

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

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**IN THE MATTER OF THE PETITION FOR
DISSOLUTION OF SOCH BRSH CONTRACTORS
CORP., PURSUANT TO BUSINESS CORPORATION
LAW SECTIONS 1108 & 1104 AND FOR OTHER
RELIEF**

**OLAYIWOLA AKABASHORUN INDIVIDUALLY AND
DERIVATIVELY ON BEHALF OF SOCH BRSH
CONTRACTORS CORP.,**

Index No. **801515/21E**

Petitioner(s),

Hon. **FIDEL E. GOMEZ**
Justice

- against -

**SOCH BRSH CONTRACTORS CORP.,
SOCH BRSH 1 LLC, and SONIA P. COLLINS,**

Respondent(s).

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The following papers numbered 1 to 1, Read on this motion noticed on 9/7/22,
and duly submitted as no. 1 on the Motion Calendar of 9/7/22.

| | <u>PAPERS NUMBERED</u> | |
|--------------------------------------------------------------------------|------------------------|--|
| Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed | 1 | |
| Answering Affidavit and Exhibits | | |
| Replying Affidavit and Exhibits | | |
| Notice of Cross-Motion - Affidavits and Exhibits | | |
| Pleadings - Exhibit | | |
| Stipulation(s) - Referee's Report - Minutes | | |
| Filed Papers-Order of Reference | | |
| Memorandum of Law | | |

Motion by Jay S. Markowitz, is decided in accordance with the Decision and Order annexed hereto.

Dated: 9/14/2022

Hon. 
FIDEL E. GOMEZ, AJSC

- 1. CHECK ONE CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION/CROSS-MOTION IS GRANTED (MOTION)
 DENIED (CROSS-MOTION)
 GRANTED IN PART
- 3. CHECK IF APPROPRIATE. OTHER
 SETTLE ORDER
 SUBMIT ORDER
 DO NOT POST
 FIDUCIARY APPOINTMENT
 REFEREE APPOINTMENT
 NEXT APPEARANCE DATE:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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IN THE MATTER OF THE PETITION FOR
DISSOLUTION OF SOCH BRSH CONTRACTORS CORP., **DECISION AND ORDER**
PURSUANT TO BUSINESS CORPORATION LAW
SECTIONS 1108 & 1104 AND FOR OTHER RELIEF Index No: 801515/21E

OLAYIWOLA AKABASHORUN INDIVIDUALLY AND
DERIVATIVELY ON BEHALF OF SOCH BRSH
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- against -

SOCH BRSH CONTRACTORS CORP., SOCH BRSH 1
LLC, and SONIA P. COLLINS,

Respondent(s).

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In this special proceeding for, *inter alia*, dissolution of a corporation, Jay S. Markowitz, respondents' counsel, seeks, *inter alia*, an order pursuant to CPLR § 1201, appointing a Guardian ad Litem (GAL) for respondent SONIA P. COLLINS (Collins). Saliently, movant contends that because Collins is unable to understand the nature of this action, she cannot assist in her own defense. Petitioner consents to the portion of the instant application which seeks the appointment of a GAL and otherwise opposes every other portion.

For the reasons that follow hereinafter, movant's motion is granted, in part.

The instant special proceeding seeks dissolution of a

corporation. The petition states that on September 1, 2017, petitioner OLAYIWOLA AKABASHORUN (OA) and Collins formed respondent SOCH BRSH CONTRACTORS CORP (Soch), a corporation. OA and Collins each own 50 percent of Soch's shares, petitioner is Soch's Director and Collins is also Soch's Director and its President. On January 27, 2020, after delivering two notes and mortgages to Washington Equity and Funding Corp., Soch purchased real property located at 721 East 216 Street, Bronx, NY (216). On July 21, 2020, Collins unilaterally and without petitioner's knowledge or consent transferred 216's title to respondent SOCH BRSH 1 LLC (Soch B), a corporation whose sole member is Collins. As a result of the foregoing, petitioner and Collins, *inter alia*, no longer communicate, are so divided that they cannot elect a board of directors for Soch, and cannot run Soch in a productive manner. Petitioner therefore seeks to dissolve Soch pursuant to BCL § 1104, the sale of Soch's property, the distribution of Soch's assets according to petitioner and Collins' ownership shares in Soch, and a credit to petitioner for any sums Collins dissipated from Soch. Petitioner also seeks the appointment of a receiver pursuant to BCL § 1008, to sell Soch's assets and an accountant pursuant to the foregoing section to determine whether and to what extent Collins has dissipated Soch's assets.

On March 11, 2022, petitioner moved by Order to Show Cause (OSC) seeking an order pursuant to Judiciary Law §§ 70 and 753

holding Collins in contempt for the purported transfer of 216 during the pendency of the instant action. This OSC has been adjourned numerous times because petitioner has been unable to personally serve Collins with the OSC and more importantly, because movant on the present application has indicated that Collins was hospitalized for many months and is likely afflicted with dementia.

APPOINTMENT OF A GAL

Movant's motion seeking an appointment of a GAL is granted. Significantly, the record establishes that Collins is afflicted with a medical infirmity which has impaired her ability to communicate with movant, her attorney, such that she is currently incapable of defending this action and, therefore, protecting her rights.

CPLR § 1201 mandates that under four sets of circumstances, a person must appear in an action by his guardian ad litem. The statute reads, in pertinent part, that

[a] person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent, or other person or agency having legal custody, or adult spouse with whom he resides, or if he is an infant, person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the mental hygiene law and the court so directs because of a conflict of interest or for other cause, or if he is an adult incapable of adequately

prosecuting or defending his rights.

Thus, subject to other portions of the statute, not relevant here, an infant, a person declared to be incompetent, one declared a conservatee, or an adult incapable of adequately prosecuting his/her rights must appear in any action by way of a GAL. The court's power to appoint a guardian ad litem is among its inherent powers (*Berman v Grossman*, 24 AD2d 432, 433 [1st Dept 1965] ["The power to appoint a guardian ad litem to appear for and represent the incompetent in the proceeding, absent prohibitory legislation, is among the court's inherent powers in the matter of supervision over the person and property of the incompetent."]). Moreover, in order to warrant the appointment of a GAL, the Court need not determine that the person for whom a GAL is sought is incompetent (*Application of Ciena*, 8 AD2d 877, 877 [3d Dept 1959] ["It is not necessary that there be a formal or judicial declaration of incompetency before the appointment of guardian ad litem (We think there has been undue emphasis on technical considerations, and we find no justification for distinguishing between an incompetent person and an alleged incompetent when it clearly appears that the party affected is a person of unsound mind and actually an inmate of an institution for mentally unsound persons."]), *affd sub nom. Ciena v State*, 7 NY2d 939 [1960]; see *Anonymous v Anonymous*, 3 AD2d 590, 594 [2d Dept 1957] ["The appointment of such a guardian would of course in no way amount to an adjudication of incompetency but

would merely be a determination of the fact that the state of the record indicates a necessity for the court to intervene for the party's protection."]). Instead, when "substantial evidence is presented to indicate that [a party] is an adult incapable of adequately defending his rights[,] . . . there must be a guardian ad litem [appointed] for him" (*Palaganas v D.R.C. Indus., Inc.*, 64 AD2d 594, 594 [1st Dept 1978] [internal citations omitted]). Stated differently, when it is established that a person is afflicted with an infirmity which renders he/she unable to assist in his/her own defense or prosecution, the appointment of a GAL is warranted (*Anonymous v Anonymous*, 256 AD2d 90, 91 [1st Dept 1998] ["In light of the court's observation of defendant in an apparently chronic irrational and agitated state attributable to alcohol and substance abuse and defendant's consequent and manifest inability to assist his attorneys in his defense, the court properly concluded that appointment of a guardian ad litem for defendant pursuant to CPLR 1201 and 1202 was necessary to protect defendant's interests in the instant litigation."] *cf.* *Nancy C. v Alison C.*, 57 AD3d 986, 987 [2d Dept 2008] ["The mother correctly contends that the Family Court improvidently exercised its discretion in appointing a guardian ad litem for her in the absence of evidence indicating that she was incapable of adequately prosecuting or defending her rights."]; *Matter of In re Barbara Anne B.*, 51 AD3d 1018, 1019 [2d Dept 2008]).

Here, movant states that for several months prior to March 16, 2022, despite attempts via e-mails, texts and phone calls he was unable to contact Collins. On March 15, 2022, movant finally spoke to Sabita Blake, who indicated that Collins had been discharged from the hospital and was now living with Collins' sister, who was caring for her. Upon speaking to Collins, movant states that "she was heavily medicated, and could not understand what I was telling her about this lawsuit, and most importantly could not understand the nature of" the OSC filed by petitioner seeking to hold Collins in contempt.

Movant also submits a document from Jacobi Hospital dated March 17, 2022, and signed by Bajaj Veeresh Veeresh (Veeresh), a medical doctor. Within the document, Veeresh states that Collins "has difficulty with memory and will be recommended to have 24 hour supervision."

Based on the foregoing, it is clear that Collins is currently afflicted with a medical infirmity, rendering her incapable of adequately defending her rights, and thus requiring the appointment of a GAL to defend those rights in this special proceeding (*Palaganas* at 594; *Anonymous*, 256 AD2d at 91).

WITHDRAW AS COUNSEL

Movant's motion seeking to be relieved as counsel is denied as

premature. Significantly, movant premises the instant motion on Collins' inability to participate in her defense, which makes representing her impossible. However, the foregoing impediment could and should be remediated by the appointment of a GAL, which as noted above, this Court has, thereby obviating the need for movant to withdraw as counsel.

It is well settled that an attorney "may terminate his relationship [with his client] at any time for good sufficient cause and upon reasonable notice" (*In re Dunn*, 205 NY 398, 403 [1912]; *Mason v MTA New York City Tr.*, 38 AD3d 258, *2 [1st Dept 2007]; *Matter of Williams v Lewis*, 258 AD2d 974, 974 [4th Dept 1999]). Specifically, CPLR § 321(b)(2) states that

[a]n attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.

Notice of a motion to withdraw as counsel must be given to the client and a failure to give said notice mandates denial of the motion (*Birky v Katsilogiannis*, 37 AD3d 631, 632 [2d Dept 2007]; *In re Kindra B.*, 296 AD2d 456, 458 [2d Dept 2002]); *Wong v Wong*, 213 AD2d 399, 400 [2d Dept 1995]; *Matter of Williams* at 974). Moreover, the decision to grant or deny a motion to withdraw as

counsel rests within the discretion of the trial court and shall not be overturned absent an improvident exercise of that discretion. (*Cashdan v Cashdan*, 243 AD2d 598, 598 [2d Dept 1997]).

With respect to grounds for the grant of such a motion, a client's failure to pay legal fees has been deemed good cause warranting an attorney's withdrawal (*Galvano v Galvano*, 193 AD2d 779, 780 [2d Dept 1993] ["Under these circumstances, we find that the Supreme Court's denial of the appellant's motion to withdraw was an improvident exercise of discretion. It is well settled that an attorney will be permitted to withdraw from employment where a client refuses to pay reasonable fees."]; *Matter of Lenk*, 218 AD2d 802, 802 [2d Dept 1995]). Irreconcilable differences between an attorney and his client, such as a client's threats and constant questioning of the attorney's work and legal strategy and the questioning of the attorney's competence and loyalty have all been deemed to constitute good cause for withdrawal by counsel (*Lake v M.P.C. Trucking, Inc.*, 279 AD2d 813, 814 [3d Dept 2001]; *Bankers Trust Company v Hogan*, 187 AD2d 305, 305 [1st Dept 1992]; *Kiernan v Kiernan*, 233 AD2d 867, 868 [4th Dept 1996]). A client's failure to maintain contact with his lawyer has also been deemed good cause for purposes of attorney withdrawal (*Tartaglione v Tiffany*, 280 AD2d 543, 543 [2d Dept 2001]).

Here, while the record establishes that movant has had

difficulty communicating with Collins - his client, it is because of the medical infirmity which forms the basis of the application to have a GAL appointed. It is very probable that once a GAL is appointed, he or she will be able to participate in the defense of this action and adequately communicate with movant, thereby likely restoring the attorney/client relationship between movant and Collins. As such, the instant motion is premature and therefore, denied. It is hereby

ORDERED that William Forero, Counselor-at-Law at the Law Offices of Edmond J. Pryor, located at 292 City Island Ave, Bronx, NY 10464, and whose telephone number is 718-829-0222, be appointed as Guardian ad Litem for Collins. Mr. Forero is authorized, empowered and designated to appear in this special proceedings herein as Guardian ad Litem with the power to protect and defend Collins' legal interests in this special proceeding by, *inter alia*, communicating with, assisting Jay Markowitz, Counselor-at-Law and attorney for respondents at the Law Offices of Jay S. Markowitz, P.C., located at 185 Hillside Avenue 1st Floor, Williston Park, NY 11596, whose telephone number is 718-468-0068, with respondents' defense of this special proceeding, and where necessary paying legal fees from Collins' assets upon filing his acknowledged Consent and Qualifying Affidavit. It is further

ORDERED that William Forero will be empowered to discharge the

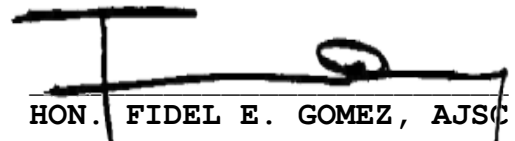
foregoing duties and shall be paid \$150.00 upon the filing of a notice of appearance on behalf of the ward, and provision shall be made at the conclusion of this action for an additional fee, payable upon the entry of judgment, and upon application by the GAL pursuant to 22 NYCRR 36.4 and/or by further order of this Court. It is further

ORDERED that all parties appear for a virtual Status Conference on October 17, 2022 at 10:30am. It is further

ORDERED that movant serve a copy of this Decision and Order upon all parties and the GAL within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 14, 2022
Bronx, New York


HON. FIDEL E. GOMEZ, AJSC