no jurisdiction to make a finding for money judgment. Assuming arguendo, that it has such right, where the res to be liened is found to have been improperly and unlawfully liened, the finding of money judgment cannot survive where there is nothing to lien. The error in making a finding of money judgment is a question of law. Only if there was no error, is the finding of the amount of the judgment is a matter of abuse of discretion.

In further response, the findings of the amount of hours expended was proven to be false by the record. As those findings are clearly erroneous, the findings of the court cannot stand.

ARGUMENT

1. Attorney's attempt to obtain a charging lien where there was no recovery and where the property sought to be liened was not recovered by the attorney, all in defiance of *Sinclair*, is unenforceable despite language in her retainer agreement allowing her to do so. Both the charging lien and the money judgment heard without notice at the same hearing must be reversed.

Attorney relies solely for her justification for demanding a charging lien on her client's homestead which property was not recovered by her but was merely owned by her client at the time the retainer agreement was signed, on one sentence

(reproduced below) in the case of *Sabin v. Butter*, 522 So.2d 939 (Fla. 3rd DCA 1988). Attorney grossly misreads this 1988 case and simplifies the facts so that their reading omits information which defeats their argument that her retainer agreement is dispositive and requires courts to enforce her agreement. Attorney claims *Sabin* allows her to circumvent *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A.*, 428 So.2d 1383 (Fla. 1983) and no longer requires her to prove, in order to be able to satisfy the requirements of a charging lien, the four elements of *Sinclair*. But *Sinclair* is definitional. {See *Cole v. Kehoe*, 710 So.2d 705 (Fla. 4th DCA 1998) at 706. "By definition, an attorney's charging lien cannot attach to property not involved in the suit and not before the court.} Only if the elements of *Sinclair* are met, may a lawyer prevent his client from having the matter heard in an action at law.

The element here that attorney claims not to apply to her is that the attorney must recover something upon which there can be a lien. Chames admits that she did not "recover" his homestead but that by reason of her retainer agreement such recovery is not necessary. Based on one sentence in *Sabin*. But the retainer in *Sabin* properly limited the attorney's right to charging lien only to "all assets recovered or protected during the course of the proceedings." *Sabin*, at 940. (Emphasis supplied.) (Chames required her client to sign a retainer agreement allowing her a charging lien on all his interests in all properties, personal and real,

within the jurisdiction of the court which, in her brief, she claims means anything he owns situated in Miami-Dade County and did not limit herself to that which she procured through her efforts on his behalf.) The attorney in *Sabin* successfully procured real property assets for his client including a portion of the marital abode, but not, a close reading of the case reveals, cash or proceeds. There being no cash procured (or, as termed in this 1988 case, judgment proceeds) being secured by the attorney, a charging lien was then ordered on the client's portion of the marital home secured by attorney but which was then lived in by his ex-wife and their children.

The client in *Sabin* appealed the charging lien on his homestead for two reasons: First, because there were no "judgment proceeds" (aka monies obtained from the judgment) to which a lien could attach, and he claimed that the charging lien could only be placed on monies secured, and, second, because the lien could not be enforced against a homestead when only one of the joint owners agreed to such lien. The court rejected the first argument. It stated (and this is the sentence upon which the entire claim of Chames is based) that

> "Although a charging lien ordinarily attaches only to judgment proceeds, *Pasin v. Kroo*, 412 So. 2d 43 (Fla. 3rd DCA 1982), the parties may enter into contracts which expressly subject other property to the charging lien. *See Billingham v. Thiele*, 109 So.2d 763 (Fla. 1959)." *Sabin*, at 940.

It is obvious that judgment proceeds is used in its common and correct meaning, monetary or cash received from a judgment. Indeed, not one case found by Petitioner indicates that proceeds ever refers to anything but monetary or cash. Dictionary definitions equally are consistent that proceeds refers to cash, money, or flow of income. Therefore, because the retainer agreement between the parties in *Sabin* allowed a charging lien on real property obtained by the efforts of the attorney, and not just on cash, the court said that such charging lien could be imposed. But it denied enforcing the charging lien because the property, though obtained by attorney's efforts, was homestead and could not be liened unless it lost its homestead designation. The court specifically did not reach the issue of whether the client's waiver of homestead was enforceable at the time of voluntary sale so that the attorney could then impose a lien. The court never circumvented or defied or expanded the strictures of *Sinclair* despite argument to the contrary by Respondent.

The holding is also significant. "We hold, without reaching the homestead law question as presented, that Sabin's agreement with Butter is ineffective to subject the marital home to an execution sale." *Sabin*, at 940. Therefore, and of fatal blow to Chames' arguments, the very case upon which their entire premise is founded refutes their claim that a retainer agreement can expand *Sinclair*.

This is supported by analysis of Sabin's cited authorities. In *Pasin*, client had retained attorney to cancel a contract for sale of real property. She lost and was required sell. In reversing the charging lien placed on the proceeds from the sale, the court stated;

> "An attorney's lien, or charging lien on funds recovered for a client through the attorney's services may issue only if there is a client-attorney relationship and the attorney has, in fact, recovered proceeds for the client. The lien may not issue if no proceeds have been recovered. *Citations omitted.* Pasin was the losing party so there was no recovery of funds. It was error to impose a $12,000.00 charging lien upon the proceeds from the sale of her real property." *Sabin*, at 940. (Emphasis Supplied.)

By citing *Pasin* the court in *Sabin* reinforced the requirement that a positive recovery had to be made and that where there was no recovery of proceeds (monetary recovery) no lien could be placed on the proceeds which were not secured by attorney's efforts. But *Sabin* also cited *Billingham*.

In *Billingham*, supra, this court held that attorneys may not obtain charging liens on the real properties secured by them for their clients unless the attorneys first had an agreement with their clients permitting such charging lien. Therefore, by inference, real property as well as proceeds could be liened by charging lien as long as the attorney secured such property by his efforts for his client and if an agreement for such lien was entered into between them.

Citing both of the cases as authority, the *Sabin* court permitted the lien on that which was recovered by the attorney's efforts even if it was other than monies

awarded (judgment proceeds) but it would not enforce the lien as it was homestead. Significantly, Judge Ferguson participated in both decisions.

Chames' incorrect analysis of *Sabin* has been soundly refuted. Chames has taken a sentence out of context and attempted to give it meaning it never had. Chames even denies that *Yavitz v. Martinez, Charlip, Delgado & Befeler*, 568 So.2d 103 (Fla. 3rd DCA 1990), rev. den., 576 So.2d 295 (Fla. 1991) conflicts with their interpretation of *Sabin* in that *Yavitz* did not involve a retainer agreement that expanded that which could be liened. They are wrong. Even though the language of the retainer agreement is not published, it is easily inferred. The order for charging lien, which was reversed, was on "the assets, estate, and property" of the client. The appeal was not based on the fact that the retainer agreement did not contain permission for such property to be liened. The appeal was based on the fact that the lien exceeded the amount that could be considered proceeds! Therefore it is logical to infer that the retainer agreement, which was a required element that the trial court had to find contained the agreement that such lien be imposed on those properties, did in fact so read. Reversing the lien, the court held charging lien be only against proceeds and not against the client's personal assets.

DeMayo is taken aback by Chames' objection to his citation of *Franklin & Marbin, P.A. v. Mascola*, 711 So.2d 46 (Fla. 4th DCA 1998). In that case there was a retainer agreement which agreement must have allowed for a charging lien or

else the trial court could not have imposed one and the client would have also appealed on that basis. The appeal was on the basis that there was nothing on which to impose the lien, to which the appellate court agreed, and that therefore the finding of a money judgment, heard over the objections of the client as in the case at bar, could not stand. It was further noted that the client (as DeMayo here) was not on notice that the issue of a money judgment would even be heard and that only the issue of charging lien would be heard therefore requiring reversal of the money judgment! *See notices in Appendix to Reply Brief.*

Respondent in a footnote attempts to dismiss *Mazzorona v. Mazzarona*, 703 So.2d 1187 (Fla. 3rd DCA 1997), *Shawzin v. Sasser, P.A.*, 658 so.2d 1148 (Fla 4th DCA 1995) and *Cole v. Kehoe*, 710 So. 2d 705 (Fla. 4th DCA 1998), with the same argument. Respondent is wrong in each regard. *Mazzorona* said a lien cannot "be imposed against the 'assets, estate, and property' of the wife" inferring by that quoted language that that was what was permitted under the language of the retainer agreement. Id at 1189. It said that the lien on the non-marital asset of the wife, to wit: her personal injury award, could not stand. Again, no appeal was taken on the issue of there being no agreement for such overbroad a claim therefore again inferring that such retainer language did exist. In *Shawzin* not only is there a retainer agreement, but it is reproduced in pertinent part in the opinion and in fact is similar to Chames' retainer. But the attorney's in *Shawzin*

never attempted to lien that which they did not procure. The court allowed a charging lien on the proceeds derived by their client from the prior sale of the marital home, which property they had secured for him, but of only that portion of those proceeds which no longer had homestead exemption protection. The court reversed, however, the entry of an order of money judgment for the sum of the attorney's fees owed as the client had no notice that the issue of money judgment would be heard and only had notice that his attorney was seeking a charging lien against his property. The facts in *Shawzin* are almost identical to the facts herein except that the Chames went even further than the attorney's in *Shawzin* in that she never secured Petitioner's homestead for him. The case is further authority to reverse the money judgment as well. "As Appellee noticed a hearing only on his motion for charging lien, the notice failed to apprise appellant that a money judgment might be entered against him." *Shawzin*, at 1151.

In *Cole*, supra, again the inference is plain that the lawyer's retainer agreement allowed them a charging lien on property that was outside that which they secured or obtained for their client. The court reversed, limiting the lien to only that which was the successful "fruits" of their efforts.

Respondent's other basic argument is that the parties may convey jurisdiction to the trial court to hear the matter of charging lien and impose one based only on contract and without regard to whether the requirements of *Sinclair*

have been ignored. It is fundamental that parties cannot, even my mutual assent, convey jurisdiction to a court where there is none. *Citizens Property Insurance Corporation v. Scylla Properties, LLC*, et al., 946 So.2d 1179 (Fla. 1st DCA 2006). *In the Interest of D. N.H.W., et al., v. L.H.D. and S.W.*, 955 So.2d 1236 (Fla. 2nd DCA 2007). Jurisdiction is conveyed by constitution, statute or common law. While the family law court has jurisdiction to hear the issue of charging lien, where there is nothing upon which to impose a lien, it does not magically become empowered to order such lien by way of a contract that seeks to circumvent law. *Franklin*, supra.

Chames dismisses DeMayo's equal protection and due process arguments although they were raised in detail in the trial court and were the first ruling of the trial judge. DeMayo has the full right to raise the issue here again. *Savoie v. State*, 422 So.2d 308 (Fla. 1982). Further, DeMayo raised at trial level and appellate level the issue of lack of notice. It is the lack of notice that the issue of money judgment would be heard (and indeed that very judgment still exists by way of the last sentence in the opinion of the District Court of Appeals, Third District, <u>which sentence was included pursuant to motion by Chames!</u>

As to respondent's Point II, it is irrelevant whether the language in the retainer agreement says "within" or "under" the jurisdiction of the court as both are overbroad and seek to circumvent *Sinclair*. The contract is nonetheless ambiguous

and subject to de novo review. As noted above, the Family Law court does not have jurisdiction over the real property holdings of a party when that property is not part of the suit. See also, *Administrative Order No. 03-15, I (A), The Eleventh Judicial Circuit Miami-Dade County, Florida*, establishing the Family Court, which does not grant that court jurisdiction to hear money judgments.

As to Chames' Point III, the findings of the lower court as to the number of hours and amount of pleadings prepared and reviewed being "clearly erroneous" and as this finding was the main finding in determining the amount of the fees, the judgment and lien must be reversed. *Tobin v. Michigan Mut. Ins. Co.*, 948 So.2d 692 (Fla. 2006).

As to Chames' Point IV, it is interesting to note that Chames quotes DeMayo at hearing when in other places in his brief he criticizes DeMayo for doing the same. Chames offers no standards to determine whether his client signed the waiver knowingly, freely, and voluntarily and understanding what he was signing except for evidence of signature. If waiver will ever be found to be enforceable, which it should not, rigorous standards must be identified. In any event, attorney failed in her duties to client here, and worse.

CONCLUSION

The order of the appellate court finding no effective waiver of homestead should be upheld but the order affirming the money judgment must be reversed.

Respectfully submitted,

_____

SOPHIE DEMAYO
9100 SW 115 Terrace
Miami, Florida 33176
305-252-2825
Fl Bar No. 267155

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was mailed this 30th day of August, 2007, to the following:

Jonathan Heller
Heller and Chames, P.A.
261 NE 1st Street
Sixth Floor
Miami, Florida 33132

Jay Levy, P.A.
9130 South Dadeland Blvd.
Two Datran Center, Suite 1510
Miami, Florida 33156

Office of the Attorney General
400 S. Monroe Street # PL#01
Tallahassee, Florida 32399

Paul S. Singerman, Esq. &
Illyse M. Homer, Esq.
Berger Singerman, P.A.
200 S. Biscayne Blvd.; Suite 1000
Miami, Florida 33131

Robert W. Goldman, Esq.
Goldman, Felcoski, and Stone, P.A.
The 745 Building
745 12th Avenue South
Suite 101
Naples, Florida 34102

John W. Little, Esq.
Brigham and Moore, LLP
One Clearlake Centre
Suite 1601
250 South Australian Avenue
West Palm Beach, Florida 33401

_____

SOPHIE DEMAYO
9100 SW 115 Terrace
Miami, Florida 33176
305-252-2825
Fl Bar No. 267155

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply Brief of Petitioner, Henry DeMayo, was prepared in 14 point Times New Roman, Microsoft Word Format.

_____
SOPHIE DEMAYO