

Mastec N. Am., Inc. v Consolidated Edison, Inc.

2008 NY Slip Op 30565(U)

February 1, 2008

Supreme Court, New York County

Docket Number: 0601687/2005

Judge: Marcy S. Friedman

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

PRESENT: Hon. Marcy S. Friedman
Justice

PART 57

Mastec

INDEX NO. 601687/05

- v -

MOTION DATE _____

Consolidated Edison

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Withdraw

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Cross-Motion
Answering Affidavits — Exhibits _____

PAPERS NUMBERED

1
2, 2A

Repeating Affidavits _____

Memo of Law M, M2

Cross-Motion: Yes No

FILED

FEB 11 2008

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

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

Dated: 2-1-08

Marcy Friedman

Hon. Marcy S. Friedman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ X

MASTEC NORTH AMERICA, INC.,

Plaintiff,

- against -

CONSOLIDATED EDISON, INC., et al.,

Defendants.

Index No.: 601687/05

DECISION/ORDER

_____ X

Cozen O'Connor ("Cozen") moves to withdraw as counsel for plaintiff MasTec North America, Inc. ("MasTec"). MasTec, represented by separate counsel on the motion, opposes Cozen's withdrawal and cross-moves for an order declaring that Cozen is not entitled to any legal fees for Cozen's representation of MasTec after Cozen's alleged commission of malpractice in this action.

Cozen contends that its withdrawal as counsel for MasTec is mandatory, based on a conflict of interest that has developed between Cozen and MasTec as a result of MasTec's assertion of a potential malpractice cause of action against Cozen for loss of a construction lien claim. This action arises out of MasTec's performance of labor and services on an underground duct system owned by defendant Consolidated Edison. The complaint pleaded causes of action, among others, for damages for unjust enrichment and fraud, as well as for foreclosure of a mechanic's lien. By order dated January 25, 2007, this court granted partial summary judgment to defendants dismissing the foreclosure cause of action based on the expiration of plaintiff's

notice of pendency. By order dated January 18, 2007, the court had held that the lapsed notice of pendency could not be revived. The potential malpractice cause of action that MasTec asserts against Cozen is based on Cozen's failure to seek a timely extension of the notice of pendency.

Cozen moves to withdraw pursuant to Code of Professional Responsibility Disciplinary Rule 5-101(a) (22 NYCRR § 1200.20[a]), which provides:

A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

Bar Association ethics opinions interpreting this provision have held that an irremediable potential malpractice claim gives rise to a conflict of interest that requires withdrawal. (See NY St Bar Assn Comm on Prof Ethics Op 734 [2000] ["State Bar Op 734"]; NYC Assn Bar Comm on Prof & Jud Ethics, Formal Op 1995-2 [1995].)¹

While MasTec itself cites these opinions, it represents that it is generally satisfied with Cozen's work and that it wishes to continue to be represented by Cozen. MasTec further contends that a conflict of interest will not develop if Cozen successfully prosecutes its remaining causes of action, in which event it will not have a claim for malpractice based on the loss of the lien foreclosure cause of action.

This contention is without merit. As the ethics opinions persuasively reason, in the case of a potential irremediable malpractice claim "not only [is] there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could

¹The parties have not cited, and the court's own research has not located, any case law on the issue.

not be confident that the quality of the lawyer's work would be unaffected if the representation continued." (State Bar Op 734.) Cozen also cogently points out that its continued representation of MasTec would place it in the anomalous position of having to demonstrate the merits of MasTec's claims, while at the same time anticipating a malpractice defense that would require it to establish that MasTec could not have prevailed on its claims. (See Reply Memo. of Law at 7.)

While the court thus finds that a conflict of interest exists, the parties have not addressed or submitted authority on the issue of whether the conflict is waivable under the circumstances of this case by MasTec, a sophisticated commercial entity. On this record, therefore, the court will not reach the issue of whether Cozen's withdrawal is mandatory. Nor need the court do so because permissive withdrawal is, in any event, proper.

The attorney-client relationship is one of trust and confidence (Campagnola v Mulholland, Minion & Roe, 76 NY2d 38 [1990]), and may be terminated where that relationship breaks down. As the Court of Appeals has noted, "[a]ttorney-client relationships frequently end because of personality conflicts, misunderstandings or differences of opinion having nothing to do with any impropriety by either the client or the lawyer." (Klein v Eubank, 87 NY2d 459, 463 [1996].) Indeed, Disciplinary Rule 2-110(c)(1)(iv) (22 NYCRR § 1200.15[c][1][iv]) is a catch-all provision that authorizes permissive withdrawal where the client "renders it unreasonably difficult for the lawyer to carry out employment effectively." Under this provision, withdrawal may be authorized based on a client's expression of dissatisfaction with its attorney's services. Under Disciplinary Rule 2-110(c)(1)(vi) (22 NYCRR § 1200.15[c][1][vi]), permissive withdrawal may also be authorized where a client "[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees." (See Holmes v Y.J.A. Realty Corp., 128 AD2d

482 [1st Dept 1987] [citing both Disciplinary Rules and authorizing withdrawal based on accusations of conflict of interest and repudiation of fee arrangement]; McGuire v Wilson, 735 F Supp 83 [SD NY 1990] [citing analogous ABA Model Code of Professional Responsibility Disciplinary Rules 2-110[c][1][d] and [f], and authorizing withdrawal based on client's allegations of "mishandlings" of legal representation and failure to pay fees].)

The instant case, similarly, involves a clear breakdown of the attorney-client relationship, evidenced not only by MasTec's assertion against Cozen of the potential malpractice claim, but also by MasTec's dissatisfaction with its fee arrangement with Cozen and its attempt to negotiate a new arrangement. (See MasTec Letter to Cozen, dated July 6, 2007 [advancing new fee proposal and stating: "The fee structure in this matter is broken. As currently structured, it has the high potential to produce unreasonable results."][Ex. A to MasTec Aff. In Support of Cross-Motion].) Under these circumstances, Cozen should be permitted to withdraw.

In so holding, the court finds that MasTec's assertion of prejudice is not a bar to the withdrawal. Under Disciplinary Rule 2-110(c) (22 NYCRR § 1200.15[c]), with exceptions not here relevant, "a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client." MasTec claims that it would be prejudiced by Cozen's withdrawal because it would still have to pay a "success bonus" to Cozen in the event of a positive outcome, and would also have to compensate replacement counsel to "learn" this already extensively litigated case, and that such costs "would make pursuing this case not economically viable for MasTec." (MasTec Memo. Of Law In Support at 5. See also Aff. of Corey Collins [MasTec's associate general counsel], ¶9.) These assertions are unsupported by any evidentiary detail as to the fees MasTec has already paid or

would have to pay in future either to Cozen or to replacement counsel, and MasTec fails even to attach its current retainer providing for the success bonus or to state its amount. MasTec's wholly conclusory claim of prejudice is therefore insufficient to preclude Cozen's withdrawal.²

Finally, MasTec's claim that Cozen should be barred from collecting any legal fees from the date of its alleged malpractice is premature, given the absence of any determination as to whether Cozen in fact committed malpractice. The court notes, however, that the authority cited by MasTec does not support its contention that Cozen would have no right to attorney's fees for any services performed after a conflict of interest developed as a result of the malpractice. MasTec cites a line of cases that broadly holds that an attorney who violates the Code of Professional Responsibility is not entitled to legal fees for any services rendered. (See e.g. Quinn v Walsh, 18 AD3d 638 [2d Dept 2005]; Pessoni v Rabkin, 220 AD2d 732 [2d Dept 1995]. See also Yannitelli v D. Yannitelli & Sons Constr. Corp., 247 AD2d 271 [1st Dept 1998], lv denied 92 NY2d 875, cert denied sub nom Heller v Yannitelli, 525 US 1178 [1999].) In these cases, however, the attorneys engaged in multiple representation of parties with conflicting interests or committed multiple violations of the Code, and their misconduct therefore appears to have affected the entire representation. MasTec does not address other cases which appear to have involved an attorney's misconduct that did not affect the representation or occurred in connection with the handling of a specific matter, and which hold that "[a] lawyer forfeits his entire fee due to misconduct only where the misconduct relates to the representation for which the fees are

²It is noted that at the oral argument of the motions, Cozen represented on the record that, if permitted to withdraw, it would transfer its file to new counsel for Mastec without conditions. There is no claim that Cozen has not taken steps, required by Disciplinary Rule 2-110(a)(2) (22 NYCRR § 1200.15[a][2]), to the extent reasonably practicable to avoid prejudice to MasTec as a result of the withdrawal.

[* 7]
sought.” (See Decolator, Cohen & DiPrisco, LLP v Lysaght, Lysaght & Kramer, P.C., 304 AD2d 86, 91 [1st Dept 2003]. See also Grutman Katz Greene & Humphrey v Goldman, 251 AD2d 7 [1st Dept 1998].) MasTec also does not address the applicability, to Cozen’s claim for fees unrelated to the lien foreclosure cause of action, of settled law that an attorney retains the right to enforce the statutory charging lien where the attorney’s representation terminates as a result of the breakdown of the attorney client relationship and where, as here, “there has been no misconduct, no discharge for just cause and no unjustified abandonment by the attorney.” (See Klein, 87 NY2d at 464.)

The issue as to Cozen’s entitlement to fees should be determined only after full briefing of the applicable law. Moreover, to the extent that Cozen seeks fees in connection with its work on MasTec’s lien foreclosure cause of action, its claim for such fees should be determined only after a determination as to whether Cozen committed malpractice in connection with that cause of action.

It is further noted that Cozen does not, in connection with the motion to withdraw, seek any determination as to the fees to which it will be entitled. This decision should not be construed as precluding Cozen from taking appropriate proceedings to fix its fee upon withdrawal or at a later time, as appropriate. (Cf. Matter of Cohen v Grainer, Tesoriero & Bell, 81 NY2d 655 [1993].)

It is accordingly hereby ORDERED that the motion of Cozen O’Connor for leave to withdraw as counsel for plaintiff MasTec North America, Inc. is granted upon filing by motion with the Clerk of the Court of proof of compliance with the following conditions: 1) Within 10 days of the date of entry of this order, Cozen shall serve a copy of this order with notice of entry

by regular mail upon Cozen at its last known address, upon counsel who appeared for MasTec in connection with this motion, and upon all other appearing parties; and 2) Together with the copy of this order with notice of entry, Cozen shall also serve upon MasTec a notice directing MasTec to appoint a substitute attorney within 30 days after service of the notice; and 3) Cozen shall file proof of compliance with the above conditions with the Clerk of Part 57 of this Court on or before the next scheduled appearance date in the Part; and it is further

ORDERED that in view of the complexity of the action, no further proceedings shall be taken against MasTec without leave of this court for a period of 90 days after service on MasTec of a copy of this order with notice of entry; and it is further

ORDERED that MasTec's cross-motion is denied without prejudice to proceedings by MasTec or Cozen for a determination as to Cozen's entitlement to legal fees pursuant to the terms of this decision.

This constitutes the decision and order of the court.

Dated: New York, New York
February 1, 2008

FILED
FEB 11 2008
NEW YORK
COUNTY CLERKS OFFICE

Marcy Friedman

MARCY FRIEDMAN, J.S.C.