SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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BALESTRIERE PLLC,

Plaintiff,

- v -

BAJA RE PATRIOT COMPANY, S. DE R.L. DE C.V.,

Defendant.

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INDEX NO. 655404/2019

MOTION DATE 03/05/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67

were read on this motion to/for DISMISS.

In this action, Plaintiff Balestriere PLLC ("Plaintiff") seeks a declaratory judgment preventing Defendant Baja de Patriot Company, S. de R.L. de C.V. ("Defendant" or "Baja Re") from disbursing funds to Plaintiff's former clients pursuant to a settlement agreement, on the grounds that Plaintiff maintains a charging lien for legal services against any such disbursements. Defendant brings this motion to dismiss the complaint pursuant to CPLR 3211[a] [2], [3], [7], and [1]. The motion has been fully submitted.

BACKGROUND

This is one of three related cases brought by Plaintiff regarding its former representation of Juan Diaz Rivera, Jonathan Bernstein, Desarrollos Inmobiliarios de Pedregal, S.A. de C.V. ("DIPSA"), and Desarrolladora Farallon, S. de R.L. de C.V. ("Farallon"; collectively, the "Former clients") against Defendant's parent company, Carval Investors, LLC, in connection with multiple disputes relating to the development of The Resort at Pedregal (the "Resort"), a luxury resort in Cabo San Lucas, Mexico. Plaintiff represented the Former Clients from 2014 through early 2018,

when the parties entered into a Master Settlement Agreement (the "MSA"). (NYSCEF Doc No. 3, the "MSA".) Subsequently, Defendant sold the resort in July 2019.

The current dispute relates primarily to one provision in the MSA: Section 15 ("Contingent Payment by Baja Re"), which states that "[s]ubject to the terms hereof, the Farallon Parties[1] and the White Lilly Parties[2] shall be entitled to a Success Fee provided that none of the Farallon Parties and the White Lilly Parties have committed a Default of any of their respective obligations." (MSA at 17.) Section 15 indicates that if the Farallon and White Lilly Parties complied with the condition precedent of providing certain invoices to Baja Re within 10 days of their receipt of the Resort's sale certificate, they would be entitled to a Success Fee, which was to be calculated as a percentage of the total sale price of the Resort. (*Id*. at 18.) Defendant states that this was a material condition precedent because, if complied with, Defendant would have been entitled to a significant tax deduction under Mexican law. (NYSCEF Doc No. 42 at 2.)

Plaintiff alleges that its representation of the Former Clients, which included more than 16,000 hours of legal work, culminated in the MSA, providing them with $25 million in value and eliminating $50 million in liabilities. Plaintiff, however, alleges that the Former Clients "refused to pay the Firm for its work" which compelled Plaintiff to initiate arbitration in September 2018. (NYSCEF Doc No. 1 at 6.) Defendant sold the Resort in June 2019 and provided the sale certificate to the Farallon and White Lilly Parties on July 19, 2019, but they failed to comply with the condition precedent of delivering the invoices within 10 days. (*Id*.)

Plaintiff wrote to Defendant and Defendant's parent corporation, CarVal, asking them to

[1] Pursuant to the MSA, the "Farallon Parties" are defined as Former Clients herein, Farallon, DIPSA, and Juan Diaz Rivera, plus Desadiri, S.A. de C.V., the Estate of Manuel Ramon Diaz Rivera Gonzalez, and Defendant in related action 654510/2019, Leticia Diaz Rivera. (MSA at 1.)

[2] Likewise, the "White Lilly Parties" are defined as Former Client herein, Jonathan Bernstein, plus Kevin Moore, and White Lilly LLC, a party that unsuccessfully sought to intervene in related action 654720/2018. (*Id*.)

refrain from making any payments under Section 15 to its Former Clients because the Former Clients had refused to pay Plaintiff. Plaintiff stated that it possessed a charging lien against any payments the Former Clients were entitled to and threatened further litigation against Defendant and CarVal. (NYSCEF Doc No. 4.) After numerous emails sent by Plaintiff inquiring as to the status of the Success Fee, counsel for CarVal indicated in an August 14, 2019 email that the condition precedent for the payment of the Success Fee was not met, and that Defendant and CarVal would thus not make the requested payment of the Success Fee to Plaintiff without a court order. (NYSCEF Doc No. 17.) Plaintiff then commenced this action on September 17, 2019.

Defendant brings this motion to dismiss, alleging that this court lacks subject-matter jurisdiction, that Plaintiff lacks legal capacity/standing to bring this suit, that Plaintiff fails to state a cause of action, and because documentary evidence conclusively refutes Plaintiff's allegations, pursuant to CPLR 3211[a] [2], [3], [7], and [1], respectively.

DISCUSSION

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87 [1994].) On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp*., 292 AD2d 118, 121 [1st Dept 2002].) However, the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts. (*See Bishop v Maurer*, 33 AD3d 497 [1st Dept 2006]; *Igarashi v Higashi*, 289 AD2d 128 [1st Dept 2001].)

New York Judiciary Law § 475 ("Attorney's lien in action, special or other proceeding") reads as follows:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his or her client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his or her client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

"[A]n attorney's recovery under Judiciary Law § 475 is contingent upon his client reaching a favorable outcome, because the charging lien is a specific attachment to the funds which constitute the client's recovery." (*Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 188 [1st Dept 2002], citing *Butler, Fitzgerald & Potter v Sequa Corp*., 250 F3d 171, 177 [2d Cir 2001].) "The lien applies only to proceeds created through the attorney's efforts." (*Oppenheim v Pemberton*, 164 AD2d 430, 433 [3d Dept 1990], citing *Greenberg, Cantor & Reiss v State of New York*, 128 AD2d 939, 940 [3d Dept 1987].) "While this statutory charging lien comes into existence upon commencement of an action or proceeding, *the lien attaches only when proceeds in an identifiable fund are created by the attorney's efforts in that action or proceeding*." (*DeCastro v Kavadia*, 2018 WL 4771528, *3 [SD NY, Oct. 3, 2018 No. 12-CV-1386 (JMF) (emphasis added)], quoting *City of Troy v Capital Dist. Sports, Inc.*, 305 AD2d 715, 716 [3d Dept 2003].)

Here, Plaintiff has failed to set forth a cause of action for declaratory judgment because the alleged charging lien did not attach to the Success Fee, which Defendant did not pay out due to the Former Clients' failure to comply with the condition precedent of providing invoices within

10 days of receipt of the sales certificate. (NYSCEF Doc No. 29, ¶ 20.) Even after accepting as true all facts in the complaint, Defendant has conclusively established that the settlement proceeds Plaintiff claims its charging lien attaches to simply do not exist. Accordingly, Plaintiff is not entitled to any declaration regarding Defendant's payment, or nonpayment, of any funds pursuant to the provisions of the MSA. It is hereby

ORDERED that the motion of Defendant Baja Re Patriot Company, S. De R.L. De C.V. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said Defendant, with costs and disbursements to said Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said Defendant.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

09/25/20
DATE

W. FRANC PERRY, J.S.C.

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