SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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LLOYD A. GELWAN, and AMANDA NELSON as Executrix of the ESTATE OF GLENN BACKER,

Plaintiffs,

- v -

GEORGES-LUCIEN DE RATAFIA, DIANE ACKROYD, THE WARSHAWSKY LAW FIRM, STEVEN M. WARSHAWSKY, and THE COUNTY OF COLUMBIA, NEW YORK,

Defendants.

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INDEX NO. 654525/2016

MOTION DATE 01/31/2023,

MOTION SEQ. NO. 004 006 007 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 136, 139, 140, 141, 142, 143, 144, 147, 148, 171, 175, 216, 217, 220, 221, 222, 229, 230, 231, 232, 233, 234, 249, 250, 251, 252, 265, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 344, 345, 349, 354, 397, 398, 399

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 178, 179, 180, 181, 182, 183, 184, 200, 223, 226, 235, 236, 237, 253, 254, 255, 256, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 346, 350, 406

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 218, 219, 224, 227, 238, 239, 240, 245, 246, 257, 258, 259, 260, 266, 267, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 342, 347, 351, 400, 401, 402, 407, 408, 409, 410, 411, 412, 413, 414, 415, 417

were read on this motion to/for CHANGE VENUE.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 225, 228, 241, 242, 243, 247, 248, 261, 262, 263, 264, 268, 269, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 343, 348, 352, 353, 403, 404, 405

were read on this motion to/for DISMISS.

In motion sequence 004, defendants The Warshawsky Law Firm and Warshawsky seek the dismissal of all claims against them; in motion sequence 006, defendants De Ratafia and Ackroyd seek the dismissal of all claims against them; and in motions sequence 007 and 008,

defendant the County of Columbia, New York (Columbia County) seeks the dismissal of the one claim made against it, or, alternatively, a change of venue to Columbia County.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Federal lawsuit

This action arises out of an incident which took place in 2011, the specific details of which are not directly relevant to these motions. Plaintiffs Gelwan and Backer were retained by defendants De Ratafia and Ackroyd (De Ratafia parties) to represent them in a federal civil rights action in the Northern District of New York arising out of the incident (*De Ratafia v Hyson*, US Dist Ct, ND NY, 13 Civ 174, Mordue, J., 2014 [federal action]).

The retainer agreement is written on Backer's letterhead, and provides that the De Ratafia parties have retained Backer's firm, as well as Gelwan as "of counsel," to commence and prosecute the federal lawsuit, and that they have agreed to pay a 40 percent contingency fee, which Backer would share equally with Gelwan (NYSCEF 18).

In May 2015, the law firm of O'Connell & Aronowitz was brought in to act as co-counsel with Backer and Gelwan, and in June 2015, the firm, at the De Ratafia parties' request, was substituted as counsel in place of Backer (NYSCEF 95).

In March 2016, again at the De Ratafia parties' request, defendants Warshawsky and the Warshawsky Law Firm (collectively, Warshawsky) were substituted as counsel for O'Connell & Aronowitz, with Gelwan remaining as co-counsel. Gelwan was apparently discharged by the plaintiffs in April 2016 (*id.*).

Following discovery, the defendants in the federal case moved for summary judgment. While the motion was pending, Backer died (NYSCEF 95).

On March 31, 2016, the Court denied the summary judgment motion, and a jury trial was set for June 13, 2016 (NYSCEF 170).

On or about May 27, 2016, the case settled, and on June 9, 2016, a stipulation of dismissal was filed and then so-ordered by the federal judge on June 10, 2016. The stipulation provides that the federal court will retain jurisdiction for 120 days to resolve any fee dispute between the attorneys (NYSCEF 91).

On August 26, 2016, Gelwan filed this action, on his own behalf and on behalf of Backer's Estate, by summons with notice (NYSCEF 1).

On October 21, 2016, Warshawsky filed a motion in the federal action seeking to have that Court set the amount of any legal fees owed to Gelwan and Backer. The federal judge denied the motion on September 27, 2017, declining to exercise supplemental jurisdiction on the ground that the plaintiffs' obligation to pay attorney's fees in the federal action was "too far removed from the Section 1983 action to support supplemental jurisdiction." The Court also observed that this action was pended and sought the same relief (NYSCEF 95).

B. Instant action

In September 2016, defendants served a demand for a complaint (NYSCEF 2), and plaintiffs then filed a motion seeking an extension of time to serve a complaint, which was granted in May 2017, with plaintiffs directed to file their complaint within 30 days thereof (NYSCEF 32). By stipulation, the parties agreed to extend plaintiffs' deadline to serve a complaint to July 2017 or to file a motion seeking to seal certain portions of the complaint (NYSCEF 33).

In July 2017, plaintiffs filed a motion for a sealing order, which was granted in part in June 2018 (NYSCEF 62).

Between May 2017 and March 2021, the case was marked disposed in error, and upon Gelwan's letter request dated December 31, 2020 (NYSCEF 65), it was restored to active status by order dated March 9, 2021 (NYSCEF 70).

In March 2021, plaintiffs filed a complaint, and in January 2022, following motion practice, plaintiffs filed a second amended complaint (NYSCEF 150), which contains the following claims:

Plaintiffs' first through eight causes of action are asserted against the De Ratafia parties, and allege (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) quantum meruit; (4) promissory estoppel; (5) unjust enrichment; (6-7) tortious interference; and (8) the enforcement of an attorney's charging lien against the settlement proceeds (NYSCEF 106).

Claims eight to 12 are asserted against Warshawsky and allege: (8) a charging lien; (9) tortious interference; (10) breach of fiduciary duty; (11) professional negligence; and (12) a violation of Judiciary Law § 487. Claims 13 and 14 seek related declaratory relief, and claim 15, asserted against defendant Columbia County, seeks to enforce an alleged charging lien against it (*id.*).

On January 14, 2022, Backer's Estate discontinued the Estate's claims (NYSCEF 173). Thus, Gelwan, proceeding self-represented, is the only remaining plaintiff.

II. MOTIONS TO DISMISS

On a motion to dismiss pursuant to CPLR 3211(a)(1) a court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] [internal quotation marks, brackets, and

citations omitted]). Dismissal may only be granted where the documentary evidence put forth by the defendant "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Lezama v Cedano*, 119 AD3d 479, 480 [1st Dept 2014]), with the defendant bearing the burden of making this required showing (*Kolchins*, 31 NY3d at 106).

CPLR 3211(a)(3) allows a party to move for judgment dismissing a cause of action against him on the ground that the party asserting the cause of action does not have the capacity to sue.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court determines whether the pleading states a cause of action and "[t]he motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002] [internal quotation marks and citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court liberally construes the complaint (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]), and "take[s] the allegations of the complaint as true and provide[s] the benefit of every possible inference" (*EBC 1, Inc.*, 5 NY3d at 19 [internal citation omitted]).

"At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017] [internal quotation marks and citation omitted]. "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual

allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*id.* at 142 [internal citations omitted]).

A. De Ratafia parties' motion

1. Delay in filing complaint

In opposing a motion to dismiss, made on the ground that the plaintiff had delayed in filing her complaint, the plaintiff must demonstrate a reasonable excuse for the delay and a meritorious claim in order to avoid dismissal (*see McKenzie v Jack D. Weiler Hosp.*, 171 AD3d 615 [1st Dept 2019]).

Although Gelwan indisputably delayed in filing the complaint, part of that delay was occasioned by the COVID-19 pandemic, medical issues suffered by him and his wife, and the litigation as to sealing of certain portions of the complaint. He also obtained stipulations with the other defendants to extend his time to serve a complaint. Gelwan thus demonstrates a reasonable excuse for his delay (see e.g., Barker v Gervera, 218 AD3d 1159 [4th Dept 2023] [

Moreover, as it is undisputed that Gelwan has not been paid his attorney fees despite the settlement of the federal action over seven years ago, he has meritorious claims against defendants, as discussed in further detail below.

2. Breach of contract

While the retainer agreement is between the De Ratafia parties and Backer, Gelwan is identified therein as "of counsel" to Backer and as another attorney who will be assisting in litigating the federal action, and Backer agreed to split the 40 percent contingency fee equally with Gelwan. It is also undisputed that Gelwan provided legal services to the De Ratafia parties for some period of time, but they have not yet paid him for his services. He thus sufficiently

states a claim for the De Ratafia parties' breach of the retainer agreement or, alternatively, as a third-party beneficiary of the agreement.

The fact that Backer ultimately withdrew from representing the De Ratafia parties is irrelevant given the language in the retainer agreement which provided him and Gelwan with a contingency fee upon the recovery of any sums in the De Ratafia parties' favor, and which is not conditioned on Backer's continued representation of them when any sum is recovered.

3. Unenforceable retainer agreement

The De Ratafia parties allege that the retainer agreement violates 22 NYCRR 1200.0, Rule 1.5(g), so it does not permit an allocation of the fee between Backer and Gelwan based on each attorney's work on the case. However, even if the retainer does not comply with the Rule, the agreement is not thereby rendered unenforceable (*see e.g., Costa v Arandia & Arandia*, 191 AD3d 499 [1st Dept 2021] [trial court correctly rejected argument that contingency fee agreement was unenforceable, as duly-agreed-upon contingent fee agreements are generally valid]; *Matter of Estate of Quigley*, 172 AD3d 1516 [3d Dept 2019] [even if counsel had violated the professional rules related to dividing contingency fee among counsel, agreement was nevertheless enforceable]).

4. Quantum meruit and unjust enrichment

The De Ratafia parties concede that if the retainer agreement is determined to be unenforceable, Gelwan may be entitled to a quantum meruit recovery (*see e.g., Roth Law Firm, PLLC v Sands,* 82 AD3d 675 [1st Dept 2011] [recovery of legal fees under quantum meruit theory permitted even when law firm failed to comply with "letter of engagement" rule]).

Gelwan's unjust enrichment cause of action likewise states a claim (*id.*) and, in any event, it is not duplicative as a party may plead alternative theories of recovery in a complaint

(CPLR 3014; *Tahari v Narkis*, 216 AD3d 557 [1st Dept 2023] [claims for promissory estoppel and unjust enrichment properly pleaded as alternative to breach of contract claim]).

5. Alleged conflict and related Rules violations

The De Ratafia parties also allege Gelwan should not be compensated because a conflict existed based on his joint representation of them. However, they cite no caselaw to support their position, and research discloses none. The same is true for their claim that Gelwan improperly required that they obtain his approval of any settlement involving them and improperly sought a five percent "bonus" contingency from them.

6. Tortious Interference

A party cannot tortiously interfere with its own contract, and therefore Gelwan's claims related to this allegation are dismissed (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413 [1996] [tortious interference claim requires showing existence of valid contract between plaintiff and third party, and defendant's procurement of third party's breach of contract]; *see also U.S. Bank Ntl. Assn. v Kahn Prop. Owner, LLC*, 206 AD3d 855 [2d Dept 2022] [tortious interference claim cannot be maintained against defendant which is party to contract at issue).

7. Breach of covenant of good faith and fair dealing

Gelwan's cause of action for breach of the covenant of good faith and fair dealing is duplicative of his breach of contract claim, and must thus be dismissed (*see Hymowitz v Nguyen*, 209 AD3d 997 [2d Dept 2022]).

8. Charging lien

As Gelwan appeared as "of counsel" to Backer and the De Ratafia parties in the federal action, he is entitled to assert a claim for a charging lien (*see Itar-Tass Russian News Agency v Russian Kurier, Inc.*, 140 F3d 442 [2d Cir 1998] [recognizing that more than one attorney may

be attorney of record for purpose of charging lien, and observing that no cases limited charging lien to only one attorney in action where both attorneys appeared together on behalf of plaintiffs]).

9. Conclusion

Therefore, for the reasons stated above, the De Ratafia parties' motion to dismiss is granted to the extent of dismissing Gelwan's claims against them for tortious interference and breach of the covenant of good faith and fair dealing, and is otherwise denied.

B. Warshawsky Motion

The motion to dismiss on the ground that Gelwan failed to serve a complaint timely is denied for the same reasons as above (*infra*, II.A.1.).

1. Breach of Fiduciary Duty

As New York law provides that co-counsel attorneys do not generally owe fiduciary duties to each other, this claim is dismissed (*See Appel v Schoeman Updike Kaufman Stern & Asher, LLP*, 2015 WL 13654007, fn 9 (Dist Ct, SD NY 2015]; *see also Steinberg v Schnapp,* AD3d 171 [1st Dept 2010] [dismissing quantum meruit claim as attorney was not in privity with co-counsel]).

2. Legal Malpractice

Construing Gelwan's claim for "professional negligence" as a legal malpractice claim, claims for legal malpractice, and the associated duties of due care held as an attorney, only run in favor of the client, not co-counsel (*see Burton v Rogovin*, 262 AD2d 72 [1st Dept 1999] [attorney may not assert legal malpractice claim against co-counsel]).

3. Tortious Interference

Gelwan alleges that Warshawsky tortiously interfered with Gelwan's rights under the contingent fee agreement, and his associated charging lien rights under Section 475 of the Judiciary Law. Warshawsky argues that there can be no claim for tortious interference because the retainer agreement was terminable at will (NYSCEF 103).

In order to sustain a claim that a third party has tortiously interfered with a retainer agreement between an attorney and her client, it must be alleged and shown that the tortious conduct at issue constituted a crime or an independent tort, and allegations of "mere self-interest or economic motivations will not suffice." (*Steinberg v Schnapp*, 73 AD3d 171 [1st Dept 2010]).

In the second amended complaint, Gelwan alleges, in essence, that Warshawsky excluded him from pretrial proceedings in the federal action in order to make it appear that he was not doing any work in that action, and thereby convinced the De Ratafia parties that they should limit or contest Gelwan's fees in that action so that Warshawsky would receive more of any recovery obtained (NYSCEF 86).

These allegations do not rise to the level of accusing Warshawsky of a crime or independent tort, but rather that Warshawsky acted in his own self-interest and for his own financial motivations, and, therefore, are insufficient to state a claim for tortious interference with contract against Warshawsky (*see also LoPresti v Florio*, 71 AD3d 574 [1st Dept 2010] [plaintiff did not allege that defendants' conduct included fraudulent representations, violation of a duty of fidelity, or threats]).

4. Charging Lien Under Judiciary Law § 475

Section 475 of the Judiciary Law provides:

> 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 therefore 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.

While Warshawsky argues that Gelwan would only be entitled to a charging lien if he had been discharged by the De Ratafia parties, the language of the statute does not contain such a limitation, and he cites no authority to support his argument (*cf. Upfront Megatainment, Inc. v Thiam*, 217 AD3d 595 [1st Dept 2023] [law firm entitled to charging lien as it was retained to negotiate settlement and retainer agreement entitled it to payments for sums recovered in settlement]; *see also* Simon's NY Rules of Prof. Conduct § 1.8:133 [2023] [charging lien automatically created as soon as attorney appears on behalf of client in litigation]). In any event, Gelwan alleges that he was discharged by the De Ratafia parties.

5. Section 487 of the Judiciary Law

Judiciary Law § 487(1) provides that it is a misdemeanor for, and creates liability for treble damages against, an attorney who is "guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

As Gelwan was not a party in the federal action (*Gelmin v Quicke*, 224 AD2d 481 [2d Dept 1996] ["party" refers to party in action]), and as the alleged misconduct occurred during the federal action and not here (*Chibcha Rest., Inc. v David A. Kaminsky & Assoc., P.C.*, 102 AD3d 544 [1st Dept 2013] [claim must be brought in action in which

alleged misconduct occurred]), Gelwan does not state a claim for a violation of Judiciary Law § 487.

6. Conclusion

For these reasons, Gelwan's claims for breach of fiduciary duty, legal malpractice, tortious interference with contract, and a violation of Judiciary Law § 487 are dismissed.

C. Columbia County's motion to dismiss

Columbia County moves to dismiss Gelwan's claim against it for, essentially, interfering with his charging lien against the settlement proceeds by paying his share of the proceeds to the De Ratafia parties and Warshawsky, despite being on notice of Gelwan's lien, in violation of Judiciary Law § 475 (NYSCEF 208). It moves to dismiss on the grounds that: (1) Gelwan fails to state a claim against it as a charging lien cannot be enforced against a defendant which successfully moved to dismiss all claims against it; (2) the lien is barred by the statute of limitations and waiver; and (3) the lien is barred as payment of the lien was made to an attorney of record (NYSCEF 215).

Columbia County's first two arguments are meritless, as it is being sued herein as the entity that paid settlement funds to Warshawsky, despite allegedly knowing of Gelwan's charging lien on them, and not as a dismissed defendant, and indeed it was not named as a defendant in the federal action. Nor does its payment to Warshawsky relieve it of liability related to Gelwan's lien (*see Schneider, Kleinick, Weitz, Damashek & Shoot v City of New York*, 302 AD2d 183 [1st Dept 2002] [as defendant had knowledge of attorney's claims in underlying action, its payment of the attorneys' fees portion of settlement amount only to successor counsel subjected it to liability to attorney asserting lien; defendant with knowledge of plaintiff's

attorney's lien has affirmative duty to protect lien and if it fails to do so, it may be held liable to attorney]; *cf. Mason v City of New York*, 67 AD3d 475 [1st Dept 2009] [City not liable for amount of charging lien as it disbursed settlement funds in accordance with court's order fixing amount of lien and directing City to release monies).

Nor has Columbia County shown that Gelwan waived his right to a lien, as Gelwan consistently asserted his right to a lien in the federal action, the federal action settled in May 2016 and Gelwan commenced this action three months later, and he participated in the motion before the federal court seeking a determination as to the amount of attorneys' fees owed to him, if any (*see Schneider, Kleinick, Weitz, Damashek & Shoot*, 302 AD2d at 192 [finding that attorney did not waive right to attorneys fees as he was consistent in efforts to preserve rights to fee]).

However, as the statute of limitations to enforce a charging lien is three years from the date of accrual, i.e., the date of the alleged conversion (CPLR 214[3]), and although Gelwan commenced this action within one month of the attorneys' fees payment to Warshawsky, he did not assert a claim against Columbia County until the second amended complaint was deemed filed and served in January 2022, thus rendering his claim against it untimely.

Nor does the claim relate back to Gelwan's original pleading, as Columbia County and the other defendants in this action – the De Ratafia parties and Warshawsky – are not united in interest, and indeed, they were opposing parties in the federal action (*see Emmett v Town of Edmeston*, 2 NY3d 817 [2004] ["relation back" requires unity of interest between party in proceeding and nonparty sought to be added]). It is also clear that Gelwan knew of Columbia County's existence and alleged conduct related to the charging lien when he commenced this action in 2016, and thus he also does not show that he made a mistake in failing to add Columbia

County to the action in 2016 (*cf Ellis v Newmark & Co. Real Estate, Inc.*, 209 AD3d 520 [1st Dept 2022] [plaintiff showed that failure to add additional defendants arose from confusing and misleading information as to what entity owned premises at issue]).

D. Columbia County's motion to change venue

In light of the dismissal of Gelwan's claim against Columbia County (*see supra*, II.C.), its motion to change venue is denied as moot.

III. CONCLUSION

Accordingly, it is hereby:

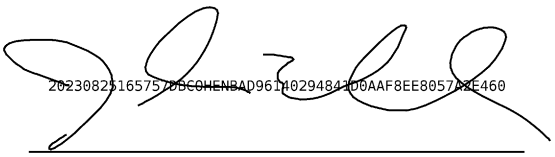
ORDERED, on motion sequence 004, the motion to dismiss by defendants De Ratafia and Ackroyd is granted to the extent of dismissing Gelwan's claims against them for tortious interference with contract and breach of the covenant of good faith and fair dealing, and those claims are severed and dismissed, and the remainder of the motion is denied; it is further

ORDERED, on motion sequence 006, the motion to dismiss by defendants The Warshawsky Law Firm and Steven M. Warshawsky is granted to the extent of dismissing Gelwan's claims against them for breach of fiduciary duty, legal malpractice, tortious interference with contract, and a violation of Judiciary Law § 487, and those claims are severed and dismissed, and the remainder of the motion is denied; it is further

ORDERED, on motion sequence 007, the motion by the defendant The County of Columbia, New York to change venue is denied as moot; it is further

ORDERED, on motion sequence 008, the motion by defendant The County of Columbia, New York to dismiss is granted and Gelwan's claim against said defendant is severed and dismissed, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remaining parties are directed to contact Part 58's Special Master, Richard Swanson, to schedule a settlement conference before him, by joint email to rpswanson432@gmail.com.



8/25/2023
DATE

DAVID B. COHEN, J.S.C.

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