

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2153-14T1  
A-4694-14T1

ROBERT DIGGS,

Plaintiff-Respondent,

v.

EBONY MILLS a/k/a EBONI DIGGS,

Defendant-Respondent.

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FRANCES NICOTRA,

Plaintiff-Appellant,

v.

ROBERT DIGGS and EBONY  
MILLS a/k/a EBONI DIGGS,

Defendants-Respondents.

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Submitted July 27, 2016 — Decided March 8, 2017

Before Judges Leone and O'Connor.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Monmouth  
County, Docket No. FM-13-141-05, and Equity  
Part, Monmouth County, Docket No. C-126-14.

Frances Nicotra, appellant pro se in A-2153-  
14 and A-4694-14.

Jeffrey W. Goldblatt, attorney for  
respondents.

The opinion of the court was delivered by  
O'CONNOR, J.A.D.

Appellant Frances Nicotra, Esq., (attorney) represented  
respondent Ebony Mills in her action for divorce against  
respondent Robert Diggs.<sup>1</sup> The attorney's appeals have been  
listed back-to-back and are consolidated for the purpose of this  
opinion.

First, the attorney appeals from the December 16, 2014  
Family Part order denying her motion for an attorney's charging  
lien, and from the February 11, 2015 Family Part order directing  
she pay Diggs \$2,675 in counsel fees.

Second, the attorney appeals from a May 8, 2015 Chancery  
Division, General Equity Part order granting Diggs summary  
judgment in an action in which the attorney sought, among other  
things, to compel the sale of the former marital home to satisfy  
her judgment against Mills for legal fees. For the reasons that  
follow, we affirm.

I

A

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<sup>1</sup> In fact, both respondents filed pleadings asserting a cause  
of action for divorce; Diggs filed a complaint and Mills a  
counterclaim.

We derive the following from the record. The parties settled their respective dissolution actions and were divorced on March 28, 2006. A dual judgment of divorce (DJOD) was filed on April 21, 2006, which incorporated the parties' property settlement agreement (PSA). The only significant asset was the marital home, which had always been titled in Diggs' name, but there was no dispute Mills acquired an equitable interest in this property during the marriage.

The PSA provided the parties would cooperate in listing the marital home for sale, taking into consideration the realtor's recommendations for both the listing and ultimate sales price. The parties agreed to equally divide the net proceeds after the house was sold and, out of those proceeds, each would pay their respective attorney's fees. Diggs further agreed to contribute \$12,500 toward Mills' attorney fees out of his one-half share of the proceeds.

The house was on the market for sale for two years. There were no offers, which respondents attributed to the depressed real estate market and poor economy that existed at the time. In 2008, the parties took the house off of the market. Thereafter, Mills needed money, and over a period of time, the duration of which is unclear, but before 2014, Diggs bought out

Mills' equitable interest in the home for approximately \$150,000.

In 2008 or 2009, the attorney commenced a collection action against Mills to recover the attorney's fees she incurred during the divorce action. On March 23, 2009, a judgment against Mills for \$43,327.12, plus post-judgment interest, was entered. The judgment was docketed and recorded as a lien in May 2009.

In May 2014, the attorney filed a motion in the Family Part requesting, among other things, the court appoint a receiver to sell the marital house, in order to enable Mills to obtain her equitable share of the home from the sale proceeds and pay off the judgment. The attorney also requested the court order Diggs to pay her \$12,500, his agreed upon contribution to Mills' attorney fees.

Although served with the motion, Mills did not file a response. Diggs filed a certification, pointing out he bought out Mills' interest in this asset. He admitted he still owed Mills' attorney \$12,500. The judge denied the attorney's motion because Mills no longer had an interest in or any claim to the house. Further, the judge found the attorney had already secured a judgment against Mills for outstanding counsel fees.

In September 2014, the attorney filed another motion in the Family Part seeking an attorney's charging lien for \$43,327.12.

In her moving certification, the attorney explained she wanted the judgment for \$43,327.12 attached to the PSA and DJOD, and Mills' "interest in connection with the [PSA] and Judgment of Divorce and the proceeds thereof" paid to her to satisfy the judgment before disbursed to Mills. The attorney further clarified she wanted the court to order that both Mills and Diggs be restrained from dissipating or transferring any property in which they had an interest, and that they comply with the terms of the PSA so the attorney's lien could be satisfied. During oral argument on the motion, the attorney stated she was not seeking to hold Diggs responsible for what Mills owed her, but did want the house sold so she could collect her fee from the sale proceeds. The attorney admitted the real estate market had been "very bad," which was why she waited five years to enforce her judgment.

Mills did not respond to the motion but Diggs did file a certification, again pointing out respondents were unable to sell the house because of the economy, and so Diggs ultimately bought out Mills' interest in the house. Diggs argued he should not be forced to sell a house he solely owned and in which Mills had neither an equitable nor legal interest, especially if the purpose for selling the house was to satisfy legal fees for which he was not responsible.

Diggs further certified the provision in the PSA in which the parties agreed to sell the house was not for the purpose of paying counsel fees. The parties were agreeable to selling the house because Mills did not want and Diggs could not afford to buy out Mills' equitable interest in the house at that time. Then, as "an offshoot" of the anticipated sale of the house, respondents agreed outstanding counsel fees would be paid from the sale proceeds. But, their agreement to sell the house was not for the purpose of paying counsel fees.

On December 16, 2014, the Family Part judge denied the attorney's motion, because Mills' interest in the house terminated when Diggs bought out her equity in this asset and, further, Diggs was the sole owner. The court also noted the attorney already had a judgment against Mills. While the judge did not elaborate on the latter point, we assume the judge meant a charging lien would be cumulative to a judgment and, thus, superfluous.

During oral argument the attorney asserted for the first time Diggs' purchase of Mills' interest in the home was invalid because it had not been memorialized and thus violated the Statute of Frauds. The judge declined to rule on this issue because the argument had not been raised in the parties' pleadings.

The judge also awarded Diggs counsel fees, but the judge did not put the amount of fees the attorney was to pay into the December 16, 2014 order. On February 11, 2015, the judge entered another order clarifying the attorney was to pay Diggs \$2,675 in fees.

B

In July 2014, the attorney filed a verified complaint in the General Equity Part, alleging the PSA obligated respondents to sell the marital home and use the proceeds to pay off legal fees. In one count of the verified complaint, the attorney maintained respondents had failed to make an effort to sell the house and, as a third party beneficiary of the PSA and DJOD, she was entitled to a judgment compelling the sale of this asset so the judgment for \$43,327.12 could be satisfied.

In the other count of the complaint, the attorney alleged respondents engaged in conversion "by their distinct acts of dominion wrongfully exerted over [the attorney's] personal property." The remedy the attorney sought was also to compel the sale of the marital home so that the attorney's judgment against Mills could be satisfied.

On May 8, 2015, the General Equity Part judge granted Diggs' motion for summary judgment.<sup>2</sup> Although the judge found Diggs was obligated to pay the attorney \$12,500 under the terms of the DJOD, the judge concluded the attorney was not a third party beneficiary of the DJOD. The judge further found there was a sale of the marital home, albeit in the form of Mills selling and Diggs purchasing Mills' equitable interest in the house. The judge did not rule on whether respondents engaged in an act of conversion. Finally, the judge ordered Diggs to pay the attorney the \$12,500 he agreed to pay under the PSA, within fourteen days.

## II

### A

We first address the attorney's appeal from the Family Part's December 16, 2014 and February 11, 2015 orders. The attorney's principal contentions are, first, the Family Part judge erred by failing to impose an attorney's charging lien on the marital home. The attorney claims she was entitled to a charging lien on the home so she could force its sale, thereby releasing half of the sale proceeds to Mills and enabling her to

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<sup>2</sup> Mills did not file an answer to the verified complaint. The General Equity Part judge noted default was entered against her. The record does not show whether a default judgment was also entered against Mills as well.



satisfy the \$43,327.12 judgment. Second, the attorney maintains the judge erred by ordering her to pay Diggs' counsel fees.

An attorney's charging lien "is intended to protect attorneys who do not have actual possession of assets against clients who may not pay for services rendered." Martin v. Martin, 335 N.J. Super. 212, 222 (App. Div. 2000) (citing Republic Factors, Inc. v. Carteret Work Uniforms, 24 N.J. 525, 534 (1957)). N.J.S.A. 2A:13-5, commonly known as the Attorney's Lien Act, provides that an attorney appearing for a party instituting an action "shall have a lien for compensation, upon his client's . . . claim or counterclaim." The attorney's lien "shall contain and attach to a . . . judgment . . . in his client's favor, and the proceeds thereof in whose hands they may come." Ibid. If a client obtains an asset either through a judgment or settlement, his or her attorney may obtain a lien even if the proceeds from the judgment or settlement of the underlying action have been disbursed. Musikoff v. Jay Parrino's the Mint, L.L.C., 172 N.J. 133, 143 (2002).

"Regardless of the attorney's right of recovery against his own client for the services which were rendered, his statutory lien is one impressed upon the client's interest in the claim or judgment and can rise no higher than that interest." Hobson Constr. Co. v. Max Drill, Inc., 158 N.J. Super. 263, 268 (App.

Div. 1978). "Where there is no recovery [by a client], there is nothing to which the attorney's lien can attach." Cole, Schotz, Bernstein, Meisel & Forman, P.A. v. Owens, 292 N.J. Super. 453, 460 (App. Div. 1996). Nothing in the Attorney's Lien Act authorizes an attorney's lien to attach to assets allocated to or held by a client's adversary. After all, "[t]he purpose of the attorney's charging lien is to prevent the attorney from being deprived of a fee after having performed legal services which result in the client obtaining something of value." Id. at 461.

Here, what the attorney wants is a charging lien affixed to the marital home. That cannot be accomplished. An attorney's lien can only attach to an asset in which, at the least, the client has an interest. The attorney did secure for Mills an equitable interest in this property, but Mills' equitable interest in the house itself was extinguished some time before 2014, when, for consideration equivalent to what Mills would have realized if the house had been sold, Diggs bought out Mills' interest in the home. Her equitable interest in the property ceased to exist at that time.

Mills received cash as a result of Diggs purchasing her interest, just as she would have if the house had been sold and the proceeds divided between her and Diggs. Mills' obligation

to pay the attorney is the same, regardless whether she obtained her equitable interest in the house as the result of a sale to a third party or a sale to Diggs. The fact she did not draw out her equity in the house as a consequence of respondents selling the house on the market is immaterial; Mills was still obligated to pay her attorney from the proceeds she received from selling her interest in the house.

The attorney may have an interest in those proceeds, but she is not seeking a charging lien against them but against the house, presumably because she already has a judgment against Mills. However, the attorney may not have a charging lien attach to an asset in which her client does not have an interest and, in fact, is held by the client's adversary.

The attorney raises additional arguments. Some of the arguments were not properly raised or were not raised at all before the Family Part judge and, thus, we decline to consider them. See State v. Galicia, 210 N.J. 364, 383 (2012) ("Generally, an appellate court will not consider issues, even constitutional ones, which were not raised below."). The remainder of the arguments she raises lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E). Accordingly, we affirm both the December 16, 2014 and February 11, 2015 orders.

B

We turn to the May 8, 2015 General Equity Part order from which the attorney also appeals. Among other things, the attorney argues that, as each party was vested with an interest in one-half of the marital property, the Chancery judge should have partitioned the property so Mills' share could have been sold and the proceeds used to pay off the attorney's judgment against Mills.<sup>3</sup> In the alternative, the attorney argues respondents should have been found liable for conversion because they failed to ensure the attorney was paid when Diggs paid Mills for her interest in the marital property.

First, as previously stated, Mills' interest in the property was terminated when Diggs bought out her equity in the home. Thereafter, the property could not have been partitioned. Second, and more to the point, the attorney did not seek partition in her verified complaint nor argue before the Chancery judge the subject property should have been partitioned. Again, we do not consider issues not properly presented to the trial court, unless they go to the jurisdiction of the trial court or concern matters of great public interest, which is not the case here. Galicia, supra, 210 N.J. at 383. Third, the judge did not make any ruling pertaining to

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<sup>3</sup> At the time the attorney's brief was filed, the judgment had been reduced to \$38,643.31.

conversion; thus, we decline to pass upon this issue in the first instance. See Ins. Co. of N. Am. v. Gov't Emps. Ins. Co., 162 N.J. Super. 528, 537 (App. Div. 1978).

We have considered the attorney's remaining arguments challenging the May 8, 2015 order and conclude that they are without sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION