SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** 34M

Justice

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CONWAY & CONWAY,

Plaintiff,

- v -

JOHN LEOPOLDO FIORILLA, CITIGROUP GLOBAL MARKETS, INC.

Defendants.

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INDEX NO. 652138/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for DISMISS.

Plaintiff, Conway & Conway (plaintiff), commenced this action seeking to collect outstanding legal fees and interest allegedly owed by its former client, defendant John Leopoldo Fiorilla (Fiorilla), from funds held by defendant Citigroup Global Markets, Inc. (Citigroup). Citigroup now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint. The motion is opposed. For the following reasons, Citigroup's motion is granted.

FACTUAL ALLEGATIONS

In 2010, Fiorilla commenced the FINRA arbitration against Citigroup captioned *John Leopoldo Fiorilla, Individually and as Trustee FBO John Leopoldo Fiorilla Trust U/A/D 06-25-2003 v Citigroup Global Markets, Inc.*, FINRA Docket No. 10- 03615 (the arbitration), seeking to recover losses he allegedly incurred in the market downturn of 2007–2008. On April 30, 2012, one day before the arbitration hearings were scheduled to begin, both Citigroup and Fiorilla, through prior counsel, Klayman & Toskes, P.A. (Klayman), notified FINRA that they had settled all of Fiorilla's claims for the sum of $800,000 (the settlement). Fiorilla subsequently terminated Klayman due to a disagreement over a settlement proposal contemplated by the parties, reneged on the settlement and, on May 11, 2012, notified FINRA that he wished to proceed with the arbitration. Upon termination of Klayman, Fiorilla retained plaintiff, a law firm, to represent him in connection with the arbitration and the subsequent proceeding related to the vacatur of Fiorilla's arbitration award (the vacatur proceeding).

On May 14, 2012, plaintiff and Fiorilla executed a retainer agreement (2012 Retainer), which provided for plaintiff to receive a contingent fee on any amounts recovered in the FINRA arbitration. On July 29, 2013, plaintiff and Fiorilla executed a second retainer agreement (2013 Retainer) providing for plaintiff's legal representation of Fiorilla in an appeal of a separate

legal action. Prior to the FINRA panel's decision, Citigroup offered a subsequent multi-million-dollar settlement offer, which Fiorilla rejected. After attending twenty-eight hearing sessions at FINRA over the course of two years, plaintiff obtained an arbitration award for Fiorilla in excess of $17,000,000 (arbitration award), inclusive of accrued interest.

In 2013, Citigroup petitioned the Supreme Court of the State of New York to vacate the arbitration award. Plaintiff represented Fiorilla throughout the vacatur proceeding. By judgment dated January 2, 2014, the court granted Citigroup's petition and vacated the arbitration award. On May 15, 2014, the New York County Clerk entered judgment vacating the arbitration award and reinstating the settlement, providing that Citigroup owed Fiorilla $800,000 pursuant to the prior agreement between the parties settling the matter (the 2014 Judgment). The decision of the Supreme Court of the State of New York was affirmed by the New York Appellate Division, First Department, and the New York Court of Appeals denied Fiorilla leave to further appeal the vacatur of the arbitration award.

On June 1, 2020, plaintiff commenced the instant matter against Fiorilla and Citigroup for payment under the 2012 and 2013 Retainers. Plaintiff's cause of action for constructive bailment against Citigroup, alleges that plaintiff has perfected an attorney's lien upon the Settlement and that Citigroup is obligated to deliver to plaintiff the full $263,532.43 and associated statutory and contractual interest that Fiorilla purportedly owes plaintiff (NYSCEF doc. no. 53, compl at ¶¶ 80–85.). According to plaintiff, Citigroup has refused to make payment on Fiorilla's 2014 Judgment, alleging competing claims on the 2014 Judgment. Plaintiff claims that Citigroup currently has no claims on the 2014 Judgment.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman. Spira & Carson. LLC v Helix BioPhanna Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1,6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]). Although factual allegations in a plaintiff's pleading may be accorded favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*see Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Initially, plaintiff fails to cite to any relevant case law or statue indicating that a defendant bailee such as Citigroup lacks standing to challenge plaintiff's claims. Accordingly, the Court next addresses Citigroup's motion to dismiss the complaint.

In support of its motion to dismiss, Citigroup argues that plaintiff fails to state a claim for constructive bailment. Specifically, Citigroup argues that plaintiff has not adequately alleged that any portion of the funds Citigroup holds for Fiorilla pursuant to the settlement is plaintiff's property or that Citigroup is under any legal obligation to deliver any funds to plaintiff. Citigroup further contends that plaintiff was not the attorney of record during the settlement, that the

settlement was not the result of a claim or counterclaim asserted by Fiorilla, or that the settlement was not a result of plaintiff's efforts. Citigroup further argues that plaintiff's services pursuant to the 2013 Retainer cannot form the basis for a charging lien because it was unrelated to the settlement. Citigroup next argues that plaintiff has waived the right to assert a charging lien because plaintiff did not notice its purported lien until July 9, 2018, four years after this court reinstated the settlement. Citigroup further argues that even if a charging lien could be enforced, plaintiff is not entitled to statutory or contractual prejudgment interest.

A constructive bailment claim arises when there is delivery of property, acceptance of the property, and failure to return the property on demand (see *Jay Creations, Inc. v Hertz Corp.*, 42 AD2d 534 [1st Dept 1973]). Central to plaintiff's claim for constructive bailment is whether plaintiff alleged sufficient facts to demonstrate that plaintiff asserted a charging lien on the 2014 Judgment pursuant to Judiciary Law § 475.

"Pursuant to Judiciary Law § 475, '[w]hen an action is commenced, the attorney appearing for a party obtains a lien upon his or her client's causes of action . . . This lien attaches to any final order or settlement in the client's favor" (*Tangredi v Warsop*, 110 AD3d 788, 788 [2013]). Further, an attorney need not be counsel of record at the time a plaintiff receives judgment or settlement proceeds in order to have a lien on those proceeds, rather "[a]n attorney's participation in the proceeding at one point as counsel of record is a sufficient predicate for invoking the statute's protection" (*Klein v Eubank*, 87 NY2d 459, 462 [1996]).

Plaintiff alleges that it worked on Fiorilla's representation in the FINRA arbitration over the course of two years, including by engaging in extensive preparation, presentation, negotiation, and discovery, that Fiorilla was awarded $800,000 as part of the settlement of the arbitration. However, plaintiff fails to allege any facts demonstrating that its efforts resulted in the settlement that plaintiff now seeks a lien, and in fact alleges that the settlement occurred prior to its representation of Fiorilla (*see Rothfeder v City of New York*, 48 AD3d 234, 235 [1st Dept 2008] ["While a charging lien does extend to settlement proceeds . . . , it is enforceable only against the portion of the fund created in that action as a result of the attorney's efforts"] [internal quotation marks and citations omitted]; *Chadbourne & Parke, LLP v AB Recur Finans*, 18 AD3d 222, 223 [1st Dept 2005] ["A charging lien is a security interest in the favorable result of litigation . . . , giving the attorney equitable ownership interest in the client's cause of action and ensuring that the attorney can collect his fee from the fund he has created for that purpose on behalf of the client"] [internal quotation marks and citations omitted]; *Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183, 187 [1st Dept 2002] ["The lien is predicated on the idea that the attorney has by his skill and effort obtained the judgment, and hence should have a lien thereon for his compensation, in analogy to the lien which a mechanic has upon any article which he manufactures"] [internal quotation marks and citations omitted]). Thus, the Court finds that plaintiff fails to allege that it undertook any efforts in producing the settlement, and thus plaintiff's claims for an attorney's charging lien on Fiorilla's recovery pursuant to the 2014 Judgment fails.

Plaintiff's argument that its work performed during the vacatur proceeding resulted in the 2014 Judgment, i.e. the settlement, made for the first time during oral argument, is without merit. As Citibank correctly argues, the vacatur proceeding was initiated by Citibank because of the

unfavorable determination in the FINRA arbitration. Further, plaintiff's representation of Fiorilla was limited to avoiding the reinstatement and enforcement of the already agreed-to settlement. Indeed, the 2014 Judgment states: "[p]ursuant to the settlement between the parties reached prior to the commencement of the arbitration hearings, [Citigroup] shall have judgment against [Fiorilla] in the amount of $800,000 in full and complete satisfaction of all claims made in the [FINRA arbitration]" (NYSCEF doc. no. 47, *Citigroup Global Markets, Inc. v. Fiorilla*, index no. 653017/2013, [Sup. Ct., New York County 2014], proposed order and judgment, motion sequence 001). The trial court in the vacatur proceeding acknowledged the settlement of the underlying matter, which predated plaintiff's representation of Fiorilla. Thus, plaintiff's representation of Fiorilla in vacatur proceeding may not be a basis for a charging lien (*see* Judiciary Law § 475)

As stated in the 2014 Judgment, Citigroup, and not plaintiff, received a favorable determination in the vacatur proceeding. As there is no allegation that plaintiff obtained an affirmative recovery on behalf of Fiorilla, plaintiff has failed to state a claim for a charging lien (*see Tunick v Shaw*, 6 Misc 3d 1014[A], 800 NYS2d 358 [Sup Ct, New York County 2004), *affd as modified*, 45 AD3d 145 [1st Dept 2007] ["With respect to the first requirement, an attorney's charging lien does not attach when an attorney merely defends or protects a client's interests in property the client already owns, without asserting an affirmative claim, or obtaining an affirmative recovery"]). Accordingly, the vacatur proceeding neither arose from a claim or counterclaim, nor was the result of the vacatur proceeding a determination in Fiorilla's favor.

Moreover, it is unclear what the connection is between the work plaintiff performed under the 2013 Retainer agreement and the work performed in connection with the 2014 Judgment, as plaintiff fails to allege facts sufficient to establish the work performed under the 2013 Retainer concerned the 2014 Judgment or the settlement (*see Kaplan v Reuss*, 113 AD2d 184, 186 [2d Dept 1985], *affd*, 68 NY2d 693 [1986] ["A charging lien, on the other hand, applies only to the proceeds obtained from a particular litigation and may be enforced only to obtain the reasonable value of the attorney's services and disbursements in connection with that litigation]). Accordingly, plaintiff also fails to demonstrate a charging lien as in relation to the 2013 Retainer.

Plaintiff also argues that Fiorilla is entitled to postjudgment interest on the 2014 Judgment. This request, which does not appear as relief sought in the complaint, is denied. Fiorilla has not asserted the right to collect postjudgment interest from Citigroup pursuant to the 2014 Judgment. Importantly, plaintiff fails to allege any facts demonstrating that plaintiff will be harmed by Citigroup's alleged failure to remit payment of postjudgment interest to Fiorilla (*see Frankel v J.P. Morgan Chase & Co.*, 193 AD3d 689 [2d Dept 2021] ["To confer standing, a claimed injury may not depend upon speculation about what might occur in the future, but must consist of cognizable harm, meaning that a plaintiff has been or will be injured"]). This is especially true in light of the Court's finding that plaintiff has failed to state a claim for constructive bailment. Thus, plaintiff fails to demonstrate standing to assert a claim for postjudgment interest on the 2014 Judgment.

Similarly, in light of the above finding that plaintiff failed to allege facts sufficient to state a claim for constructive bailment, plaintiff is not entitled to either statutory or contractual prejudgment interest on the charging lien.

Accordingly, it is hereby

ORDERED that Citigroup's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is granted, and the complaint is dismissed against that defendant; and it is further

ORDERED that Citigroup shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

9/23/2022
DATE

DAKOTA D. RAMSEUR, J.S.C.

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