

**Executive Mgt. Co. v BAO Tech.,
Inc.**

2008 NY Slip Op 33279(U)

November 26, 2008

Supreme Court, Nassau County

Docket Number: 14698/07

Judge: Leonard B. Austin

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No. 14698/07

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

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-12-08
Submission Date: 9-12-08
Motion Sequence No.: 002/MOT D

EXECUTIVE MANAGEMENT CO.,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Rosenberg & Fortuna, LLP
666 Old Country Road, Suite 810
Garden City, New York 11530

BAO TECHNOLOGIES, INC. and OLGA
MILMAN,
Defendants.

COUNSEL FOR DEFENDANT
Donald Pearce, Esq.
1500 Broadway, 21st Floor
New York, New York 10036

_____ x

ORDER

The following papers were read on the motion of Donald Pearce, Esq. to be relieved as counsel for Defendants:

Order to Show Cause granted on July 31, 2008;
Affirmation of Donald Pearce, Esq. dated July 28, 2008.

Donald Pearce, Esq. ("Pearce") moves for leave to withdraw as the attorney for the Defendants, BAO Technologies, Inc. ("BAO") and Olga Milman ("Milman").

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BACKGROUND

Plaintiff, Executive Management Co. ("Executive"), brought this action against BAO and Milman, who retained the services of Pearce to defend them in this action.

Defendants entered into a written Retainer Agreement with Pearce pursuant to which Defendants paid Pearce a retainer which was to be periodically replenished as funds were applied to fees earned and disbursements incurred. Pearce claims the initial deposit was fully used and that charges for legal services have continued to increase. Although Pearce has received payments from the Defendants, they have never been for the full amount owed. In addition, promises to pay the past due invoices in full, replenish the retainer deposit and wire money to Pearce's attorney trust account for fees owed have not been fulfilled.

Pearce claims that the attorney-client relationship has been irreparably harmed and that his ability to litigate this claim has been frustrated and compromised. Consequently, he requests that he be relieved as attorney for the Defendants, staying all proceedings in this case, and that the Court fix and determine his charging lien for services rendered, costs incurred and disbursements paid.

DISCUSSION

A. Leave to Withdraw

Under CPLR 321(b)(2), an attorney of record may be removed from a case by an order of the court in which the action was brought. The attorney must show good cause for withdrawal. 22 NYCRR 1200.15(c)(6) [Code of Professional Responsibility DR 2-110(c)(6)]. The decision to grant or deny permission to withdraw lies within the

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discretion of the trial court. Matter of Khan v. Dolly, 39 A.D.3d 649, 650 (2nd Dept. 2007).

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) [Code of Professional Responsibility DR2-110(c)(1)(iv)]. See, Green v. Gasparini, 24 A.D.3d 505 (2nd Dept. 2005); and Walker v. Mount Vernon Hosp., 5 A.D.3d 590 (2nd Dept. 2004). Permission to withdraw has also been granted 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 (3rd Dept. 2001); and Winter v. Rise Steel Erection Corp., 231 A.D.2d 626 (2nd Dept. 1996).

Sufficient cause for withdrawal has also been found to exist if the client fails or refuses to pay attorney's fees or expenses necessary to carry on the litigation. Furthermore, an attorney may seek to be relieved as counsel where a client refuses to pay reasonable fees. Galvano v. Galvano, 193 A.D.2d 779 (2nd Dept. 1993); and Code of Professional Responsibility DR 2-110[C][1][f]. While nonpayment of fees alone does not automatically entitle counsel to withdraw from representation. (Cashdan v. Cashdan, 243 A.D.2d 598 [2nd Dept. 1997]), counsel will not be compelled to finance a litigation or render free legal services. Galvano v. Galvano, *supra*.

Here, Defendants agreed to the terms of the retainer agreement which stated that the retainer deposit would be periodically replenished by Defendants as it was drawn down. Once the retainer deposit was fully used up, Defendants did not replenish it and although Defendants have periodically sent checks, the checks were never for the

full amount owed and legal fees continue to accrue. Despite promises to pay the past due invoices, replenish the retainer deposit as agreed and wire these funds to Pearce's attorney trust account, Defendants have done none of the above.

Under such circumstances, Pearce has demonstrated good cause sufficient to be relieved as counsel for Defendants.

B. Retaining and Charging Liens

A retaining lien derives from the attorney's possession of a client's papers. Cohen v. Cohen, 183 A.D.2d 802 (2nd Dept. 1992). Counsel is entitled to be paid for his or her services or have the value of those services secured before the papers are returned to the client or forwarded to incoming counsel. *Id.* This type of lien is independent from a suit's proceeds. *Id.* It is extinguished only when the court directs the release of the client's papers in exchange for payment of the attorney's fees or upon the posting of security. *Id.*

Unless an attorney has been discharged for cause, an attorney has a retaining lien on a client's papers. Artim v. Artim, 109 A.D.2d 811 (2nd Dept., 1985). If the client fails to demonstrate exigent circumstances mandating immediate release of the outgoing attorney's file, an expedited hearing should be ordered to determine the outgoing attorney's lien and condition release of the file upon payment of the fee or posting of adequate security ensuring payment of the fee. Fields v. Casse, 182 A.D.2d 738 (2nd Dept., 1992), and Artim v. Artim, *supra*.

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A charging lien, on the other hand, is a security interest against the proceeds of an action. Cohen v. Cohen, *supra*. It attaches automatically upon the interposition of the claim, whether in a complaint or a responsive pleading. See, Judiciary Law §475.

If a client makes an uncontroverted showing of exigent circumstances, such as indigency, requiring release of the file without payment, the court may convert the retaining lien into a charging lien and order release of the file. See, Rosen v. Rosen, 97 A.D.2d 837 (2nd Dept. 1983).

In either event, where a charging lien or a retaining lien is asserted, the attorney is entitled to a prompt hearing to determine the amount of the lien. See, Katsaros v. Katsaros, 152 A.D.2d 539 (2nd Dept. 1989).

Pearce has requested a charging lien. Under the circumstances, however, it appears that a retaining lien is more appropriate. Regardless, Pearce has demonstrated an entitlement to a lien against the Defendants' file. Therefore, the matter is set down for a hearing before Special Referee Frank M. Schellace to determine Pearce's reasonable attorney fees¹. Upon payment of the fee or making provision for security for payment of the fee, Pearce shall turn the file over to new counsel for Defendants or if none is designated, to Defendants.

Accordingly, it is,

¹In the absence of any opposition to Pearce's motion to be relieved as counsel indicating that Defendants dispute the reasonableness of Pearce's fees, Pearce is not required to send notice pursuant to 22 NYCRR Part 137. See, Scordio v. Scordio, 270 A.D.2d 328 (2nd Dept. 2000); and Rotker v. Rotker, 195 Misc.2d 768 (Sup. Ct. Westchester Co. 2003).

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ORDERED, that the motion of Donald Pearce, Esq. to be relieved as attorney for the Defendants is **granted**; 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 Defendant, BAO Technologies, Inc., pursuant to CPLR 311(a)(1) and upon Defendant, Olga Milman, pursuant to CPLR 308(1) or (2) 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 Defendants 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 the matter is respectfully referred to Special Referee Frank M. Schellace on January 14, 2009 at 9:30 a.m., to hear and determine all issues relating to the fair and reasonable value of legal services rendered by Donald Pearce, Esq. in connection with this matter so as to fix said attorney's retaining lien; and it is further

ORDERED, that incoming counsel for Defendants and counsel for Plaintiff shall appear before this Court on February 13, 2009 at 9:30 a.m. to schedule a hearing to determine the reasonable legal fees of Plaintiff's attorney as ordered in this Court's Order, dated August 5, 2008.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
November 26, 2008

ENTERED
DEC 04 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE
Hon. LEONARD B. AUSTIN, J.S.C.