# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ANTHONY CANNATARO **PART** IAS MOTION 41EFM

*Justice*

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SCAROLA MALONE & ZUBATOV LLP,

Plaintiff,

- v -

ANDREW ELLNER, LIGHTBOX CAPITAL MANAGEMENT, LLC, .LIGHTBOX VENTURES, LLC,BREM MOLDOVSKY, LLC

Defendant.

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**INDEX NO.** 651324/2017

**MOTION DATE** 09/04/2019, N/A

**MOTION SEQ. NO.** 015

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 015) 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 515, 516, 517, 518, 519, 520, 521, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567

were read on this motion to/for DISMISSAL.

In this action for attorney's fees, defendants LightBox Capital Management, LLC, LightBox Ventures, LLC, and Andrew Ellner (all three together, the "LightBox defendants") now move to dismiss defendant Brem Moldovsky, LLC's cross-claims, pursuant to CPLR 3211. The underlying facts of this case were already delineated in this Court's earlier decision and order dated July 8, 2019.

On a motion to dismiss pursuant to CPLR 3211 "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010] [internal quotation marks omitted]; *see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

CPLR 3211(a)(5) provides for dismissal of claims that are barred by reason of *res judicata* and/or collateral estoppel. *Res judicata* applies "where a judgment on the merits

exists from a prior action between the same parties involving the same subject matter" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). "Collateral estoppel is an equitable doctrine that is based on the notion that a party should not be permitted to relitigate an issue previously decided against it" (*Nat'l Union Fire Ins. Co. v Hartford Ins. Co.*, 248 AD2d 78, 82 [1998]) (internal citations omitted). "The party seeking to invoke the doctrine need only establish two requirements: (1) that the identical issue was necessarily decided in the prior action and is decisive in the present action; and (2) that the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination" (*Id.*).

In the underlying federal action, District Court Judge Cote issued a partial ruling awarding attorney's fees to the firms that represented the Lightbox defendants' in *Lightbox Ventures, LLC v 3rd Home Ltd., et al.*, No. 16-cv-2379 (S.D.N.Y.) (Cote, J.). With regard to Brem Moldovsky, LLC, she found:

> For the following reasons, $150,000 is a reasonable fee in quantum meruit for the Moldovsky Firm's representation of Lightbox. Lightbox has already paid the Moldovsky Firm $104,052; accordingly, the Moldovsky is entitled to a charging lien of $45,948.
>
> As stated above, the bench trial resulted in a net judgment of $83,338.19 in favor of Lightbox, plus fees. The initial retainer agreement between the Moldovsky Firm and Lightbox provided that the Moldovsky Firm would be paid 35% of Lightbox's recovery after trial, in addition to the $75,000 retainer. With this award of a charging lien, the Moldovsky Firm will be paid a total of $150,000, or $75,000 in addition to its retainer. That payment of another $75,000 is far in excess of 35% of the judgment of $83,338.19.

It is undisputed that the Moldovsky Firm's lien award has since been fully satisfied. As such, under the doctrines of *res judicata* and collateral estoppel, plaintiff's causes of

action sounding in *quantum meruit* and unjust enrichment are dismissed as they have already been litigated and decided in the federal action.

As to defendant Brem Moldovsky, LLC's request for a preliminary injunction, the federal court already issued an injunction, which is still in effect. As such, that cause of action is dismissed. Brem Moldovsky, LLC's claim for promissory estoppel is also dismissed, as it is well settled that a claim for promissory estoppel will not lie where the alleged promise is simply a promise to fulfill one's contractual obligations (*Brown v Brown*, 12 AD3d 176 [2004]; *see also Hoeffner v Orrick*, 61 AD3d 614 [2009]; *Celle v Barclays Bank P.L.C.*, 48 AD3d 301 [2008]).

Brem Moldovsky, LLC's next cross-claim for fraudulent inducement alleges that Mr. Ellner overstated the strength of LBV's case and expert report, and that the firm detrimentally relied on those misrepresentations. It is well established that where a party has the means, by the exercise of reasonable or due diligence, to ascertain the truth or falsity of a material representation, he or she cannot claim justifiable reliance thereon (*Peach Parking Corp. v 346 West 40th Street*, LLC, 42 AD3d 82 [2007]); *Fishberger v Voss*, 51 AD3d 627 [2008]). Reasonable or "justifiable reliance" is a condition that cannot be met where a party has the means to discover the true nature of the transaction by the exercise of ordinary intelligence and fails to make use of those means (*Arfa v Zamir*, 76 AD3d 56 [2010] *aff'd* 17 NY3d 737 [2011]); *Urstadt Biddle Properties, Inc. v Excelsior Realty Corp.*, 65 AD3d 1135 [2009]). As an attorney deciding whether to take the Lightbox defendants' case, Brem Moldovsky had the ability and the responsibility to do his own due diligence, and exercise ordinary intelligence in evaluating the relative merits of the Lightbox defendants' claims. As such, Brem Moldovsky, LLC's cause of action for fraudulent misrepresentation is dismissed.

As to plaintiff's claims for breach of contract and account stated, it is well settled that an attorney discharged without cause is limited to compensation measured by the

fair and reasonable value of the services rendered whether that be more or less than the amount provided in a retainer agreement (*Sae Hwan Kim v M & Y Gourmet Grocers*, 239 AD2d 170 [1997] citing *Matter of Montgomery*, 272 NY 323, 326-327 [1936]); *see also Liddle & Robinson, LLP v Garrett*, 720 F. Supp. 2d 417, 425 (S.D.N.Y. 2010). In contrast to claims for breach of contract, courts have held that account stated claims may be brought by attorneys discharged without cause (*see Ferraioli ex rel. Suslak v Ferraioli*, 8 AD3d 163, 164 [2004]; *Zanani v Schvimmer*, 50 AD3d 445, 446 [2008]; *Bartning v Bartning*, 16 AD3d 249, 249–50 [2005]; *see also Banker v Esperanza Health Sys., Ltd.*, 2011 WL 838909 (S.D.N.Y. 2011), *report and recommendation adopted*, 2011 WL 867217 (S.D.N.Y. 2011) (whatever limitations there may be in New York to the ability of a lawyer discharged without cause to recover under breach of contract or other theories, they do not preclude a claim for account stated).

In this case, Brem Moldovsky, LLC's claim for damages arising from a breach of the terminated retainer agreement must necessarily fail, as the federal court has decided that plaintiff has already recovered fees in excess of what it would be entitled to on a theory of *quantum meruit*. As such, the first and sixth cross-claims sounding in breach of contract are dismissed. Additionally, Brem Moldovsky, LLC's fourth cross-claim for violation of the misrepresentation clause of the contract is also dismissed. As to the fifth cross-claim, which asserts violation of the retainer agreement's indemnification clause, plaintiff only included Brem Moldovsky, LLC as a defendant in the amended complaint because plaintiff alleged, and it has since become clear, that Brem Moldovsky, LLC contests the priority of plaintiff's alleged contractual lien. As such, that cross-claim is dismissed as well. However, the branch of the Lightbox defendants' motion which seeks to dismiss the cross-claim pertaining to the enforcement of the contractual lien is denied (*see Ferraioli ex rel. Suslak v Ferraioli*, 8 AD3d 163, 164 [2004]), as is the branch of the motion which seeks to dismiss the cross-claim for account stated.

Lastly, the branch of the Lightbox defendants' motion which seeks to dismiss plaintiff's request for piercing of the corporate veil is also denied. "'Veil piercing is a fact-laden claim' that is not well suited for resolution upon motion to dismiss (*Damianos Realty Group, LLC*, 35 AD3d 344 [2006], *quoting First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 294 [1999]). Before dismissal can be granted, plaintiff is entitled to obtain necessary discovery to ascertain whether there are grounds to pierce the corporate veil (*see First Bank of Ams.*, 257 AD2d at 294).

Accordingly, it is

**ORDERED** that the Lightbox defendants' motion to dismiss the complaint is granted to the extent that the first, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, and thirteenth causes of action are dismissed, and the motion is otherwise denied.

12/18/19
DATE

ANTHONY CANNATARO, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |