

**Zito v Fischbein Badillo Wagner Harding**

2008 NY Slip Op 30634(U)

February 29, 2008

Supreme Court, New York County

Docket Number:

Judge: Herman Cahn

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

PRESENT: Cahn

PART 4am

Justice

Robert S. A. Zito

INDEX NO. 602308/04

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 049

MOTION CAL. NO. \_\_\_\_\_

- v -

Fischbein, Badillo, et al

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

**FILED**

MAR 07 2008

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . . .**

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

Dated: February 29, 2008 Am Cahn J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

-----X  
 ROBERT J.A. ZITO, :  
 :  
 Plaintiff, :  
 :  
 -against- : Index No. 602308/2004  
 :  
 FISCHBEIN BADILLO WAGNER HARDING, et al., :  
 :  
 Defendants. :  
 -----X

**FILED**  
 MAR 07 2008  
 NEW YORK  
 COUNTY CLERK'S OFFICE

**Herman Cahn, J.**

Nimkoff Rosenfeld & Schechter, LLP (the "Nimkoff Firm") moves for leave to withdraw as counsel of record for Plaintiff Robert J.A. Zito in the above-captioned action, CPLR § 321.

The Nimkoff Firm also seeks a hearing to determine its legal fees for its representation of Plaintiff, based on quantum meruit, and a retaining lien in the amount of outstanding unpaid disbursements.

Plaintiff opposes the motion, as does Bruce Lederman, Esq., a *pro se* defendant.

**Background**

Plaintiff is currently a partner at the law firm of Carter Ledyard & Milburn LLP. He was previously at the defendant firm Fischbein Badillo Wagner Harding ("Fischbein Badillo"), a law firm no longer in existence. Zito brought breach of contract claims against the Defendants in this action, stemming from alleged failures of Fischbein Badillo and its partners, in the calculation and payment of Zito's salary and bonus compensation.

Zito retained the Nimkoff Firm on June 26, 2003, pursuant to a retainer agreement of that date ("the Retainer Agreement"). The agreement provided for Movant to be compensated on a contingency fee basis, with disbursements to be paid on an ongoing basis.

This action was commenced and has turned out to be extremely contentious and hard fought.

Since being retained, the Nimkoff Firm has sent Plaintiff over a dozen invoices for accrued disbursements.<sup>1</sup> Although the disbursements billed total \$57,474.66, Plaintiff has paid only \$8,109.25 to date. Zito ultimately responded to the disbursement invoices with a letter, dated October 5, 2007, contesting the validity of the charges and informing the Nimkoff Firm that if “for whatever reason we cannot arrive at a resolution of the proper disbursement amount, I will elect to refer this dispute to arbitration under the applicable court rules.” Nimkoff Aff, Exh D at 2.

Movant contends that, particularly insofar as Plaintiff is a litigation attorney, he certainly understands the obligations in the Retainer Agreement. Accordingly, the Nimkoff Firm asserts that Zito is in willful violation of the agreement. It also argues that, despite the fact that several of the invoices were sent years ago, and are in regards to work done in years past, Plaintiff had not placed any of the disputed sums into an escrow account, despite the Movant’s suggestion to do so. Nimkoff Aff, Exh F.

The Nimkoff Firm now seeks to withdraw as Plaintiff’s counsel because of Zito’s claimed refusal to pay for the disbursements incurred in this action and, more generally, the deterioration of their attorney/client relationship.

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<sup>1</sup> These include invoices dated: August 5, 2003; September 29, 2003; November 13, 2003; July 31, 2004; August 31, 2004; June 22, 2005; August 2, 2005; September 12, 2005; June 28, 2006; September 13, 2006; October 18, 2006; November 15, 2006; January 29, 2007; June 5, 2007; July 31, 2007; September 30, 2007; and November 30, 2007. Nimkoff Aff, ¶ 7; Nimkoff Aff, Exh B.

Following argument on this motion, on January 18, 2008, the Court stayed this action.<sup>2</sup>

## **Discussion**

### Withdrawal of Counsel

Plaintiff argues that the Nimkoff Firm has not provided him with written reports regarding the progress of the action, and, as a result, he does not know a great deal about the manner in which it has handled the action or the nature of the alleged expenses. Despite this position, Zito also takes issue with Movant's handling of his case, including the depositions taken, conduct at same, appealing adverse rulings, costs of photocopying and use of electronic research. Zito contends that he has "learned that the only way by which I can control Mr. Nimkoff's conduct is by telling him that I will not pay his expenses unless they are reasonable and by putting him on specific budgets." Zito Aff, ¶ 42. He also takes the position that disputing the amount owed is not a refusal to pay.

Zito contends that the timing of this motion is especially inopportune, as the case will soon be proceeding to trial. Additionally, he "believe[s] that contingency fee attorneys are under a special duty to pursue a client's case to the end." Zito Aff, ¶ 4. He further argues that he has attempted to retain replacement counsel, and has been unable to find anyone who would take the case on a contingency basis, especially with Movant threatening a charging lien. Plaintiff requests that if the motion is granted, the action be stayed for six months. Zito argues that it will take him that long to find replacement counsel and he is currently caring for his wife's health.

Bruce Lederman, a *pro se* defendant, also opposes the instant motion. He, too, objects to

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<sup>2</sup> However, the Court specifically permitted *pro se* defendant Cozen O'Connor to file a motion for summary judgment, directed mediation and permitted conferences with the Special Referee who is supervising disclosure.

the timing of the motion, arguing that the trial is approaching. He further contends that Plaintiff's current counsel brought claims against many former Fischbein Badillo attorneys, claiming that they were partners who were liable to Plaintiff. He argues that, despite evidence of the baseless nature of these claims, Movant refused to discontinue them, forcing many defendants to make motions to dismiss them from the action. The Court granted those motions, and held in abeyance the requests for sanctions against Plaintiff and his counsel. Lederman seeks to have the Court retain jurisdiction over the Movant for sanctions applications by current and former defendants.<sup>3</sup>

The question of the timing of Movant's request to withdraw, raised by both Plaintiff and Lederman, has been somewhat ameliorated by events that occurred following the argument on the motion. The schedule for another motion in this action has been greatly extended.<sup>4</sup> As such, the trial date referred to in Plaintiff's and Lederman's oppositions, has lapsed and has not yet been rescheduled. However, the other issues regarding Movant's request to be relieved as counsel for Plaintiff remain.

CPLR § 321(b)(2) provides that

An attorney of record may withdraw or be charged by order of the court in which the action is pending, upon motion on such notice to

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<sup>3</sup> Lederman contends that, rather than permitting the Nimkoff Firm to withdraw, a better result would be to "leave Plaintiff and his counsel together in their unholy alliance should they elect to continue this case. Plaintiff and his counsel can always sue each other at a later date." Lederman Aff, ¶ 8.

<sup>4</sup> This delay is due to the serious health issue of an individual whose is active in the case, and the surgery and recovery time it requires. The Court notes that all counsel and parties were able, in this instance, to extend professional courtesies and reach consensus on the importance of granting this extension.

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.

The disciplinary rules of the code of professional responsibility specifically provide that a lawyer may withdraw from representation of his client if the client, by his conduct, “[d]eliberately disregards an agreement or obligation to the lawyer as to expenses or fees” or “renders it unreasonably difficult for the lawyer to carry out employment effectively.” 22 NYCRR § 1200.15 (c)(1)(vi), (iv). As one court noted, counsel may be granted leave to withdraw where “there has been a long history of nonpayment by the client” and the client has made “representation of it unreasonably difficult.” *Mars Prods. v United States Media Corp.*, 198 AD2d 175, 176 (1st Dep’t 1993).

In the instant action, Movant’s request for permission to withdraw is also grounded on its contractual rights. The Retainer Agreement clearly specified that Plaintiff is “responsible for the payment of any and all disbursements related to” the Nimkoff Firm’s representation of Plaintiff. Nimkoff Aff, Exh A at 2. Further, the Retainer Agreement expressly provides that “[i]n the event that a statement shall remain outstanding and unpaid for more than thirty (30) consecutive calendar days, you [Zito] agree that, at our option, we may then and there be discharged from all further responsibilities under this engagement.” Nimkoff Aff, Exh A at 2.

