UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
Case No. 8:20-cv-00325-T-35AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, BARRY M. RYBICKI, EQUIALT LLC, EQUIALT FUND, LLC, EQUIALT FUND II, EQUIALT FUND III, EA SIP, LLC,

Defendants,

128 E. DAVIS BLVD, LLC, 310 78TH AVE, LLC, 551 3D AVE S, LLC, 604 WEST AZEELE, LLC, BLUE WATERS TI, LLC, 2101 W. CYPRESS, LLC, 2112 W. KENNEDY BLVD, LLC, BNAZ, LLC, BR SUPPORT SERVICES, LLC, CAPRI HAVEN, LLC, EANY, LLC, BUNGALOWS TI, LLC, EQUIALT 519 3RD AVE S., LLC, MCDONALD REVOCABLE LIVING TRUST, 5123 E. BROADWAY AVE, LLC, SILVER SANDS TI, LLC, TB OLDEST HOUSE EST. 1842, LLC,

Relief Defendants.
_____/

Response to Objection to Charging Lien

We write with respect to Docket Entry 765 in the above referenced matter, an objection filed by Brian Davison ("Mr. Davison") (the "Davison Objection") to the notice of charging lien in this matter.

The Davison Objection is without merit. It not only misconstrues the record, and what this Court ordered, but it mischaracterizes the nature and extent of the legal work performed by

Moses & Singer on Mr. Davison's behalf.

PRELIMINARY STATEMENT

This matter presents a classic illustration of the maxim that "no good deed goes unpunished." Moses & Singer actively represented Mr. Davison through August 2021, against an SEC complaint asserting nine (9) different causes of actions for securities law violations in connection with an alleged $170 million Ponzi scheme involving five (5) separate real estate funds with numerous subsidiaries and operations across the United States, over 1,000 investors, hundreds of real properties, numerous personal corporate entities and well over twenty million dollars of Mr. Davison's personal assets. That representation culminated in a court-approved global settlement among the SEC, the Receiver and Mr. Davison, pursuant to which, among other things, well over a million dollars of Mr. Davison's assets were to be unfrozen, a valuable award to Mr. Davison. January 31, 2023 Declaration of Howard Fischer ("Fischer Decl.") ¶ 2.

As Mr. Davison's assets were frozen by the SEC, Moses & Singer agreed to represent Mr. Davison based on his commitment to locate other sources to pay the firm and, ultimately, if necessary, to use any unfrozen funds to pay any unpaid invoices from Moses & Singer. As evidenced by the Davison Objection, not only is Mr. Davison now attempting to renege on his commitment to use the soon to be unfrozen funds to pay Moses & Singer's outstanding invoices, but he is also apparently challenging the hourly rates that he expressly agreed to pay when he retained Moses & Singer.

Mr. Davison signed an engagement letter with Moses & Singer that set forth its rates. Fischer Decl.) ¶ 3, Ex. A (the "Engagement Letter"). At no point did Mr. Davison complain or otherwise indicate that Moses & Singer's rates were unreasonable. *Id*. ¶ 3. Indeed, Mr. Davison has substantial experience working with law firms and in his capacity as the CEO of Equialt, he retained numerous large law firms, such as Duane Morris, Fox Rothschild and DLA, whose

attorneys' rates are often higher than those of attorneys at Moses & Singer. *Id*. ¶ 4.

Moreover, the Davison Objection relies on a fundamentally flawed factual predicate. Mr. Davison essentially argues that Moses & Singer is not entitled to the requested charging lien because he contends that it accepted $75,000 from receivership funds for its attorneys' fees, which subjected it to Court-ordered restrictions on its fees and the rates that Moses & Singer was entitled to charge. Yet, Mr. Davison is wrong. Moses & Singer did not accept any payment from receivership funds and, as such, any restrictions that might otherwise have been applicable to Moses & Singer's representation of Mr. Davison are not relevant. *Id*. ¶¶ 8-10.

In any event, we respectfully submit, the only issue properly before this Court is whether Moses & Singer is entitled to an attorney's lien on the proceeds of the settlement. Under Florida law, Moses & Singer is clearly entitled to such lien. The Engagement Letter is a contract pursuant to which Moses & Singer is owed its fees; in addition to the many oral representations by Mr. Davison to Moses & Singer that Moses & Singer would be paid its outstanding fees out of any settlement proceeds, that agreement was memorialized through a Reaffirmation Agreement (defined below) wherein Mr. Davison conceded the fees were owed and committed to pay the fees from the amount received pursuant to the settlement (Fischer Decl. Ex. B); Mr. Davison admits he is seeking to avoid payment of the fees owed to Moses & Singer; and Moses & Singer filed notice of its attorney's lien in this pending action within a week of learning of Mr. Davison's effort to try to avoid paying its fees.

To the extent Mr. Davison seeks to dispute the amount of fees owed to Moses & Singer, this Court is not the proper forum to resolve such a dispute. Under the Engagement Letter, Mr. Davison agreed to subject any disputes concerning Moses & Singer's fees to arbitration in New York, which includes any issue at to the total amount of fees owed and the hourly rates charged. *Id*. ¶¶ 5-6 and Ex. A.

For these reasons and as further set forth below in greater below, the Davison Objection should be rejected in its entirety and Moses & Singer granted the requested charging lien.

ARGUMENT

1. There Is No Applicable Court-Ordered Restriction on Fees Charged by Moses & Singer

The Davison Objection hinges almost entirely upon the argument that Moses & Singer was subject to Court-ordered fee restrictions in representing Mr. Davison. *See* Objection at 2-4. This argument fails for a very simple reason – Moses & Singer never accepted money from receivership funds that would have subjected it to such restrictions, and it never agreed to the restrictions.

First, this Court's Order, dated March 16, 2020 (Docket Entry 54 (the "Fee Order"), imposed fee restrictions **only** for funds released from the receivership for Mr. Davison's legal defense. (*See* Fee Order at 4-5). While Mr. Davison admits this fact in the Davison Objection,[1] he then conveniently ignores it.

Second, the terms of the Fee Order do **not** cap the hourly rates permitted to be charged to Mr. Davison pursuant to an engagement letter. The Fee Order only restricted how and to what extent funds specifically released from receivership funds for Mr. Davison's legal defense **could be used** to pay Mr. Davison's legal fees. It does not apply to funds released for any other purpose or funds not derived from the Receivership.

Third, the Fee Order does not, in any event, relieve Mr. Davison from liability for any difference between fees incurred based on the hourly rates charged under an engagement letter and the hourly rates set forth in the Fee Order, so long as that difference is not paid from funds

[1] As the Davison Objection notes at 3, the Court Order "included provisions on the hourly rates on Davison's attorney's fees to be paid ***from unfrozen receivership funds*** and limiting Davison to two lawyers ***being paid from receivership funds***" (emphasis supplied).

released from receivership funds for the specific purpose of paying for Mr. Davison's legal defense.

Fourth, Moses & Singer was not subject to the Court imposed fee restrictions. No funds released from receivership funds for the specific purpose of paying Mr. Davison's legal fees were ever used to pay Moses & Singer's fees.

At best, giving Mr. Davison the benefit of doubt, he is confused as to the source of the $75,000 retainer received by Moses & Singer, which was previously applied to fees incurred on his behalf. The $75,000 applied by Moses & Singer was received from a third-party, not receivership funds. Accordingly, Moses & Singer is not subject to the fee constraints imposed by the Court. Mr. Davison's convenient confusion does not excuse him from his obligation to pay for the legal services he received and committed to pay in the Engagement Letter and the Reaffirmation Agreement, as defined below.

As Mr. Davison is aware, while Moses & Singer received a $75,000 check from receivership funds, that check was never accepted by Moses & Singer because Mr. Davison insisted on mounting a more vigorous defense than the Fee Order would have permitted Moses & Singer to provide him with. Subsequently, evidently using those same funds, a new check was issued from receivership funds to the Trenam Law firm, which was acting as local counsel for Mr. Davison in this matter, after the firm expressed an intent to withdraw from the case if its outstanding invoices were not paid. Fischer Decl. ¶¶ 9-10 and Ex. C. Moses & Singer did not receive or use any of those funds (or any other funds released) from receivership funds for the purpose of paying Mr. Davison's attorneys' fees. Fischer Decl. ¶ 10.

