

I&T Petroleum Inc. v LaScalia

2010 NY Slip Op 31419(U)

May 28, 2010

Supreme Court, Nassau County

Docket Number: 010337-07

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
**I&T PETROLEUM INC. and INDRAJEET
THAKURDEEN,**

Plaintiffs,

-against-

**JAMES LASCALIA, JOANNE LASCALIA and
DELTA PROPERTY LEASING, CORP.,**

Defendants.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 010337-07
Motion Seq. Nos: 2 and 4
Submission Date: 4/12/10**

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The following papers have been read on this Order to Show Cause and Cross-Motion:

- Order to Show Cause and Affirmations in Support.....x**
- Affirmation in Response.....x**
- Notice of Cross-Motion/Response to Order to Show Cause,
Affidavit in Opposition of James LaScalia, Jr., Affidavit of
James LaScalia, Jr., Affidavit of Joanne LaScalia and Exhibits.....x**
- Affirmation in Opposition to Cross Motion.....x**
- Affirmation in Reply/Further Support and Exhibits.....x**
- Transcript dated 12/16/09.....x**
- Transcript dated 2/15/10.....x**
- Other Documentation provided by James LaScalia:**
 - E-mail dated 12/10/09 and attached documents.....x**
 - Correspondence from J. LaScalia dated 12/18/09.....x**
 - Letter from J. LaScalia dated 1/22/10 with cover sheet reading
"Emergency/Commercial".....x**
 - Affidavit and Letter of James Lames LaScalia, Jr.
dated April 3, 2010, Affidavit of S. Jeraci, Affidavit of Service
After Commencement of Litigation and Exhibits.....x**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Robert J. Del Col, Esq., attorney of record for the Defendants James LaScalia (“Mr. LaScalia”) and Joanne LaScalia (“Mrs. LaScalia”) (“Defendants”), on December 11, 2009, seeking permission to withdraw as attorney of record for the Defendants, and 2) the cross motion filed by the Defendants on or about February 25, 2010, both of which were submitted on April 12, 2010. For the reasons set forth below, the Court 1) grants the application of Defendants’ Counsel for permission to withdraw as attorney of record for the Defendants but denies his application for a stay of this matter; and 2) denies Defendants’ motion in its entirety.

BACKGROUND

A. Relief Sought

Defendants’ Counsel, Robert J. Del Col (“Mr. Del Col”) moves for an Order 1) permitting him to withdraw as attorney for the Defendants in this matter; and 2) upon that withdrawal, staying and restraining Plaintiffs and co-defendant Delta Property Leasing Corp. (“Delta” or “Co-Defendant”) and their agents, for at least thirty (30) days from the entry of such decision, from proceeding in any fashion in connection with this matter.

Defendants move for an Order 1) granting an immediate stay of the judgments (“Judgments”) issued to Plaintiff and Co-Defendant, or enforcing or granting a continuance of the previous stay granted by the Honorable Arthur M. Diamond on December 11, 2009; 2) setting aside or otherwise vacating the verdict as well as the Judgments resulting from that verdict and, at the discretion of the Court, directing a new trial if appropriate; 3) directing Defendants’ Counsel to return all monies received for litigation in connection with their representation of Defendants in this matter; 4) referring this matter to the New York State disciplinary committee, and sanctioning and censuring Defendants’ Counsel; 5) restraining Plaintiffs and Co-Defendant, and their agents, from taking any further action in this case; 6) ordering an immediate traverse hearing to determine whether service of process was validly effected and requiring the process servers to produce all records in their possession; 7) denying the application of Defendants’ Counsel to be relieved; and 8) directing Defendants’ Counsel to return all records related to this case.

Mr. Del Col and Bryan R. Johnson (“Mr. Johnson”), an attorney with Mr. Del Col’s law firm (“Firm”) provide Affirmations in Support dated December 8, 2009 in which they affirm as

follows:

Mr. LaScalia is attempting to blame the Firm for the result of the trial in this matter, which resulted in a verdict adverse to Mr. LaScalia. Specifically, Mr. LaScalia has accused the Firm of 1) acting in contravention of the Rules of Professional Conduct; 2) participating in “secret conferences” in the Court’s chambers; and 3) deceiving him. Mr. LaScalia has also copied several unknown parties on e-mails in which he made these accusations.

By way of example, Mr. Del Col and Mr. Johnson cite the following:

1. In an e-mail the Law Firm received from Mr. LaScalia on December 7, 2009, Mr. LaScalia wrote the following:

Of course, I would hate to believe that you had anything but my best interests as your client at hand, but considering the lack of motions made, discovery conducted and evidence presented at the trial, and the fact that in light of the assurances and assertions by you, and your associate Bryan Johnson by whom I was referred, that you had indeed filed a Notice of Appeal, no proof has... yet been supplied to me that substantiates that fact.

2. In an e-mail Mr. Johnson received on December 8, 2009, Mr. LaScalia wrote the following:

Bryan, I got no problem putting my head down to the pillow at night, although because of the situation you were instrumental in entangling me in I don’t sleep much these days, but you will surely find it progressively more difficult to put your head “peacefully down to rest” if you continue to deceive others like you have me, in the pursuit of your Professional Career. Integrity is man’s most wordly possession and I closed my business’ doors when I could not maintain my commitment to it. I would have given you All the Money I Have just not to be dragged through this farce of a case, which you were supposedly, effectively and honestly litigate on my behalf, along with your firm. I may lose all that I have, but trust that I will stand as a testament to the “Integrity” that should you be so lucky to be born through your children. Your Grandfather was a great man and perhaps it will skip a generation or two.

Mr. Del Col affirms that Mrs. LaScalia, who is Mr. LaScalia’s wife, as well as their daughters, are friends of Mr. Johnson’s family. In addition, Mr. LaScalia is aware that Mr. Johnson was very close to his grandfather. Mr. Johnson affirms that the LaScalias’ daughter is a close friend of his, and Mrs. LaScalia is close friends with Mr. Johnson’s mother. Mr. Johnson avers, further, that he was reluctant to represent the LaScalias, who were long-time friends, but ultimately referred them to the Firm because Mr. LaScalia often expressed

dissatisfaction with the progress of the case and the work of their prior attorney. Mr. Johnson describes Mr. LaScalia as a “wolf in sheep’s clothing” (Johnson Aff. at ¶ 2) who has made “bold, baseless and defamatory statements” (*Id.*) about the Firm.

3. Mr. LaScalia often expresses inconsistent opinions regarding his satisfaction with the Firm. For example, Mr. LaScalia has told Mr. Del Col, and his staff, that Mr. Del Col is a good attorney. He has, however, also sent e-mails and letters accusing the Firm of failing to represent him properly. In addition, Mr. LaScalia sometimes refuses to talk to anyone from the Firm by telephone, demanding that any communication be in writing, and then accuses the Firm of refusing to speak with him by telephone regarding this matter.

4. Mr. LaScalia has made important statements to Mr. Del Col regarding the case, on which Mr. Del Col relied, and then subsequently advised Mr. Del Col that the statements may not have been true.

5. Mr. LaScalia has taken actions in this case without advising Mr. Del Col, which included Mr. LaScalia’s filing his own Notice of Appeal for Co-Defendant Delta. Mr. Del Col affirms that the Firm filed a Notice of Appeal on behalf of Defendants. Moreover, although Plaintiffs’ Counsel advised the Firm that Mr. LaScalia filed the Delta Notice of Appeal *pro se*, Mr. LaScalia advised the Firm that he listed Mr. Del Col as the attorney on the matter.

Plaintiffs’ Counsel provides an Affirmation in Response dated February 8, 2010 in which he affirms as follows:

Plaintiffs’ Counsel opposes that portion of the application by Defendants’ counsel that seeks a stay of enforcement of the Judgment. Plaintiffs’ Counsel affirms that, based on the oral argument on this motion on December 16, 2009, it is his understanding that all counsel consented to the stay being lifted. To avoid any uncertainty, Plaintiffs’ Counsel reaffirms his objection to any stay remaining in effect. He contends that, after judgment, the CPLR is very specific on the circumstances under which a judgment debtor may obtain a stay of enforcement. Retaining different counsel for an appeal, or opposing an attorney’s motion to be relieved from making a post-judgment motion, are not circumstances warranting a stay. CPLR § 5519 provides that a stay pending appeal is not automatic, and requires the posting of a bond absent a court order to the contrary. To obtain a stay, appellant must demonstrate a likelihood of success on appeal as well as a viable reason why a bond cannot be posted, or the judgment otherwise

secured. Accordingly, the Court should deny the application of Defendants' counsel for a stay.

With respect to the remaining aspects of the application, Plaintiffs' Counsel submits that the motion is academic because the attorney-client relationship between Defendants' counsel and Defendants terminated on entry of the final judgment against the LaScalias. Moreover, in light of the entry of judgment and filing of a Notice of Appeal by Defendants' counsel, Plaintiffs' Counsel submits that the Appellate Division is the appropriate venue in which to make the motion to be relieved in light of CPLR § 321 which provides that an application for an order to be relieved is to be made in the court in which the action is pending.

Mr. LaScalia's submissions include the following:

In his December 18, 2009 correspondence to the Court, Mr. LaScalia wrote that 1) his counsel had not informed him about the dates or disposition of the proceedings occurring on December 11, 2009; and 2) he had repeatedly attempted to contact his attorney who has not returned his calls or correspondence and "has not facilitated the timely transfer of information regarding my case."

In his Affidavit dated January 23, 2010, Mr. LaScalia outlines his objections to the legal representation that Mr. Del Col and Mr. Johnson provided to him, and provides documentation, including correspondence between him and his counsel, that he contends supports his claims. In that Affidavit, Mr. LaScalia, *inter alia*, 1) affirms that his counsel "applied absolutely no legal remedies or performed any litigation on my behalf between February 13, 2009 and September 17, 2009" (Aff. at ¶ 2(a)); 2) Mr. Johnson prepared Answers on May 5, 2009 and asserted cross claims but "then like every [sic] else they handled related to the case were never vehemently pursued..." (Aff. at ¶ 2(b)); and 3) provides minutes from the Office of the County Clerk (Ex. C) and a corresponding Affidavit that Mr. LaScalia prepared (Ex. D) which, he avers, "serves to illuminate in a clear fashion the timeline of events in support of my claim that there was a general lack in litigation performed on my behalf by Robert J. Del Col and Bryan Johnson, Esq..."

When this matter was addressed on the record on February 25, 2010, Mr. LaScalia's comments to the Court included the following:

The underlying premise of my opposition papers are criminal allegations against the individuals on a conspiracy to defraud using the New York State Supreme Court to execute a conspiracy to defraud, and that they indeed brought forward

upon this court, myself and your Honor in creating that. So the judgment that we're speaking to, which was illegally obtained, is being investigated by special prosecutor, the state police the Federal Bureau of Investigation, and any other instrument that I could use to bring justice and light to this case, sir.

With that said, I would like to bring into the record at this point the fact that Robert Del Col and Bryan Johnson intentionally denied me the ability to appeal this case and are actively involved in a coverup to the facts behind that. This has been documented in my brief to this court today and has been my allegation all along. It's very difficult to find a point of entry, and I have chosen that because when coverups are involved, they usually bring the allegations that one makes to light, and there are so many complexities of this case that one can't possibly understand, but there has been an assemblance of a tremendous amount of data that supports my allegations, and I would like the Court to closely look at those allegations related to specifically the denial of a filing of an appeal by my counselors in an effort to bury forever the events related to a jury trial which they manipulated as they acted against my own best interests as my counselors.

Tr. at pp. 10-11.

Mr. LaScalia also outlines his objections to an Order to Show Cause that this Court amended, on the record, but did not contemporaneously memorialize in writing. The Court eventually made the appropriate markings on the Order to Show Cause to reflect the Court's ruling from the bench. Although Mr. LaScalia was subsequently notified of this administrative omission, he takes the position that the initial discrepancy between the written Order to Show Cause the Court's oral direction was attributable to improper conduct by his counsel.

Defendants also provide an Affidavit of Joanne LaScalia dated January 23, 2010 in which she outlines her objections to the representation provided by Mr. Del Col and Mr. Johnson. In that Affidavit, Mrs. LaScalia affirms, *inter alia*, that 1) Mr. Del Col and Mr. Johnson "had not discussed or informed me of any plans of an affirmative defense and only met with us on several occasions in which he rarely discussed the case in detail" (J. LaScalia Aff. at ¶ 4); 2) "[o]n the few occasions the counselors set appointments they distorted the facts of those appointments and informed me that I had been mistaken and must reschedule my appointment when I was certain that these appointment[s] had been accurate[.] I had clearly noted these appointments and was certain of their times and dates that they were to take place" (J. LaScalia Aff. at ¶ 6); and 3) "I gave my unwavering trust to a Long Time family friend and feel that he has betrayed that trust and worked actively to harm me by utilizing the trust extended him" (J. LaScalia Aff. at ¶ 10).

In his Affirmation in Reply, Mr. Johnson submits, *inter alia*, that 1) the Court should grant the Firm's motion to be relieved because the breakdown in attorney-client communications makes permissive withdrawal axiomatic; 2) Defendants have continued to make frivolous and defamatory statements accusing the Firm of criminally altering a Court Order even after they were clearly advised on the record that the Order was amended by the Court; 3) Defendants' claim that the Firm purposely failed to file a Notice of Appeal and then sought to cover it up is baseless, and further makes permissive withdrawal necessary; and 4) Defendants' claim that the Firm has done nothing to litigate their claims is refuted by the record, and Defendants' demand for the return of monies they paid to the Firm is based on false claims.

With respect to the Notice of Appeal, Mr. Johnson provides a copy of the Notice of Appeal dated November 2, 2009 (Ex. F). Mr. Johnson affirms that, although the Firm's retainer agreement with Defendants did not provide for post-trial work, the Firm, on a *pro bono* basis, filed the Notice of Appeal and so notified Defendants. Mr. Johnson avers, further, that despite the Firm's notification of Defendants regarding its filing of the Notice of Appeal, Defendants filed a *pro se* Notice of Appeal without advising the Firm of their actions.

RULING OF THE COURT

A. Counsel's Application is Properly Before the Court

Preliminarily, with respect to the issue of whether this Court, or an appellate court, should decide Counsel's application to be relieved, the Court notes that this issue was addressed on the record on December 16, 2009. Specifically, Mr. Johnson took the position that this Court retained jurisdiction over this case because the Court scheduled submission dates for the parties to file for judgment notwithstanding the verdict ("JNOV") (Tr. at p.8). Thus, Mr. Johnson submitted, the Court retained jurisdiction for the purposes of determining the JNOV (*Id.*). At that December 16th conference, the Court, with the consent of counsel, lifted the stay of the matter pending determination of the instant application to be relieved and extended the time for Defendant to move for JNOV until February 1, 2010 (*Id.* at 10). In light of the foregoing, the Court determines that the application of Defendants' counsel to be relieved is properly before the Court.

B. Application to Be Relieved

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).

Bankers Trust Company v. Hogan, 187 A.D.2d 305 (1st Dept. 1992) is particularly instructive. There, the First Department reversed the trial court's denial of a law firm's motion for leave to withdraw as counsel. The First Department held that the record contained sufficient evidence to conclude that the defendant in question rendered it unreasonably difficult for the law firm to carry out its employment effectively by 1) continually questioning the law firm's work and blaming it for adverse decisions; 2) making verbal threats against the law firm; 3) insisting that the law firm pursue legal theories and arguments at trial directly contrary to law and counsel's professional judgment; and 3) exhibiting a total lack of trust and confidence in the law firm. *Id.*

C. Obligations of Attorneys

22 NYCRR § 700.4(a) provides as follows:

Attorneys are both officers of the court and advocates. It is their professional obligation to conduct each case courageously, vigorously, and with all the skill and knowledge they possess. It is also their obligation to uphold the honor and maintain the dignity of the profession. They must avoid disorder or disruption in the courtroom and must maintain a respectful attitude toward the court. In all respects attorneys are bound, in court and out, by the provisions of the Rules of Professional Conduct.

D. Post-Trial Motion for Judgment

CPLR § 4404 provides as follows:

(a) Motion after trial where jury required. After a trial of a cause of action or issue triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside a verdict or any judgment entered thereon and direct that judgment be entered in favor of a party entitled to judgment as a matter of law or it may order a new trial of a cause of action or separable issue where the verdict is contrary to the weight of the evidence, in the interest of justice or where the jury cannot agree after being kept together for as long as is deemed reasonable by the court.

(b) Motion after trial where jury not required. After a trial not triable of right by a jury, upon the motion of any party or on its own initiative, the court may set aside its decision or any judgment entered thereon. It may make new findings of fact or conclusions of law, with or without taking additional testimony, render a new decision and direct entry of judgment, or it may order a new trial of a cause of action or separable issue.

E. Application of these Principles to the Instant Action

The Court grants the application of Robert J. Del Col, Esq. to withdraw as attorney for Defendants James LaScalia and Joanne LaScalia. The submissions before the Court, as well as Mr. LaScalia's oral statements to the Court, establish that the attorney-client relationship has deteriorated to the point where continued representation is inappropriate. Mr. and Mrs. LaScalia have expressed their dissatisfaction with, and mistrust of, Mr. Del Col and his Firm to the extent that it would be inappropriate to require this attorney-client relationship to continue.

The Court denies Defendants' application for an Order granting an immediate stay of the judgments issued to Plaintiff and Co-Defendant, as there does not appear to be any basis for such a stay. The Court also denies Defendants' application for an Order restraining Plaintiffs and Co-Defendant from taking any further action in this case. CPLR § 321(c), which provides for a thirty (30) day stay upon removal of an attorney at any time before judgment, is inapposite to this matter, in which judgment has been entered. The Court concludes that a stay at this juncture is not warranted.

The Court also denies Defendants' application to set aside or otherwise vacate the verdict as well as the judgments resulting from that verdict. The Court, which presided over the trial resulting in that verdict, concludes that the verdict was not contrary to the weight of the

evidence.

The Court also denies Defendants' applications 1) to direct Defendants' Counsel to return all monies received for litigation in connection with their representation of Defendants in this matter; 2) to refer this matter to the New York State disciplinary committee, and sanctioning and censuring Defendants' Counsel; 3) to restrain Plaintiffs and Co-Defendant, and their agents, from taking any further action in this case; and 4) to direct Defendants' Counsel to return all records related to this case. Specifically with respect to Mr. Del Col's representation of Defendants, the Court has found Mr. Del Col and his Firm to be professional and capable advocates and declines to make any referral regarding, or impose any sanction against, Mr. Del Col and his Firm. Moreover, Defendants have not demonstrated the appropriateness of an Order directing Mr. Del Col to return all monies received for litigation, or to return all records related to this case. Should Defendants wish to pursue a claim against Mr. Del Col and his Firm for their allegedly inadequate representation of Defendants, they may do so via avenues better suited for such claims, such as the filing of a claim with the Grievance Committee.

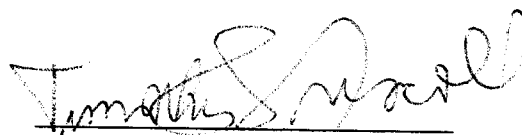
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

May 28, 2010



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
 JUN 03 2010
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE