UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. **Case No. 8:20-cv-325-MSS-MRM**

BRIAN DAVISON, et al.,

Defendants.
_____/

DEFENDANT BRIAN DAVISON'S SUPPLEMENTAL BRIEFING PURSUANT TO THE COURT'S ORDER (DOC. 848)

Davison files this supplemental brief pursuant to the Courts' Order dated March 2, 2023 (Doc.848). The Court directed supplemental briefing on several issues related to the Notice of Charging Lien filed by Moses & Singer LLP (Doc. 755).

This dispute arises in the context of the attorney-client relationship between Davison and the Moses & Singer law firm. The relationship between an attorney and his or her client is a fiduciary relationship of the very highest character. *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So.2d 557, 560 (Fla.1997), *receded from on other grounds, Cowan Liebowitz & Latman, P.C. v. Kaplan*, 902 So.2d 755 (Fla.2005). Moses & Singer has not explained how it can be counsel of record for Davison in this case and take a position so clearly contrary to his best interests.

I. FLORIDA LAW GOVERNS THE CHARGING LIEN

Federal courts recognize no common-law lien in favor of attorneys, but "give effect to the laws of the states in which they are held." *Shepard v. Florida Power Corp.*, 2011 WL 2144769, *2 (M.D. Fla. 2011) (report and recommendation by Judge Wilson) (citing *Gottlieb v. GC Financial Corp.*, 97 F. Supp. 2d 1310, 1311 (S.D. Fla. 1999). The charging lien arises in Florida because the property allegedly subject to the lien (the Bank of America account) is in Florida. "It is well established that the law of the State where the debtor's property is situated generally governs the validity, nature and effect of any liens on the property in questions." *In re Banks*, 94 B.R. 772, 773 (Bnkr. M.D. Fla. 1989) (citing *Meyer v. United States*, 375 U.S. 233 (1963)). Because Davison's bank accounts are located in Florida, Florida law governs the validity of Moses & Singer's charging lien.

In addition, when they applied for and were admitted to practice before this Court, the attorneys of Moses & Singer agreed to be bound by Middle District Local Rule 2.01(e) which provides that a "lawyer appearing in the Middle District must remain familiar with, **and is bound by**, the rules governing the professional conduct of a member of The Florida Bar." (Emphasis added). Rule 4-1.5 of the Rules Regulating the Florida Bar governs fees and costs for legal services and provides that a "lawyer must not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee . . . ."

Davison opposes the charging lien because the fee charged is clearly excessive under Rule 4-1.5 and therefore is uncollectable under Florida law; the law by which Moses & Singer agreed to be bound by virtue of its appearance in this Court. The Moses & Singer Motions to Appear in this Court were filed after the Engagement Letter was signed and effected a modification of the law related to the issue of the fee to be charged by its agreement to be bound by the Rules Regulating the Florida Bar.

II. THE COURT MUST EVALUATE THE REASONABLENESS OF THE FEES IN ORDER TO RULE ON THE CHARGING LIEN.

Under Florida law, the amount of the attorney's fees is a necessary aspect of charging lien litigation. *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla.1983) ("A summary proceeding in the original action represents the preferred method of enforcing an attorney's charging lien in Florida.").

In *Riveiro v. J. Cheney Mason, P.A.*, 82 So. 3d 1094 (Fla. 2d DCA 2012), the client contended the trial court erred in awarding the amount of fees. The trial court "made no finding as to the reasonable hourly rate or the amount of hours reasonably expended in the case. This was error." *Id.* at 1098. The court also said because the time records kept were lacking detail, it was necessary for the trial court on remand to examine the challenged billing entries and if it found that the challenged entries and any testimony offered in support of those entries were

lacking in sufficient detail to establish either reasonableness or necessity, "no award should be made." *Id.*

III. THE COURT MUST RULE ON THE AMOUNT OF THE FEE DUE MOSES & SINGER TO ADJUDICATE THE CHARGING LIEN.

This Court necessarily must rule on the amount of fees due to Moses & Singer in order to adjudicate the Charging Lien. It is undisputed that Davison has already paid Moses & Singer $291,700, which he contends is more than a reasonable fee for the services provided. Yet Moses & Singer claims to be owed an additional $571,208.08, plus interest for its services. (Doc. 755, p.2, para. 5). To approve the Charging Lien, the Court will have to determine that Moses & Singer is entitled to a fee in excess of the $291,700 it already has been paid, which it cannot do without hearing evidence. *Riveiro*, 82 So. 3d 1098.

In its January 23, 2023, Order Regarding Evidentiary Hearing (Doc. 786), the Court ordered the parties to file witness and exhibit lists and to exchange pre-marked exhibits for the hearing by 5:00 pm on February 21, 2023. Davison complied with the Court's Order. (Doc. 806). The Court's Endorsed Order continuing the evidentiary hearing (Doc. 800) did not excuse compliance with the witness and exhibit list requirement, and instead reminded the parties to review the order at docket entry 786 prior to the rescheduled hearing. To date, Moses & Singer has not provided a witness or exhibit list and should be precluded from now doing so.

The granting of the Motion to Extend and Modify Asset Freeze (Doc. 746) would result in the release of approximately $322,480 to Davison (Doc. 848, p.4). If the Court grants the charging lien and that sum is paid to Moses & Singer, it would have received total payments of $614,180; a clearly excessive fee under Rule 4-1.5. That ruling also might determine that Davison owes the remainder of the sum claimed by Moses & Singer, including interest, and provide that it can be collected from funds currently under control of the Receiver should Davison prevail on the Motions related to the coins. (Docs. 767 & 768).

IV. FLORIDA LAW SHOULD GOVERN THE WAIVER OF ARBITRATION ISSUE.

The United States Supreme Court's unanimous decision in *Morgan v. Sundance, Inc.*, 142 S.Ct. 1708 (2022), fundamentally changed the law of waiver of arbitration. The Court rejected the view of nine Circuit Courts of Appeal that the strong federal policy in favor of arbitration justified special rules for waiver of the right to arbitration.

The Court assumed without deciding that the Courts of Appeals were correct to rule on the issue of waiver of arbitration as a matter of federal law and held that courts may not "create arbitration specific variants of federal procedural rules, **like those concerning waiver**, based on the FAA's 'policy favoring arbitration.'" *Id.* at 1712-13 (emphasis added). "If an ordinary procedural rule – whether of waiver or forfeiture or what-have-you- would counsel against enforcement of an arbitration

contract, then so be it. The federal policy is about treating arbitration contracts like all others, not about fostering arbitration." *Id.*

Under Florida law, it is well-settled that filing an answer to a pleading seeking affirmative relief without raising the right to arbitration constitutes participation sufficient to constitute waiver. *Green Tree Servicing, LLC v. McLeod*, 15 So. 3d 682, 687 (Fla. 2d DCA 2009); *Price v. Fax Recovery Sys., Inc.*, 49 So. 3d 835, 837 (Fla. 4th DCA 2010); *Lapidus v. Arlen Beach Condo. Ass'n*, 394 So.2d 1102, 1103 (Fla. 3d DCA 1981).

In filing its Notice of Charging Lien, Moses & Singer effectively became a plaintiff seeking affirmative relief from this Court without invoking its right to arbitration. "A party's contract right may be waived by actively participating in a lawsuit or taking action inconsistent with that right." *Klosters Rederi A/S v. Arison Shipping Co.*, 280 So. 2d 678, 681 (Fla. 1973).

It is difficult to conceive of an act more clearly waiving a contractual right to arbitrate than a law firm that is a fiduciary to its client, both objecting to the release of funds to its client and asserting a charging lien, without asserting its right to arbitrate. Those actions are inconsistent with a right to arbitrate. *See Id.*

Application of *Morgan* by federal district courts in Florida was inconsistent. In *Amargos v. Verified Nutrition, LLC*, 2023 WL 1331261, *4-5 (S.D. Fla. Jan. 31, 2023), the court applied federal law and a totality of the circumstances test to find no waiver of the right to arbitration but acknowledged "Florida's bright line rule

that if a defendant fails to assert arbitration in its answer it has waived the right . . . .").

In *Soriano v. Experian Information Solutions, Inc.*, 2022 WL 17551786 (M.D. Fla. Dec. 9, 2022), the court discussed but did not decide the correct post-*Morgan* test for arbitration waiver because under any standard Experian had waived arbitration. In *Gaudreau v. My Pillow, Inc.*, 2022 WL 3098950 (M.D. Fla. July 1, 2022), the Magistrate Judge recommended denial of a motion to compel arbitration and cited *Morgan* for the proposition that waiver is the intentional relinquishment of a known right, whose analysis " 'focuses on the actions of the person who held the right.'" Id. at *6 (citing *Morgan*, 142 S.Ct. at 1713).

In *Warrington v. Rocky Patel Premium Cigars, Inc.*, 2023 WL 1818920 (11th Cir. Feb. 8, 2023), the Court of Appeals for the Eleventh Circuit applied a totality of the circumstances test to conclude that Patel "evinced a clear intent to litigate this matter prior to asserting his right to arbitrate and thus has 'acted inconsistently with [his] right to arbitrate.'" Id. at *2 (citing *S & H Contractors, Inc. v. A.J. Taft Coal Co.*, 906 F.2d 1507 (11th Cir. 1990), abrogated on other grounds by *Morgan v. Sundance, Inc.* 142 S.Ct. 1708 (2022)).

Davison recognizes that this Court is bound to apply *Warrington* but contends that *Warrington* wrongly decided the issue expressly left open in *Morgan* insofar as it applied a federal standard of waiver to arbitration provisions. For almost 100 years, the rule in federal courts has been that except in matters governed by the

federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. *Erie R. Co. v. Tompkins*, 58 S.Ct. 817 (1938). In general, issues related to the state law of contracts should be decided pursuant to state law, and application of a federal standard of waiver of arbitration reflects the overly protective view of arbitration agreements explicitly rejected by the Supreme Court in *Morgan*.

Under Florida law, Moses & Singer waived arbitration by taking actions inconsistent with that right, including essentially suing its client while still representing him in the same case by filing an Objection to Application to Modify Asset Freeze (Doc. 754) and Notice of Charging Lien (Doc. 755). In the context of claims by attorneys against their clients, based on Engagement Agreements drafted by the attorneys, even under the federal totality of circumstances test required by *Warrington*, Moses & Singer waived the right to arbitration.

V. SENDING THIS MATTER TO ARBITRATION INTERFERES IN THE ADMINISTRATION OF THE RECEIVERSHIP IN VIOLATION OF 15 U.S.C. § 77u(g).

If Moses & Singer asks the Court to bifurcate the proceeding, impose a charging lien, and then send the matter to arbitration in New York to determine the amount of any fee due, it will have allowed Moses & Singer to interfere with the administration of the Receivership estate. On February 22, 2023, Dawn and Scott Stallmo moved to intervene in this case. (Doc. 807). Both the SEC and the Receiver opposed their intervention citing Section 21(g) of the Exchange Act, 15

U.S.C. § 77u(g), which bars third parties from intervening in enforcement actions by the Commission. (Docs. 831 & 833, respectively).[1]

An example illustrates the point. If the Court defers ruling on the charging lien (or grants the lien but stays any payment until the proper amount of the lien is determined in arbitration), it will delay the closing of the Receivership until the amount of fees due from Davison, if any, is resolved in arbitration and becomes final after potential district and appellate court proceedings. Any such delay would result in increased costs to the Receivership estate.

VI. CONCLUSION

For the reasons set forth above, the Court should enter its Order denying the Charging Lien in its entirety or, alternatively: (a) requiring Moses & Singer to comply with the Court's Order (Doc. 54) as to hourly rates and limitations on the number of lawyers who can bill Davison; (b) finding that the sum already paid by Davidson equals or exceeds a reasonable fee for the services provided; (c) requiring Moses & Singer to refund to Davison any amount paid in excess of a reasonable fee; and (d) for such other and further relief as the Court may deem appropriate.

[1] Davison adopts the arguments of the SEC and Receiver in those filings as they relate to this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed via the Court's CM/ECF system on this 9th day of March 2023.

/s/ Stanley T. Padgett
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