It is beyond dispute that Mr. Davison agreed in signing the Engagement Letter that he would pay Moses & Singer's standard rates of which he was specifically advised. Fischer Decl. ¶ 3 and Ex. A. Thereafter, Mr. Davison regularly received invoices from Moses & Singer,

which clearly set out the work performed, the amounts owed, and the rates charged. Fischer Decl. ¶¶ 11, 14.

Based on Mr. Davison's representations that any outstanding amounts owed to Moses & Singer would be paid from funds that were to be unfrozen, Moses & Singer has patiently waited years for payment of its outstanding invoices. At first, Mr. Davison repeatedly promised that Moses & Singer's outstanding invoices would be paid because there would soon be sufficient funds to pay them. Then, he explained that his father-in-law would be providing funds sufficient to pay Moses & Singer's invoices. Fischer Decl. ¶¶ 12-13. Finally, Mr. Davison claimed that his father-in-law had decided not to provide the promised funds. Fischer Decl. ¶ 13.

Ultimately, Mr. Davison was successful in raising funds to pay a portion of Moses & Singer's outstanding invoices, but was unable to pay the bulk of the amount owed. Confronted with the possibility that Moses & Singer might be forced to seek leave to withdraw as counsel, Mr. Davison and Moses & Singer entered into an agreement, dated November 5, 2020 (the "Reaffirmation Agreement" (Fischer Decl. ¶ 15 and Ex. B), pursuant to which Mr. Davison reaffirmed his obligation to pay the then existing invoice balance and committed to pay it from unfrozen funds, when released. In consideration, Moses & Singer continued to represent Mr. Davison through execution of the Settlement Agreement in August, 2021, almost a year after the date of the Reaffirmation Agreement, and did not seek leave to withdraw. Notably, the Settlement Agreement contains a provision that any settlement funds payable to Mr. Davison (including unfrozen funds) were to be sent to Moses & Singer. This mechanism was agreed to by Mr. Davison so as to provide Moses & Singer with security that its outstanding fees would be paid.

In light of the foregoing, it is clear that Mr. Davison expressly agreed that Moses & Singer was entitled to have any outstanding fees and expenses paid out of funds that were

unfrozen and that any unfrozen funds were to be sent to Moses & Singer to ensure such payment.

2. **This Is Not the Proper Forum for Mr. Davison to Contest the Fees Charged.**

Although less than clear in the Objection, it appears that Mr. Davison is now challenging the fees that were previously incurred.[2] This Court, however, is not the proper forum to consider such a challenge.

Mr. Davison's Engagement Letter, including the Terms and Conditions, provides in relevant part:

> Except for any fee disputes subject to the New York State Fee Dispute Resolution Program[3], any other controversy, claim or dispute arising out of or relating to our engagement, our representation of Client, the services rendered, or fees and expenses charged or any other aspect of our attorney-client relationship (whether sounding in tort, contract or statutory law and whether legal or equitable), ***shall be resolved exclusively*** by binding arbitration in New York, New York in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on any award rendered by the arbitrators may be entered in any court having jurisdiction.
>
> Please note that by agreeing to arbitration: Client waives Client's right to a trial by jury or trial before a judge with respect to any controversy, claim or dispute subject to the arbitration clause; Client becomes subject to arbitration rules that differ in significant respects from court rules (including as to timing, discovery, and potential costs and damages); and Client may be liable for certain fees, costs and expenses in connection with the arbitration as provided in the rules of the American Arbitration Association or determined by the arbitrator.

Engagement Letter, p. 12 (emphasis supplied).

The Engagement Letter further provides, "Our engagement and all aspects of our relationship shall be governed by the internal laws of the State of New York. Client submits to

[2] Oddly, the Objection cites *Allie v. Ionata*, 503 So.2d 1237, 1239 (Fla. 1987) to bolster the claim that an action for refund of prior fees is appropriate in the context of this proceeding. But that case is inapposite as it involved whether claims for recoupment of fees owed could be brought as a counterclaim in a case involving the claim that an accountant and adviser breached his fiduciary duty.

[3] The New York State Fee Dispute Resolution Program is inapplicable here because it is limited to disputes concerning less than $50,000.

the nonexclusive jurisdiction of the state and federal courts located in the Borough of Manhattan in the City and State of New York in any action or proceeding relating to the arbitration of issues arising out of or relating to this engagement." Engagement Letter at p. 12.

Thus, Mr. Davison may not properly question Moses & Singer's fees in this proceeding, as Mr. Davison has contractually agreed to arbitrate any fee disputes in binding arbitration and Florida Courts routinely enforce agreements to arbitrate, any issue as to Moses & Singer's fees should be decided in arbitration in New York. *See, e.g., Identity Stronghold, LLC v. Zeidner*, 2017 WL 11616431 at *12 (M.D. Fla. Mar. 27, 2017) ("Florida public policy favors arbitration, and any doubts concerning the scope of an arbitration agreement should be resolved in favor of arbitration … Arbitration clauses are enforceable and favored when the disagreement falls within the scope of the arbitration agreement.").

3. Moses & Singer Is Entitled to an Attorney's Lien on Settlement Proceeds

The only question properly before this Court is whether Moses & Singer is entitled to an attorney's lien on the settlement proceeds that Mr. Davison will receive pursuant to the Settlement Agreement that Moses & Singer negotiated on Mr. Davison's behalf. As conceded by Mr. Davison, a lien will be issued if these elements are satisfied: (i) a signed engagement letter; (ii) the client's commitment to pay the attorney's fees from an award or other money that is to be received in the action; (iii) an indication that the client is seeking to avoid payment of the fees; and (iv) the Lien is requested while the action in which it is sought is pending. See Davison Objection at 7. Each of these elements are clearly met in the case at bar.

First, not only did Mr. Davison sign the Engagement Letter obligating him to pay Moses & Singer's fees, but he signed the Reaffirmation Agreement after its fees had already been incurred. *See* Fischer Decl. Exs. A and B.

Second, the Reaffirmation Agreement memorializes Mr. Davison's commitment to pay

Moses & Singer from any unfrozen funds, which were to be paid to Moses & Singer in the first instance.

Third, the Davison Objection and Mr. Davison's recent effort to modify the Settlement Agreement terms to permit payment of the unfrozen funds establish his effort to avoid paying Moses & Singer.

Fourth, Moses & Singer's Notice of Lien was filed prior to the termination of the pending action and, in any event, promptly after Mr. Davison's motion to modify the Settlement Agreement's Payment terms was filed in this action. *See Citizens & Peoples Natl. Bank of Pensacola v. Futch*, 650 So. 2d 1008, 1015 (Fla. 1st DCA 1994) ("All that is required to entitle the attorney to perfect a charging lien is for the attorney to file a notice of charging lien or otherwise pursue the lien in the original action prior to its termination. The attorney's charging lien must be filed before the case goes to final judgment or is dismissed."); *Richman Greer Weil v. Chernak*, 991 So. 2d 875 (Fla. 4th DCA 2008) ("Timely notice is the only requirement for perfecting a charging lien. *See Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla. 1983). 'In order to give timely notice of a charging lien an attorney should either file a notice of lien or otherwise pursue the lien in the original action.' *Daniel Mones, P.A. v. Smith*, 486 So.2d 559, 561 (Fla. 1986)(citations omitted).")

4. <u>The Fees Charged In This Case Were Reasonable</u>

While not properly before the Court, Moses & Singer respectfully submits that not only were the fees that it incurred in this matter reasonable, but they were incurred with the full knowledge and at the direction of Mr. Davison. In the event that this Court chooses to disregard the choice of Mr. Davison and Moses & Singer in the Engagement Letter that any dispute as to fees be submitted to mandatory arbitration in New York before the American Arbitration Association and consider the reasonableness of Moses & Singer's fees, Moses & Singer asks to

be permitted to submit supplemental papers detailing its voluminous and successful work on behalf of Mr. Davison.

CONCLUSION

The Davison Objection should be rejected and Moses & Singer's charging lien granted. All the requirements for a charging lien are met here. The Court should enter an appropriate order forthwith.

Dated: New York, New York
January 31, 2023

Respectfully submitted,
Howard Fischer

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