Additionally, the relationship between Plaintiff and his counsel has become extremely contentious. In addition, and related, to the issue of expenses, Movant contends that they were hindered in their representation by restrictions imposed by Zito, notably that the Nimkoff Firm did not have authorization to photocopy any documents, including those produced by the Fischbein Defendants concerning Zito’s successor liability claim, or take any depositions

regarding that claim. Nimkoff Reply Aff ¶ 26.

Further, since the briefing in this action, an unrelated scheduling dispute emerged. In the context of addressing that issue, it was established that Plaintiff, at least at certain times, no longer speaks to its counsel and seeks to have all communication with counsel by email. Clearly, this is not a tenable position for a client and his attorney.

Movant has established that its relationship with Plaintiff has deteriorated to the point where further representation is inappropriate. Indeed, where there has been a showing of “irreconcilable differences between attorney and client,” a withdrawal motion is properly granted. *Djeddah v Williams*, 267 AD2d 156, 157 (1st Dep’t 1999).<sup>5</sup>

As such, the motion to withdraw is granted.

#### A Fee Hearing

Movant also seeks a hearing to determine its fees for its representation of Plaintiff, based on quantum meruit. This, too, is granted. The First Department has held that where there has been nonpayment by a client, or other action making counsel’s representation unreasonably difficult, a fee award in quantum meruit is appropriate. *Mars Prods. v United States Media Corp.*, 198 AD2d 175, 176 (1st Dep’t 1993).

Prior to this issue emerging, this case had already been particularly contentious. As such, a Special Referee had been assigned to supervise discovery. Accordingly, and to maximize court

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<sup>5</sup> Zito also advanced the argument that Movant’s sole remedy is, not to withdraw its representation, but to arbitrate the issue of the expenses charged, under Part 137 of the Rules of the Chief Administrator of the Courts, 22 NYCRR § 137.0. However, “[p]ursuant to Disciplinary Rule 5-105, a law firm cannot sue, or threaten to sue, a current client.” *Credit Index, LLC v RiskWise Int’l, LLC*, 192 Misc 2d 755, 765 (Sup Ct NY County 2002); see 22 NYCRR § 1200.24. As such, Plaintiff’s suggestion that Movant seek redress by bringing claims against him in an arbitration proceeding, is unavailing.

resources, the issue of the Nimkoff Firm's fee is referred a referee, to hear and report.

### The Retaining Lien

Finally, Movant seeks a retaining lien, in the amount of the outstanding unpaid invoices for costs and disbursements.

Where representation is ending or has been terminated, counsel often "cannot be compelled to give up plaintiff's file before such disbursements are paid or secured." *Tuff & Rumble Mange., Inc. v Landmark Distrib., Inc.*, 254 AD2d 15, (1st Dep't 1998) citing, *Security Credit Sys. v Perfetto*, 242 AD2d 871, 871 (4th Dep't 1997) (where the court reversed the direction to counsel to surrender client's files, holding that "an attorney is entitled to a retaining lien on the files of a client that are in the attorney's possession until the attorney has been reimbursed for expenses and, as a general rule, the attorney's fee has been determined on a quantum meruit basis and either paid or secured.").

However, "[w]hether to direct that the fee be paid before the client files are turned over or secured by a lien on the proceeds of any recovery is a matter within the court's discretion." *Security Credit Sys.*, 242 AD2d at 871. Inasmuch as the issue of Movant's fees is being referred to a referee herewith, the Court will not now speculate on the value of the fees and disbursements to be calculated. The Nimkoff Firm may move for a lien, if at all, following a determination regarding its fees.

Accordingly, it is

ORDERED that the motion is granted, with regard to the Nimkoff Firm's request to withdraw as counsel to Plaintiff; and it is further

ORDERED that the motion is granted, with regard to setting a hearing to determine the amount of fees and disbursements owed to the Nimkoff Firm by Plaintiff, and this issue is referred to a referee to hear and report; and it is further

ORDERED that the motion is denied, with regard to the retaining lien for the Nimkoff Firm against Plaintiff, with leave to renew after the report of the referee is made, and it is further

ORDERED that the clerk shall enter judgment accordingly.

Dated: February 29, 2008

ENTER :

  
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J.S.C.

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