

**New Millenium Oral-Care, Inc. v Brice**

2008 NY Slip Op 31709(U)

June 6, 2008

Supreme Court, Nassau County

Docket Number: 4842-07/

Judge: Leonard B. Austin

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INDEX  
NO. 14842-07

**SUPREME COURT - STATE OF NEW YORK  
IAS TERM PART 12 NASSAU COUNTY**

**PRESENT:**

**HONORABLE LEONARD B. AUSTIN**

Justice

**Motion R/D: March 14, 2008  
Submission Date: March 14, 2008  
Motion Sequence No. 003/MOT D**

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**NEW MILLENIUM ORAL-CARE, INC.**

Plaintiff,

**COUNSEL FOR PLAINTIFF  
Dorsey & Whitney LLP  
250 Park Ave.  
New York, NY 10177**

- against -

**MICHAEL BRICE and NMOC  
SCIENTIFIC HOLDINGS, LLC**

Defendants.

**COUNSEL FOR DEFENDANT  
Anthony F. Altimari, Esq.  
128 Front Street  
Mineola, NY 11501**

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**ORDER**

The following papers were read on the motion of Anthony F. Altimari, Esq. for leave to withdraw as counsel.

Order to Show Cause dated February 21, 2008  
Affidavit of Anthony F. Altimari, Esq. sworn to on February 19, 2008

In opposition to the motion  
Affidavit of James K. Langdon sworn to on March 7, 2008

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Anthony F. Altimari, Esq. ("Altimari") moves for leave to withdraw as attorney for the Defendants, Michael Brice ("Brice") and NMOC Scientific Holdings, LLC ("NMOC").

#### BACKGROUND

This action arises from a suit commenced by Plaintiff, New Millenium Oral-Care, Inc. ("New Millenium"), for a declaration that the transfer of intellectual property rights to Defendant, NMOC, was *ultra vires*, for imposition of a constructive trust upon any funds earned or received by NMOC, and for damages stemming from allegations of conversion, breach of fiduciary duty and waste of New Millenium's corporate assets.

In response to New Millenium's complaint, Altimari interposed an answer on behalf of Brice and NMOC on or about September 28, 2007. Since service of the answer, the parties have entered into settlement discussions. A draft settlement agreement, prepared by New Millenium, included a provision concerning the identification of the shareholders. The provision specified that corporate documents clarifying the number of shares issued in the Plaintiff corporation and the identity of the owners were to be exchanged by December 10, 2007.

Following the exchange of the documents, if the parties were unable to arrive at a resolution through continued negotiation, they would then submit this issue to arbitration. The proposal set the end of 2007 as the deadline by which the parties had to come to a resolution on their own. If no agreement was reached by December 31, 2007, the parties would submit this issue to binding arbitration no later than February 15, 2008.

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To date, the corporate documents have not been exchanged . Altimari alleges that, despite this, New Millenium unilaterally chose an arbitrator and set an arbitration date of March 3, 2008. Notwithstanding Altimari's objection to the submission of the case to arbitration based upon Defendants' failure to exchange documents and Plaintiff's choice of an arbitrator without input from Defendants, the arbitrator decided that the arbitration would take place.

In light of the impending arbitration date, Altimari attempted to contact his clients to discuss the developments. Six weeks passed without any communication from Defendants despite Altimari leaving numerous phone messages for Brice in addition to sending written correspondence. To date, Altimari has received no response from Defendants. Due to the lack of communication from his clients, Altimari moved to be relieved as counsel. He also requested that Defendants be provided ninety days in which to obtain new counsel.

While Plaintiff does not oppose Altimari's motion, New Millenium objects to this matter being stayed for ninety days given the fact that the company is in a dire financial position and cannot raise additional funds until questions of ownership and control of the are resolved. As an exhibit to its papers, New Millenium annexes a letter, dated February 27, 2008, from Brice, which was sworn to before a notary, in which Brice states that he has replaced Altimari with a new attorney, John D. Desiderio, Esq., of Garden City, New York. To date, no consent to change attorney has been filed with the Court.

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### DISCUSSION

An attorney may withdraw from representing a client for good cause. 22 NYCRR 1200.15(c)(6); and, Code of Professional Responsibility DR 2-110(c)(6). Good cause exists where the conduct of the client renders it unreasonably difficult for the attorney to properly represent the client. 22 NYCRR 1200.15(c)(1)(iv); and, Code of Professional Responsibility DR2-110(c)(1)(iv). See, Green v. Gasparini, 24 A.D.3d 505 (2<sup>nd</sup> Dept. 2005); and, Walker v. Mount Vernon Hosp., 5 A.D.3d 590 (2<sup>nd</sup> Dept. 2004). The decision to grant or deny permission to withdraw lies within the discretion of the trial court. Matter of Khan v. Dolly, 39 A.D.3d 649, 650 (2<sup>nd</sup> Dept. 2007).

An attorney may withdraw from representing a client when the attorney-client relationship has deteriorated to the point where continued representation is inappropriate. Lake v. M.P.C. Trucking, Inc., 279 A.D.2d 813 (3<sup>rd</sup> Dept. 2001); and Winter v. Rise Steel Erection Corp., 231 A.D.2d 626 (2<sup>nd</sup> Dept. 1996).

CPLR 321(c) provides that if an attorney is removed from a matter, “no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.” Defendants have failed to respond to Altimari’s repeated attempts to contact him concerning the impending arbitration and ongoing settlement negotiations. Under such circumstances, Altimari has demonstrated good cause sufficient to be relieved as counsel for Brice and NMOC.

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Altimari's Order to Show Cause seeking an order relieving him as counsel and staying the March 3, 2008 arbitration was signed on February 25, 2008. In light of Brice's statement in his February 27, 2008 correspondence that he has retained new counsel and given the date that the Order was signed, an additional sixty day stay beyond the time period set forth in CPLR 321(c) is unwarranted.

Accordingly, it is

ORDERED, that Anthony F. Altimari, Esq. is granted leave to withdraw as attorney for the Defendants, Michael Brice and NMOC Scientific Holdings, LLC; and it is further

ORDERED, that a copy of this Order with Notice of Entry together with a Notice to Appoint Another Attorney as provided for by CPLR 321(c) shall be served upon Michael Brice pursuant to CPLR 308(1) or (2), NMOC Scientific Holdings, LLC pursuant to CPLR 311(a)(1), and upon the attorney for the Plaintiff pursuant to CPLR 2103(b)(2); and it is further

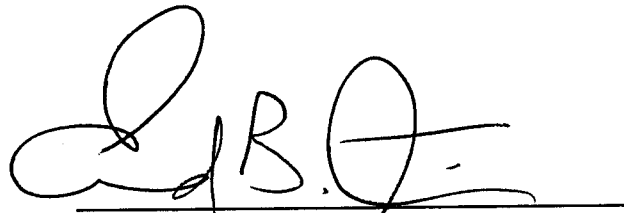
ORDERED, that no proceedings in this action shall be taken against Michael Brice and NMOC Scientific Holdings, LLC without permission of the Court for a period of 30 days after service of a copy of this Order with Notice of Entry; and it is further

ORDERED, that incoming counsel for Michael Brice and NMOC Scientific Holdings, LLC and counsel for Plaintiff shall appear for a status conference on July 2, 2008 at 9:30 a.m.

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This constitutes the decision and Order of this Court.

Dated: Mineola, NY  
June 6, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

**ENTERED**

JUN 16 2008  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE