

<b>Balestriere PLLC v Rivera</b>
2020 NY Slip Op 31448(U)
May 12, 2020
Supreme Court, New York County
Docket Number: 654720/2018
Judge: W. Franc Perry
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**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,

Petitioner,

- v -

JUAN DIAZ RIVERA, JONATHAN BERNSTEIN,  
DESARROLLOS INMOBILIARIOS DEL PEDREGAL, S.A.  
DE C.V., DESARROLLOS FARALLON, S. DE R.L. DE C.V.

Respondents.

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INDEX NO. 654720/2018  
MOTION DATE 09/26/2019  
MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 57, 63

were read on this motion to/for ORDER OF ATTACHMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 60, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Petitioner Balestriere PLLC, a law firm, brought this petition for an order of attachment in aid of arbitration. Petitioner seeks to recover \$14.6 million in legal fees from respondents. In motion sequence number 001, petitioner moves for an order of attachment in aid of arbitration against respondent Jonathan A. Bernstein. Originally the motion sought attachment against all the respondents, but now seeks relief against Bernstein only.

In motion sequence number 002, nonparty White Lilly, LLC moves to intervene. Respondent Bernstein is the managing member and founder of White Lilly, which acted as a litigation funder for the other respondents Juan Diaz Rivera (“Diaz Rivera”), Desarrollos Inmobiliarios del Pedregal, S.A. de C.V. (“DIPSA”), and Desarrollos Farallon, S. de R.L. de

C.V. (collectively, “Farallon”). White Lilly submits a cross petition for attachment in aid of arbitration against petitioner. Bernstein verified the cross petition on behalf of White Lilly. Motion sequence numbers 001 and 002 are consolidated for disposition.

Petitioner contends that Bernstein is liable for its legal fees in his personal capacity. Bernstein contends that he is not personally liable for the legal fees, that White Lilly and Farallon are liable if there are any fees to be paid, and that petitioner owes money to White Lilly. Farallon was engaged in a dispute with its co-investors in a luxury resort in Mexico. On November 5, 2014, White Lilly and Farallon agreed that each would pay 50% of the cost of litigating against Farallon’s co-investors. Bernstein signed that agreement on behalf of White Lilly. On November 20, 2014, petitioner and Farallon entered into an engagement letter and, in March 2015, they entered into a second engagement letter.

The engagement letters provided that petitioner would act as Farallon’s attorney in the dispute with the co-investors, that disputes about legal fees would be arbitrated in New York, that Bernstein was Farallon’s designated representative *vis a vis* petitioner, and that he had decision making authority in legal matters. The letters provided that “[B]y signing this Agreement, you acknowledge and confirm that you are bound to the terms of this Agreement . . . You also acknowledge that you personally undertake and assume the full performance hereof, including payments of amounts hereunder.” Petitioner contends that “you” in the above quoted provision includes Bernstein, while Bernstein claims that “you” means White Lilly. The letters did not mention White Lilly. Bernstein signed both letters. He and petitioner disagree whether he signed them on behalf of White Lilly or on behalf of himself.

Petitioner alleges that after its litigation efforts secured a favorable result for respondents, they refused to pay the agreed upon legal fees and expenses. Petitioner commenced an

arbitration proceeding against respondents with the American Arbitration Association (AAA) in New York. Bernstein answered petitioner's complaint, and White Lilly commenced its own arbitration proceeding against petitioner. Bernstein moved to dismiss the claim against him on the ground that he signed the engagement letters only in his capacity as agent for Farallon. On September 16, 2019, the arbitrator consolidated the two arbitration proceedings and, two days later, denied Bernstein's motion. The arbitrator's decision stated that the engagement letters were ambiguous as to whether Bernstein had signed them for himself or as an agent for another. The arbitrator ruled that the denial was without prejudice to raising the issue again at the end of a hearing on the merits of petitioner's claim. The decision did not mention White Lilly.

Under CPLR 7502 (c), an attachment in aid of arbitration is available "only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief" (*Drexel Burnham Lambert Inc. v Ruebsamen*, 139 AD2d 323, 327 [1st Dept 1988]; *Moquinon, Ltd. v Gliklad*, 55 Misc 3d 1212[A], 2017 NY Slip Op 50548 [U], \*3 [Sup Ct, NY County 2017]).

Attachment is a "harsh" remedy, and is construed narrowly in favor of the party against whom the remedy is invoked (*VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 58, 967 N.Y.S.2d 338 [1<sup>st</sup> Dept 2013] citing, *Penoyar v Kelsey*, 150 NY 77, 80, 44 NE 788, 3 NY Ann Cas 206 [1896]; *DLJ Mtge. Capital, Inc. v Kontogiannis*, 594 F Supp 2d 308, 319 [ED NY 2009]). Whether to grant a motion for an order of attachment rests within the discretion of the court (see *Morgenthau v Avion Resources Ltd.*, 11 NY3d 383, 387, 898 NE2d 929, 869 NYS2d 886 [2008] [no abuse of discretion when court declined to confirm the attachment orders]).

Petitioner alleges that an attachment is necessary to prevent rendering ineffectual any arbitration award, given respondents' failure to pay the legal fees, the declared intention of some of not paying, and all respondents' non-residence in New York.

When multiple respondents are sued, grounds for attachment must be asserted against each respondent (*Ford Motor Credit Co. v Hickey Ford Sales*, 62 NY2d 291, 296 [1984]; *Genger v Genger*, 152 AD3d 444, 445 [1st Dept 2017]). There must be more than a showing that the attachment would, in essence, be "helpful" (*Founders Ins. Co. Ltd. v Everest Natl. Ins. Co.*, 41 AD3d 350, 351, 839 NYS2d 474 [1st Dept 2007]). "[T]he mere fact that defendant is a non-domiciliary residing without the State of New York is not sufficient ground for granting an attachment" (*TAGC Mgt., LLC v Lehman*, 842 F Supp 2d 575, 586 [SD NY 2012] [internal quotation marks omitted]).

Petitioner makes allegations that purport to concern all the respondents without alleging anything about Bernstein in particular. For instance, petitioner alleges that Farallon lied about Mexican tax law in an attempt to divert funds from the petitioner's trust account, breached an agreement to send funds to the trust account, lied about the receipt of certain property, and stated in an email that DIPSA has no intention of paying the firm. It is not alleged that Bernstein was party to these actions.

Petitioner's motion to attach Bernstein's property is denied because it fails to sufficiently demonstrate that Bernstein will not pay any future arbitration award for legal fees and, also, because it is not clear whether he or White Lilly agreed to pay them. Moreover, Petitioner has simply failed to demonstrate that Bernstein will not be able to satisfy any judgment rendered in the underlying arbitration. On this record, the Court finds that petitioner has failed to meet its

burden of showing that any arbitration award would be rendered ineffectual, absent an order of attachment.


Under CPLR 1013, persons may intervene in actions where they have a bona fide interest in an issue involved in the action (*Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 AD3d 197, 201 [1st Dept 2010]). White Lilly’s motion to intervene is denied because it has not demonstrated whether it or Bernstein is bound by the letter agreements and as such, has not met its burden to demonstrate that it has a bona fide interest to intervene in this proceeding.

Accordingly, it is hereby

ORDERED and ADJUDGED that the Petition and petitioner’s motion sequence number 001 is denied; and it is further

ORDERED and ADJUDGED that the Cross Petition and nonparty White Lilly, LLC’s motion sequence number 002 to intervene in this action is denied.

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.

5/12/2020 DATE	 W. FRANC PERRY, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE