

Day v City of New York
2019 NY Slip Op 34039(U)
February 26, 2019
Supreme Court, New York County
Docket Number: 110400/2009
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ PART 13
Justice

VERDA DAY, Plaintiff, INDEX NO. 110400/2009
-against- MOTION DATE 02/20/2019
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

FILED
MAR 04 2019
NEW YORK COUNTY
COUNTY CLERK

THE CITY OF NEW YORK and NEW YORK CITY
HOUSING AUTHORITY, Defendant,

The following papers, numbered 1 to 5 were read on this motion to withdraw as counsel:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits _____	4 - 5
Replying Affidavits _____	

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Cross-Motion: Yes No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon a reading of the foregoing cited papers, it is Ordered that the motion to withdraw as legal counsel for plaintiff, for costs, and a retaining lien is denied.

On July 16, 2009, plaintiff, Verda Day commenced this personal injury action against defendants, the City of New York and the New York City Housing Authority. Plaintiff alleges she was injured when she fell on the sidewalk as a result of the defendants failure to properly maintain the premises. Plaintiff has been represented in this action by the law firm of Mark L. Lubelsky and Associates (hereinafter, the "Lubelsky firm").

The Lubelsky firm's motion seeks an Order permitting it to withdraw as plaintiff's legal counsel, to stay all proceedings until plaintiff has had a reasonable opportunity to retain alternative counsel, for a charging lien, retaining lien, and to be compensated for litigation costs.

The Lubelsky firm argues that it should be permitted to withdraw from representation of the plaintiff due to a conflict of interest pursuant to Rule 1.16 of the New York Rules of Professional Conduct (NYRPC). The Lubelsky firm claims that there has been a breakdown in the attorney-client relationship resulting in irreconcilable differences and the inability to continue to represent the plaintiff.

The attorney's right to withdraw from representation requires that ethical considerations be taken into consideration by the Court and that good cause for the relief sought be shown:

"The right of an attorney or counsel to withdraw from employment, once assumed, arises only from good cause. Even the desire ... or consent of the client is not always sufficient. The lawyer should not throw up the unfinished task to the detriment of his client, except for reasons of honor or self-respect. If the client insists upon an unjust or immoral course in the conduct of [her] case, or if [she] persists over the attorney's remonstrance in presenting frivolous [claims], or if [she] deliberately disregards an agreement or obligation as to fees or expenses, the lawyer may be warranted in withdrawing on due notice to the client, allowing him time to employ another lawyer. So also when a lawyer discovers that his client has no case and the client is determined to continue it; or even if the lawyer finds himself incapable of conducting the case effectively."

(Suffolk Roadways, Inc. v Minuse, 56 Misc 2d 6, at 7-8, 287 NYS 2d 965 [Sup Ct, Special Term, Suffolk County, 1968] citing to Canon 44 of the Canons of Professional Ethics)

An attorney does not have an unencumbered right to unilaterally withdraw from a case, without first demonstrating good cause for the withdrawal (*Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc. 3d 486, 501, 884 NYS 2d 596 [Sup Ct, NY County, 2009] citing to *Benefield v City of New York*, 14 Misc. 3d 603, 824 NYS2d 889 [Sup Ct, Bronx County, 2006]). Just cause for withdrawal as counsel may be waived if the movants fail to act swiftly and wait at least a year to move to be relieved as counsel (*Suffolk Broadways, Inc. v Minuse*, 56 Misc 2d 6, *supra*). The movant's lack of action under said circumstances indicates that they did not consider the alleged accusation seriously (*id.*). The rules requiring permission to withdraw are based on some client conduct that substantially interferes with the attorney-client relationship (*Countryman v Watertown Hous. Auth.*, 13 Misc 3d 632, 820 NYS 2d 757 [Sup Ct, Jefferson County, 2006] citing to *Kierman v Kierman*, 233 AD2d 867, 649 NYS2d 612 [4th Dep't 1996]). When no proper showing has been made that a client's conduct has substantially interfered with the attorney-client relationship, this is grounds to deny a motion to withdraw as counsel (*see id.*).

It is the Lubelsky firm's contention that plaintiff has demonstrated, in various ways, a continued distrust of the representation being provided to her. It is claimed at oral argument that the relationship with Verda Day has deteriorated over the course of the last four years of representation, and the motion papers allege that the plaintiff has more recently over the past few months: (1) repeatedly threatened to fire counsel and expressed distrust in counsel; (2) accused counsel of discrimination; (3) accused counsel of colluding directly with the defendant; and (4) questioned the integrity of counsel's advocacy, expertise and advice; and (5) sought to have counsel engage in unethical conduct. The motion papers specifically assert that plaintiff has accused Mark L. Lubelsky, Esq., personally of discrimination, and that she accused the firm of colluding with the defendant, New York City Housing Authority, by attempting to strike a deal that only benefits the Lubelsky firm and the defendant (*see Mot. Mensah Aff.*).

Plaintiff opposes the motion arguing that she is too old and frail to have engaged in the combative conduct which she has been accused of by the Lubelsky firm. In support of her argument plaintiff annexes to the opposition papers, a Doctor's note and an oncology report showing that she suffers from uterine cancer (*see Note from Jay Kavet, M.D. and*

OB/GYN Oncology report). Plaintiff states that she has been on chemotherapy and radiation therapy for four years and does not pose a threat to anyone at the age of 74. Plaintiff also claims she would prefer to keep her current counsel because they are familiar with the case and she has been waiting 11 years for the Lubelsky firm to bring about a resolution of the claims. Plaintiff states that it is virtually impossible for her to retain an attorney on the eve of trial after the Lubelsky firm has represented her for 11 years. She further claims that she did not accuse the firm of discrimination, only that they were not taking her case as seriously because she is poor.

The parties argued the motion in camera, on a sealed record. Each side had an opportunity to argue their respective positions and explain to the Court what really transpired between them leading to this point in the litigation. After hearing both sides, the Court is convinced that the Lubelsky firm does not have good cause for making this application to withdraw.

The arguments presented by the Lubelsky firm lack evidentiary support and fail to refute the evidence and statements made by Verda Day in support of her opposition to this motion. The Lubelsky firm provides nothing other than bare unsupported allegations that Verda Day has engaged in conduct that renders their continued representation of her, impossible after eleven years. An attorney looking to be relieved as counsel for cause must show sufficient grounds for doing so (*Frenchman v Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP*, 24 Misc.3d 486, *supra*). The bare allegations presented in support of this motion that Verda Day engaged in conduct that would render continued representation impossible, without evidentiary support, are insufficient to warrant the relief sought on this motion (see *Isserv Berg*, 38 Misc 2d 957, 239 NYS 2d 370 [Sup Ct, Special Term, Nassau County, 1963] [holding that attorney's simple statement that his bill was only partially paid and that the defendant failed to follow his directions did not constitute sufficient factual detail so that the court could allow the attorney to withdraw]).

The bare allegation that Verda Day has done something that would result in the Lubelsky firm violating the ethics rules also does not necessitate being relieved as counsel (see *Torres v Torres*, 169 AD2d 829, 565 NYS 2d 198 [1991] [holding that denial of counsel's application for leave to withdraw as counsel for defendant on the eve of a hearing on application to punish defendant for contempt for failure to make maintenance and mortgage payments was not an abuse of discretion. This was true even though defendant had, on the eve of the hearing, imparted information to the attorney which allegedly indicated that further representation of defendant by counsel would violate an attorney disciplinary rule]).

The Lubelsky firm also seeks compensation of litigation costs, a charging lien, and a retaining lien in this matter. The Lubelsky firm is not entitled to litigation costs, a charging lien, or a retaining lien because it is not relieved from the representation of Verda Day. Alternatively, the Lubelsky firm would not be entitled to an attorney's lien in this case due to excessive delay in moving to be relieved as counsel which effectively waived any objection to representation or claims that the alleged accusations were just cause for withdrawal. The Lubelsky firm is being held to a unique and exacting standard for good reason:

"The office of a lawyer is one of great importance. He is schooled in the substantive law, has studied the intricate rules of practice and is familiar with the pitfalls made in this complex world for the uninitiated. He has the

power of expression and is skilled in argument. The road he travels is technical, but he knows the turns where others get lost... The profession demands of him that he stand by under the most trying conditions-lest, unprotected, his client fall down harder than justice requires. He should not desert in the midst of the battle. The relation of attorney and client is a sacred one and it binds the lawyer, although not the client, to continue to represent him until he is properly relieved."

(Suffolk Roadways, Inc. v Minuse, 56 Misc 2d 6, supra at 7, citing to Eisenberg v Brand 144 Misc 878, 879, 259 NYS 57, 58 [Sup Ct Kings County, 1932]).

The Lubelsky firm is seeking to withdraw from representing and, essentially, abandon the client, Verda Day, when she is most vulnerable (i.e., while she is suffering from cancer, and after she has relied on their representation and guidance for that past 11 years) without good and sufficient cause. The Lubelsky firm has, therefore, automatically forfeited the ability to obtain liens:

"It is clear that an attorney cannot leave his client in the middle of a matter, because he does not supply him with money, or by reason of any other difficulty, without running the risk of losing the benefit of that relation ... The relation of attorney and client lacks mutuality. It favors the client. He may leave at any time without penalty. The attorney has a right to quit, too (although honor bound to stay), but he is severely penalized. When he withdraws, he breaks the charm that sustains his lien. He himself has destroyed the relationship necessary to support that equitable right that ensured payment of his fee."

(Suffolk Roadways, Inc. v Minuse, 56 Misc 2d 6, 7 [Sup Ct 1968] citing to Eisenberg v Brand 144 Misc 878, supra at 879).

Therefore, the motion for compensation of litigation costs as well as a charging or retaining lien is denied.

Accordingly, it is ORDERED that Mark L. Lubelsky and Associates's motion to be relieved as counsel for the plaintiff is denied and it is further,

ORDERED that the motion for compensation of litigation costs as well as a charging or retaining lien is also denied.

FILED
MAR 04 2019
NEW YORK COUNTY
COUNTY CLERK

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 26, 2019



MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE