

**Manhattan Laminates Ltd. v PBS&S Design Ctr.
Inc.**

2009 NY Slip Op 33012(U)

December 14, 2009

Supreme Court, Nassau County

Docket Number: 015375-07

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
MANHATTAN LAMINATES LTD.,

**TRIAL/IAS PART: 25
NASSAU COUNTY**

Plaintiff,

-against-

Index No: 015375-07

**PBS&S DESIGN CENTER INC., KJP GROUP, INC.,
KENNETH J. PICKLYK, MARION E. BROOKS,
RICHARD SORKIN and PAUL G. STEWART,**

Motion Seq. Nos: 3 and 4

Submission Date: 11/4/09

Defendants,

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The following papers having been read on these motions:

- Notice of Motion, Affidavits in Support (2), Affirmation in Support and Exhibits..x**
- Affirmation in Opposition and Exhibits.....X**
- Reply Affirmation in Support.....X**
- Order to Show Cause, Affirmation in Support and Exhibit.....X**

This matter is before the Court for decision on 1) the motion filed by Defendants Kenneth J. Picklyk and Paul G. Stewart on September 2, 3009, and 2) the Order to Show Cause filed by counsel for Defendants PBS&S Design, Marion Brooks and Richard Sorkin on October 15, 2009, both of which were submitted on November 4, 2009. For the reasons set forth below, the Court grants the motion in part and denies it in part. Specifically, the Court 1) denies the motion to vacate the judgment against Defendants Kenneth J. Picklyk and Paul G. Stewart with respect to the principal sum of \$100,972.02; and 2) grants the motion to vacate the judgment against Defendants Kenneth J. Picklyk and Paul G. Stewart with respect to the sums of

1) interest of \$45,538.38, 2) finance charges of \$3,237.41, 3) costs of \$4,131.82 and 4) counsel fees in the sum of \$54,277.25. With respect the Order to Show Cause, the Court grants that application in part and denies it in part. The Court 1) grants the application of Danny Montanez to be relieved as counsel for Defendants PBS&S Design and Richard Sorkin; and 2) denies Mr. Montanez' application to be relieved as counsel for Defendant Marion Brooks.

BACKGROUND

A. Relief Sought

Defendants Kenneth J. Picklyk ("Picklyk") and Paul G. Stewart ("Stewart") seek an Order directing 1) vacatur of a judgment of this court dated May 11, 2009 and entered on June 2, 2009, resulting from a Decision and Order issued by Justice Leonard B. Austin from the bench on September 26, 2008, the transcript of which was so-ordered by Justice Austin on October 7, 2008; and 2) reentry of that judgment solely against Defendants PBS&S Design Center, Inc. ("PBS&S") and Richard Sorkin ("Sorkin"). Plaintiff Manhattan Laminates Ltd. ("Laminates" or "Plaintiff") opposes the motion.

In the Order to Show Cause, counsel for Defendants PBS&S Design, Marion Brooks and Richard Sorkin seeks an Order 1) permitting him to withdraw as counsel for those Defendants; and 2) staying all proceedings. When this Court signed the Order to Show Cause on October 19, 2009, the Court directed that all proceedings and hearings in this matter are stayed pending the outcome of the Order to Show Cause. No opposition or other response has been submitted with respect to the Order to Show Cause.

B. The Parties' History

Laminates filed the Complaint on August 30, 2007. By notice of motion dated April 23, 2008, Plaintiff moved for a default judgment against all Defendants. Pursuant to the oral decision of the Court (Austin, J.) dated September 26, 2008, the transcript of which was so-ordered on October 7, 2008 ("Judge Austin Decision"), Justice Austin 1) granted Plaintiff's motion for a default judgment against Defendants PBS&S Design Center ("PBS&S"), KJP Group, Inc. ("KJP"), Kenneth J. Picklyk ("Picklyk") and Paul G. Stewart ("Stewart") in the sum of \$100,972.02; and 2) referred the case to the Special Referee ("Referee") to a) determine the interest, finance charges and counsel fees due on the default judgment that Justice Austin granted against Defendants PBS&S, KJP, Picklyk and Stewart; and b) conduct a traverse hearing to

determine whether Plaintiff properly served Defendants Brooks and Sorkin. Justice Austin stated, further, that “If service is sustained [as to Defendants Brooks and Sorkin], judgment as to those defendants, or either of them, as is determined by the referee, is also granted as to them. If service is not sustained as to them, the matter is dismissed.”

The Judge Austin Decision includes the following direction:

Judgment against those defendants [PBS&S, KJP, Picklyk and Stewart] is granted in the sum of \$100,972.02. The referee will determine the appropriate interest and a finance charge pursuant to the contract, finance charges, as well as reasonable counsel fees upon such determination by the referee. Plaintiff has leave to take judgment against those defendants.

(Ex. A to P’s Aff. in Opp. at p.7)

The Referee conducted the traverse hearing (“Hearing”) on January 21, 2009. Counsel for Plaintiff affirms that, several weeks prior to the Hearing, counsel for Plaintiff and counsel for all Defendants agreed to the amount of interest, finance charges, costs and counsel fees to be awarded to Plaintiff, and advised the Referee of their agreement, as reflected on pages 6-8 of the transcript of the Hearing (“Transcript”). On page 2 of the Transcript, when the Referee asked the attorneys to give their appearances for the record, Mr. Leonardi identified himself as counsel for the Plaintiff and Mr. Montanez responded “Danny Montanez for the defendants.”

Pages 6 and 7 of the Transcript contain a discussion among Mr. Leonardi, Mr. Montanez and the Referee regarding the stipulation reached regarding the counsel fees, interest and finance charges that were the subject of the inquest. Pages 7-9 contain the following colloquy among Mr. Montanez, Mr. Leonardi and the Referee (designated as “The Court” in the Transcript):

THE COURT: Let the record reflect what has now been marked into evidence as Plaintiff’s Exhibit 1, is labeled second amended affidavit of services, which is a submission by the plaintiff with respect to that branch of Justice Austin’s order that directed me to conduct the hearing on the issue of reasonable counsel fees. Counsel, you have stipulated that this is the amount of reasonable counsel fees in this case?

MR. MONTANEZ: Yes.

THE COURT: With respect to that branch of Justice Austin’s order, which directed me to conduct the hearing to determine the appropriate interest and finance charges, I understand you have reached a stipulation on that also?

MR. LEONARDI: Yes. The interest, statutory interest of 9 percent commencing on December 14, 2006 running through the present. Finance charges at 1.5 percent pursuant to the invoices, subject invoices, also beginning from December 14, 2006 through the present.

THE COURT: Counsel that is also a stipulation?

MR. MONTANEZ: Yes, your Honor. The bill of cost is also there as well, which we stipulated to.

Counsel for Plaintiff affirms that, as a result of this stipulation, the inquest did not proceed, and the only determination that the Referee made at the Hearing was whether the Court should grant the motion for a default judgment with respect to Defendants Brooks and Sorkin. With respect to Defendant Sorkin, who was allegedly too ill to attend the Hearing, the Referee denied his request for an adjournment, concluded that he was “in default of” the hearing and held that the Court has jurisdiction over Defendant Sorkin. The Referee then heard testimony on the issue of the propriety of service of process on Brooks. At the conclusion of that testimony, the Referee determined that Plaintiff did not properly serve Brooks and, in light of the Judge Austin Decision, dismissed the case against Brooks.¹

The Referee then directed counsel as follows:

Counsel, with respect to the other defendants and the stipulations that have been placed on the record, I am going to direct you to submit to me a formal order and judgment for my signature, which will contain in it that which has been stipulated to on the record today.

(Transcript at p. 43)

Stephen T. Treacy, a partner in the law firm for which Mr. Leonardi worked during the events in question, provides an Affirmation in Opposition to Defendants’ motion. Mr. Treacy affirms that Mr. Leonardi worked on this case under Mr. Treacy’s supervision, that Mr. Leonardi is no longer with Mr. Treacy’s law firm, and that Mr. Treacy provides the Affirmation based on

¹ The Court subsequently granted Plaintiff’s motion for reargument as to that portion of the Referee’s decision that ruled that service of process on Brooks was improper and, upon that reargument, modified the decision of the Referee to the extent that the Court 1) vacated that portion of the Referee’s decision holding that the court does not have jurisdiction over Defendant Brooks and dismissing the action against Defendant Brooks; and 2) directed that a *de novo* traverse hearing would be conducted before the Court. That hearing has not yet been conducted.

his review of his law firm's file.

Mr. Treacy affirms that, as directed by the Referee, Mr. Leonardi sent a letter dated January 30, 2009 to the Referee that contained Plaintiff's Proposed Judgment and Notice of Judgment, with proof of service, and provides a copy of that January 30, 2009 letter, which reflects that Mr. Leonardi mailed a copy of the letter and enclosures to Mr. Montanez. The Referee signed the Judgment on May 11, 2009, and the Judgment was entered by the Nassau County Clerk's Office on June 2, 2009. The Judgment directed that Plaintiff was entitled to recover from PBS&S, KJP, Picklyk, Sorkin and Stewart the sum of \$100,972.02, plus interest from December 14, 2006 of \$45,538.38, plus finance charges from December 14, 2006 of \$3,237.41, plus costs of \$4,131.82 and counsel fees in the sum of \$54,277.25, for a total of \$208,156.88. Mr. Treacy affirms that, upon information and belief, Picklyk and Stewart have since changed attorneys, and have retained Marvin J. Weinroth, Esq. who filed Chapter 7 Bankruptcy Petitions on their behalf on January 12, 2009.

Picklyk and Stewart provide Affidavits in Support of their motion, dated August 31, 2009. In his Affidavit, Picklyk affirms that 1) at his direction, Mr. Weinroth filed a Chapter 7 Bankruptcy Petition on behalf of Picklyk on January 12, 2009, which specifically named the Plaintiff as one of the creditors ("Bankruptcy Filing"); 2) Plaintiff had notice of Picklyk's Bankruptcy Filing by virtue of Plaintiff's receipt of a Notice of Meeting of Creditors of the United States Bankruptcy Court that was mailed to Plaintiff on January 15, 2009; 3) James Kalpakis, Esq., of Montanez & Kalpakis, Esqs., Picklyk's prior attorney in the matter *sub judice*, had personal knowledge of the Bankruptcy Filing as a result of Picklyk, Mr. Weinroth and Stewart advising Mr. Kalpakis of that Filing; and 4) Plaintiff knew that the Bankruptcy Court granted Picklyk a Discharge of Debtors ("Discharge"), pursuant to Section 727 of the Bankruptcy Code (Ex. B. to Ds' Motion) on April 7, 2009 because the Bankruptcy Court mailed Plaintiff a copy of that Discharge on April 7, 2009.² Picklyk submits that, in light of Plaintiff and Mr. Kalpakis' knowledge of the Discharge prior to the entry of the Judgment, the Judgment was entered in error as to Defendants Picklyk and Stewart and should be reinstated solely against Defendants PBS&S and Sorkin.

² Although not critical to the determination of this motion, the Court notes that the documentation reflects that the Bankruptcy Court mailed copies of the Discharges to Plaintiff on April 9, 2009.

In his Affidavit in Support, Stewart affirms that 1) Stewart advised Mr. Kalpakis on January 6, 2009, the date of a scheduled deposition, of Stewart's intention immediately to file for bankruptcy and to substitute Mr. Weinroth as his attorney in the instant matter; 2) Stewart had Mr. Weinroth file a Chapter 7 bankruptcy petition on January 12, 2009, which specifically named Plaintiff as one of the creditors; 3) Stewart and Mr. Weinroth advised Mr. Kalpakis that Stewart filed a Chapter 7 petition on January 12, 2009; and 4) Plaintiff was aware that the Bankruptcy Court granted Stewart a Discharge because the Bankruptcy Court mailed Plaintiff a copy of that Discharge on April 7, 2009. Stewart submits that, in light of Plaintiff's notice of Stewart's Discharge prior to the entry of the Judgment, the Judgment was entered in error, and should be reinstated solely against Defendants PBS&S and Sorkin.

Mr. Weinroth provides an Affirmation in Support of Defendants' motion, in which he affirms that 1) on January 12, 2009, he filed Chapter 7 Bankruptcy Petitions on behalf of Picklyk and Stewart which listed Plaintiff as a creditor; 2) Picklyk and Stewart advised Mr. Kalpakis of Montanez and Kalpakis, their counsel of record in this matter, of the Bankruptcy Filings before and during the pendency of the bankruptcy; 3) by facsimile dated January 12, 2009, a copy of which Mr. Weinroth provides, Mr. Weinroth provided Plaintiff's counsel with copies of the Filing receipts and docket printout regarding the Bankruptcy Filings; and 4) on April 7, 2009, Picklyk and Stewart were discharged in bankruptcy, and on April 7, 2009, the Bankruptcy Court mailed the Notices of Discharge to Plaintiff.³

Mr. Treacy affirms that his firm did not receive the Discharge Notices until January 23, 2009, after the Hearing was completed, at which time his firm immediately sent a letter to Justice Austin (Ex. E to P's Opp.) who directed that a teleconference be conducted with counsel and the court. Mr. Treacy affirms, based on his conversations with Mr. Leonardi, that the teleconference took place on January 26, 2009, at which time Justice Austin 1) expressed his displeasure with Mr. Montanez for failing to advise the Court of the bankruptcy filings, and expressed skepticism about Mr. Montanez's claim that he had no prior knowledge of those filings; and 2) directed Plaintiff's counsel to prepare and submit to the Court an Order of Severance, severing Picklyk and Stewart from the action. In his Reply Affirmation, Mr.

³ See n. 2.

Weinroth submits that Justice Austin’s direction regarding the Order of Severance constituted a judicial determination, and that Plaintiff’s apparent failure to prepare that Order of Severance was in contravention of Justice Austin’s direction.

C. The Parties’ Positions

Moving Defendants submit that the Judgment should not have been entered against Picklyk and Sorkin because 1) Plaintiff had both actual and constructive notice of the Bankruptcy Filings and Discharges well before the entry of the Judgment; 2) Plaintiff had an opportunity to participate in the bankruptcy proceedings; and 3) Plaintiff had an obligation not to proceed to judgment against Defendants Picklyk and Sorkin, particularly in light of Plaintiff’s knowledge of the Discharges. They argue, further, that Justice Austin’s direction regarding the filing of an Order of Severance was a judicial determination regarding the progression of this matter, not a ministerial act as Plaintiff suggests. In light of the foregoing, Moving Defendants ask the Court to discharge the Judgment as to Defendants Picklyk and Stewart, and re-enter the Judgment solely against PBS&S and Sorkin.

Plaintiff opposes the application, submitting that 1) the judicial determinations regarding Picklyk and Stewart, leading to the issuance and entry of the Judgment against them, were made prior to the Bankruptcy Filings; and 2) only ministerial acts, which are exempt from the automatic stay provisions applicable to bankruptcy proceedings, occurred subsequent to the Bankruptcy Filings. Plaintiff also argues that, because moving Defendants never sought discharge of the actual Default Judgment against them, but rather sought discharge of an unsecured debt in the sum of \$100,972.02 that ran to PBS&S and Sorkin, but not to either Picklyk or Stewart individually, Picklyk and Stewart were discharged from an unsecured debt that belonged to PBS&S and Sorkin, but not to them.

In his Reply Affirmation, Mr. Weinroth disputes Plaintiff’s contention that the Referee’s calculation of interest, costs and counsel fees, and the execution and entry of the Judgment are ministerial acts that are exempt from the stay provisions of the Bankruptcy Code. Mr. Weinroth cites numerous federal cases that, he submits, support the conclusion that a ministerial act is a “rote non-judicial, clerical entry that basically requires no judicial interference, interpretation or decision of any kind” (Reply Aff. at ¶ 17).

With respect to his Order to Show Cause, Mr. Montanez moves to withdraw as counsel for Defendants PBS&S, Brooks and Sorkin due to irreconcilable differences between him and Defendants, and the lack of cooperation of those Defendants. Mr. Montanez affirms that 1) Defendants Stewart and Picklyk gave the entire file to Mr. Weinroth when they retained him as counsel and, therefore, Mr. Montanez has no information other than what he has obtained from the court's website; 2) he has repeatedly requested the file (it is not clear from whom), has not received any response and has not received the file; 3) Plaintiff would not be prejudiced by the Court's granting of this application; and 4) since September, "those Defendants" (presumably Stewart and Picklyk) stopped communicating with Mr. Montanez's office.

RULING OF THE COURT

A. The Court Denies Vacatur of the Judgment Against Picklyk and Stewart that Justice Austin Awarded Prior to the Bankruptcy Filings

Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition creates an automatic stay against "the commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case." *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527 (2d Cir. 1994), quoting 11 U.S.C. § 362(a)(1). The stay is effective immediately upon the filing of the petition. *Id.*

There is, however, an exception to this stay provision for ministerial acts, that is relevant to the Court's consideration of this motion. In *Rexnord*, the district court heard arguments of counsel regarding the entry of judgment in favor of plaintiff. At the conclusion of the hearing, which began at 2:30 p.m., the district court stated "I'm going to order that judgment be entered in favor of [plaintiff] in the amount of \$12,946,748 principal and accrued interest...So I'm going to endorse the original documents to that effect on this application...I want to enter this today." *Id.* at 524-525. That same day, defendant's counsel advised the district court and plaintiff by letter that defendant had filed a petition for bankruptcy, pursuant to Chapter 11 of the Bankruptcy Code, at 3:18 p.m. that day, following the hearing. The following day, the money judgment was entered on the district court docket by the court clerk. *Id.* at 525.

The defendant in *Rexnord* argued, *inter alia*, that the judgment of the district court should not be given effect because it was docketed after the filing of defendant's Chapter 11 petition,

and thus was entered in violation of the automatic stay in bankruptcy. *Id.* at 527. The Second Circuit rejected that argument, concluding that they “do not believe that the simple and ‘ministerial’ act of the entry of a judgment by the court clerk constitutes the continuation of a judicial proceeding under section 362(a)(1).” *Id.* The Second Circuit cited, *inter alia*, *Teachers Ins. v. Annuity Ass’n v. Butler*, 58 Bankr. 1019, 1022 (S.D.N.Y.) in which the court held that the filing of a signed judgment and entry on the docket by the clerk was a ministerial act that did not violate the automatic stay provisions of Section 362. *Id.* at 528. Thus, the *Rexnord* court held that “[t]he judicial proceedings were concluded at the moment the judge directed entry of judgment, a decision on the merits having then been rendered.” *Id.* at 528. *See also* *Soares v. Brockton Credit Union*, 107 F.3d 969 (1st Cir. 1997) in which the court held that “[m]inisterial acts, even if undertaken in a state judicial proceeding subsequent to a bankruptcy filing, do not fall within the automatic stay proscription[,]” citing, *inter alia*, *Rexnord*. *Soares* at 974. The *Soares* court held that actions, such as entry on the docket, that “[follow] on the heels of a judicial decision[,]” are ministerial and, therefore, do not violate the automatic stay provision, even if completed after an affected party files for bankruptcy. *Id.*

In light of the procedural history of the matter *sub judice*, the Court concludes that, on September 26, 2008, well in advance of the Bankruptcy Filings, Justice Austin made the judicial determination that Plaintiff was entitled to a judgment against Defendants PBS&S, KJP, Picklyk and Stewart for the principal sum of \$100,972.02, and the entry of the judgment for that sum was a ministerial act unaffected by the automatic stay generated by the Bankruptcy Filings.⁴ The Referee’s resolution of the other issues of interest, finance charges, costs and counsel fees, in conformity with a stipulation that the parties reached after the Judge Austin Decision, on the other hand, constituted a judicial determination that took place after the Filings. Accordingly, as the automatic stay provisions apply to the determination of those issues at the Hearing, and in light of the Discharges, the Court vacates those portions of the Judgment against Defendants Picklyk and Stewart with respect to the sums of 1) interest of \$45,538.38, 2) finance charges of \$3,237.41, 3) costs of \$4,131.82 and 4) counsel fees in the sum of \$54,277.25.

⁴ The Court is not bound by counsel’s representations regarding Justice Austin’s comments, during a telephone conference, regarding the preparation of an order of severance, in the absence of a formal order or transcript reflecting the precise circumstances under which those comments were made.

B. The Court Grant's Counsel's Motion to Withdraw in Part and Denies it in Part

Pursuant to 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 is within the discretion of the trial court. *Matter of Khan v. Dolly*, 39 A.D.3d 649, 650 (2d Dept. 2007). Good cause exists when 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 DR § 2-110(c)(1)(iv)). See *Green v. Gasparini*, 24 A.D.3d 505 (2d Dept. 2005) and *Walker v. Mount Vernon Hosp.*, 5 A.D.3d 590 (2d Dept. 2004). Sufficient cause for withdrawal has been found when the client fails or refuses to pay attorney's fees or expenses necessary to carry on the litigation. 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 (3d Dept. 2001); *Winter v. Rise Steel Erection Corp.*, 231 A.D.2d 626 (2d Dept. 1996).

In light of Mr. Montanez' intimate familiarity with the issues that will be raised at the *de novo* traverse hearing that the Court will conduct regarding the propriety of service of process on Defendant Brooks, the Court denies his application to be relieved as counsel for Defendant Brooks. With respect to Defendants PBS&S and Sorkin, however, in light of the entry of Judgment against them, and the fact that there are no pending motions with respect to those Defendants, the Court grants Mr. Montanez's application to be relieved as counsel for Defendants PBS&S and Sorkin.

In light of the Court's decision, the Court also vacates the stay provision in the Order to Show Cause dated October 19, 2009.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for Plaintiff and counsel for Defendant Marion Brooks to appear before the Court on January 14, 2010 at 9:30 a.m., at which time the Court will schedule the *de novo* traverse hearing.

ENTER

DATED: Mineola, NY

December 14, 2009



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

DEC 16 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**