



ORDERED in the Southern District of Florida on November 30, 2017.

A handwritten signature in black ink that reads "A. Jay Cristol".

**A. Jay Cristol, Judge
United States Bankruptcy Court**

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA**

In re:

Case No. 15-27691-BKC-AJC

NASSAU DEVELOPMENT OF
VILLAGE WEST, CORP.,

Chapter 11

Debtor.

**MEMORANDUM OPINION AND ORDER DENYING EDDY LEAL, P.A.'S MOTION
FOR IMPOSITION OF CHARGING LIEN**

THIS MATTER came before the Court for hearing on November 15, 2017 at 10:30 a.m. upon Eddy Leal, P.A.'s Motion for Imposition of Charging Lien ("Charging Lien Motion") [ECF No. 190]. The Court (i) having reviewed and considered the Charging Lien Motion and the Objection filed by Orlando Benitez, Jr. [ECF No. 200] (the "Objection"), (ii) having reviewed and considered the docket and pleadings filed in this case, and (iii) having heard argument of counsel to the parties, enters the following decision denying the Charging Lien Motion.

A. Background

1. On October 2, 2015, the Debtor commenced this voluntary Chapter 11 proceeding.

2. On November 30, 2015, Eddy Leal, P.A. filed a notice of appearance as counsel to Orlando Benitez, Jr. and DD&C Financial Investments Corporation (“DD&C”) (herein collectively referred to as “Benitez”).

3. Benitez asserted various secured claims against the Debtor and the Debtor’s real property in this Chapter 11 case (the “Benitez Claims”).

4. On June 1, 2016, the Debtor objected to the Benitez Claims [ECF No. 63] and filed an adversary proceeding against Benitez [ECF No. 64].

5. On June 3, 2016, Drew Dillworth was appointed the Chapter 11 trustee in this Chapter 11 case (the “Trustee”) [ECF Nos. 67, 68].

6. On September 30, 2016, Eddy Leal, P.A. filed a motion to withdraw as counsel to Benitez in this Chapter 11 case [ECF No. 106]. The motion was granted by Order of the Court dated October 13, 2016 [ECF No. 109].

7. Thereafter, on October 21, 2016, Leon Cosgrove, LLC filed a notice of appearance as counsel to Benitez [ECF No. 114].

8. On April 24, 2017, Eddy Leal, P.A. filed its Notice of Charging Lien [ECF No. 139], asserting a charging lien on any proceeds due and payable to Benitez in this Chapter 11 case in respect of fees asserted to be owed to Eddy Leal, P.A. by Benitez for the representation of Benitez in this Chapter 11 case.¹

9. On June 21, 2017, Leon Cosgrove filed a motion to withdraw as counsel to Benitez [ECF No. 143]. That motion was granted by Order dated June 30, 2017 [ECF No. 148].

¹ At the hearing on the Charging Lien Motion, Eddy Leal, P.A. represented to the Court that the only fees being sought in connection with the Charging Lien Motion were the fees alleged to be owed in connection with this Chapter 11 case. Also at the hearing on the Charging Lien Motion, Benitez asserted, among other things, that he did not owe any fees to Eddy Leal, P.A. in respect of this Chapter 11 case based on Benitez’ assertion that such representation was provided under a flat fee arrangement and such flat fees had been paid. Based on the Court’s ruling, the Court does not decide this factual issue.

10. On June 30, 2017, the Trustee objected to the Benitez Claims [ECF No. 150] (the “Benitez Claim Objections”).

11. On June 30, 2017, the Trustee filed his Chapter 11 Trustee’s Motion For Entry Of Order (I) Approving Competitive Bidding And Sale Procedures; (II) Approving Form And Manner Of Notices; (III) Approving Purchase And Sale Agreement With Stalking Horse Bidder; (IV) Scheduling Dates To Conduct Auction And Hearing To Consider Final Approval Of Sale, Including Treatment Of Executory Contracts And Unexpired Leases; (V) Authorizing Sale Of Substantially All The Debtor’s Assets Free And Clear Of All Liens, Claims, Encumbrances And Interests; And (VI) Granting Related Relief [ECF No. 149] (the “Sale Motion”). Pursuant to the Sale Motion, the Trustee proposed to sell the Debtor’s real property, together with the real property of an affiliated debtor, Grand Abbaco of Village West, Corporation (the “Grand Abbaco Debtor”), Case No. 16-14286-AJC (the “Grand Abbaco Case”).

12. In addition, the Trustee asserted in the Sale Motion that the Benitez Claims were the subject of objections and, as such, Benitez did not own or hold allowed claims against the Debtor’s estate and did not have the right to assert a credit bid under Section 363(k) of the Code in connection with the proposed sale of the Debtor’s real estate.

13. As a result of the Benitez Claim Objections, Benitez did not have the right to receive distributions in this Chapter 11 case unless and until the Benitez Claim Objections were resolved by settlement or order of this Court.

14. On July 12, 2017, Genovese Joblove & Battista, P.A. (“GJB”) filed a notice of appearance for DD&C and Benitez in this case [ECF Nos. 157, 158].

15. On September 21, 2017, the Trustee, Benitez and DD&C Financial Corporation signed that certain Stipulation for Settlement (the “Benitez Settlement Agreement”). The Benitez Settlement Agreement (I) evidenced a complex and comprehensive settlement between the Trustee

and Benitez in this Chapter 11 case and in the Grand Abbaco Case, and (II) provided that Benitez would have allowed secured claims in this case entitled to a distribution herein. The Benitez Settlement Agreement also provided that Benitez would have the right to credit bid such allowed secured claims, that Benitez would agree to a fixed surcharge amount that would be paid to the estate for the purpose of paying allowed fees and expenses of the Trustee and his professionals, and the Trustee and Benitez would exchange mutual general releases.

16. On September 21, 2017, the Trustee filed his Motion to Approve Settlement Agreement [ECF No. 175] (the “Benitez Settlement Motion”), seeking approval of the Benitez Settlement Agreement.

17. On October 5, 2017, the Court conducted a hearing on the Benitez Settlement Motion and the objections asserted thereto, including that of Eddy Leal, P.A. (the “Settlement Hearing”).

18. At the Settlement Hearing, Benitez was represented by Paul J. Battista, Esq. and Allison R. Day, Esq. of Genovese Joblove & Battista, P.A.

19. Based on the record at the Settlement Hearing, including the testimony of the Trustee and the argument of counsel to all parties, the Benitez Settlement Agreement was negotiated and prepared by and on behalf of the Trustee through his counsel, Meland Russin & Budwick, P.A., and by and on behalf of Benitez through his counsel, Genovese Joblove & Battista, P.A.

20. On October 11, 2017, the Court entered an Order granting the Benitez Settlement Motion and approving the Benitez Settlement Agreement [ECF No. 184].

21. At the time the Benitez Settlement Motion was filed, Eddy Leal, P.A. had not been counsel to Benitez for almost 12 months in this Chapter 11 case.

22. In the Charging Lien Motion, Eddy Leal, P.A. does not assert or claim that Eddy Leal, P.A. negotiated, prepared or obtained approval of, or was otherwise involved in, the Benitez Settlement Agreement with the Trustee. Rather, at the hearing on the Charging Lien Motion, Eddy Leal, P.A. asserted that the work he performed for Benitez in this Chapter 11 case approximately 12 months earlier necessarily gave rise to or facilitated the Benitez Settlement Agreement.

23. On October 13, 2017 and pursuant to the Sale Motion, the Court conducted an auction of the Debtor's real property, together with the real property owned by the Grand Abbaco Debtor.

24. Benitez was present at the auction and was deemed a qualified bidder for the Debtor's real property based on the terms of the Benitez Settlement Agreement.

25. Benitez was represented at the auction and the sale hearing immediately following the auction by Paul J. Battista, Esq. and Allison R. Day, Esq. of Genovese Joblove & Battista, P.A.

26. Benitez was not the successful bidder at the auction.

27. On October 31, 2017, the Court entered an Order granting the Sale Motion and approving the sale of the Debtor's property to B and B Grove Properties, LLC, who was the successful bidder at the auction [ECF No. 198].

28. Pursuant to the Benitez Settlement Agreement, Benitez was entitled to receive an amount equal to the net proceeds from such sale, but in no event more than his allowed secured claim in this proceeding.

29. On November 20, 2017, the Trustee filed his Report of Sale [ECF No. 203] and represented to the Court that an amount equal to \$2,225,000.00 was to be distributed to Benitez. The foregoing amount represented payment of Benitez' allowed secured claim against the Debtor's real property pursuant to the Benitez Settlement Agreement *less the amount of \$100,000, which*

was reserved by the Trustee in response to the demand made by Eddy Leal, P.A. in connection with the Charging Lien Motion.

30. It is undisputed that the funds against which Eddy Leal, P.A. is asserting a charging lien are derived from the Trustee's sale of the Debtor's real property, and these funds are due and owing to Benitez based on the terms of the Benitez Settlement Agreement.

B. Analysis

31. For a charging lien to attach to proceeds of a settlement or judgment in Florida, the attorneys' services must "produce a positive judgment or settlement for the client, since the lien will attach only to tangible fruits of the [attorney's] services." *See Litman v. Fine, Jacobson, Schwartz, Nash, Block & England, P.A.*, 517 So.2d 88, 91-92 (Fla. 3rd D.C.A., 1987); *see also, Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertrnik, P.A. v. Baucom*, 428 So.2d 1383, 1385 (Fla. 1983).² Eddy Leal, P.A. asserts a charging lien against Benitez' share of the sale proceeds that are due and owing pursuant to the Benitez Settlement Agreement for services it provided to Benitez before withdrawal from this case – nearly one year prior to the agreement being reached. In particular, Eddy Leal, P.A. asserts the services it provided helped to produce the Benitez Settlement Agreement, to wit, successfully prosecuting motions to remand numerous foreclosure cases improperly removed to this Court, attending the 341 meeting of creditors, seeking dismissal as a bad faith bankruptcy filing, defending Creditor Benitez in an adversary proceedings, prosecuting a derivative action lawsuit filed on behalf of Creditor Benitez, negotiating a contract

² There are four threshold elements required to be shown in Florida to assert a successful charging lien action, which include (i) an express or implied contract between the lawyer and the client; (ii) an express or implied understanding that payment for legal fees depends on the recovery in the case or that the fees will be paid from the recovery; (iii) the client has refused to pay for legal services rendered in the case or has disputed the amount of the fees; and (iv) the lawyer has given the client timely notice of intent to impose the lien. *See Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertrnik P.A. v. Baucom*, 428 So.2d 1383 (Fla. 1983). For purposes of this Motion, the Court assumes the foregoing elements exist, but does not decide these factual issues on this record.

for \$35,000,000 to purchase an “assemblage” of real estate owned by this Debtor and affiliates, and seeking the assistance of the U.S. Trustee to appoint a Trustee in the case.

32. Upon review of the record, the Court is not persuaded that the services of Eddy Leal, P.A. in any way produced or facilitated the Benitez Settlement Agreement. The record establishes that such services, to the extent they were provided, did not give rise to the allowed secured claims in favor of Benitez, which in turn was the basis for the payments that were made to Benitez from the sale of the Debtor’s property. The foreclosure cases Eddy Leal, P.A. asserts it persuaded this Court to remand were improperly removed in the first instance and remand did not produce or even help to produce a settlement in this bankruptcy case as the case continued on for more than a year after the remand orders. Eddy Leal, P.A. asserts entitlement to a charging lien for defending Creditor Benitez in an adversary proceeding, prosecuting a derivative action on behalf of Creditor Benitez, and negotiating a contract for \$35,000,000 to purchase an “assemblage” of real estate owned by this Debtor and affiliates. However, it was these “services” that delayed settlement, multiplied litigation and unnecessarily prolonged this case and the sale of the properties. The foregoing services in no way produced or helped to produce the Benitez Settlement Agreement.

33. Moreover, attending a 341 meeting of creditors on behalf of a creditor of the estate did not produce or facilitate the Benitez Settlement Agreement. Although Eddy Leal, P.A. may have sought dismissal of the case as a bad faith bankruptcy filing, such relief was not granted and those services did not result in the Benitez Settlement Agreement.

34. The present case is similar to the case of *Rochlin v. Cunningham*, 739 So.2d 1215 (Fla. 4th D.C.A. 1999). In *Rochlin*, the court addressed a request for a charging lien by an attorney on the basis that even though the attorney was terminated, she had previously negotiated certain terms of a settlement agreement for the client that ultimately ended up in a final settlement

agreement that was negotiated and finalized by subsequent counsel to the client. The *Rochlin* court found and concluded that the “fact that the final settlement agreement included some terms that were negotiated by appellant [the former attorney] does not mean that she produced a positive result for [the client].” *Id.* at 1217. The court went further and found that the “record shows that no settlement was reached while appellant [the former attorney] represented Cunningham [the client] mainly because of the advice concerning child support. Based on this record, we hold that the unresolved settlement agreement did not constitute a positive result as contemplated in *Litman....*” *Id.*

35. Similar to the reasoning in *Rochlin*, the court in *Correa v. Christensen*, 780 So.2d 220 (Fla. 5th DCA 2001) concluded that “[i]t is not enough to support the imposition of a charging lien that an attorney has provided his services; the services must, in addition, produce a positive judgment or settlement for the client, since the lien will attach only to the tangible fruits of the services.” *Id.* (citing to *Sinclair*); *see also, Robert C. Malt & Co. v. Carpet World Distributors, Inc.*, 861 So.2d 1285 (Fla. 4th DCA 2004)(“A charging lien cannot be imposed merely because the attorney provided legal services.”)

36. Eddy Leal, P.A. had long since withdrawn from representing Benitez in this case by the time the Benitez Settlement Agreement was negotiated with the Trustee by Genoese Joblove & Battista, P.A. Even if, as Eddy Leal, P.A. asserts (and Benitez denies), certain aspects of the Benitez Settlement Agreement resulted from the efforts of Eddy Leal, P.A. or that the work performed by Eddy Leal, P.A. facilitated the Benitez Settlement Agreement, such aspects, efforts and work are insufficient and far too remote to support the imposition of a charging lien in this case.

37. Notwithstanding the denial of a charging lien in this case, nothing in this Order is intended to prevent Eddy Leal, P.A. from suing Benitez for attorneys fees in an appropriate forum.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that the Charging Lien Motion is DENIED, and the Trustee or Genovese Joblove & Battista, P.A., as applicable, are authorized and directed to disburse the funds (i.e. \$100,000) being held in escrow/reserve in respect of the Charging Lien Motion to or at the direction of Orlando Benitez, Jr. in further payment of his allowed secured claims in this case.

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Submitted By:

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Copies Furnished To:

Paul J. Battista, Esquire is directed to serve copies of this Order on all parties in interest and to file a Certificate of Service.