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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

JOSEPH COLLINS x

- against -

TELCOA INTERNATIONAL CORP., et al.

x

Index Number 23796 1997

Motion Date April 13, 2010

Motion Cal. Numbers 8 & 9

Motion Seq. Nos. 17 & 19

The following papers numbered 1 to 20 read on this motion by the law firm of Certilman Balin Adler & Hyman, LLP for an order, pursuant to CPLR 321(b)(2), relieving them and discharging them from representing defendants Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin, and staying the action for 60 days to permit these defendants to retain or appear with new counsel. Plaintiff cross-moves for an order holding Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin, and their attorneys Martin P. Unger, Esq., and Certilman Balin Adler & Hyman LLP in contempt of court, pursuant to Judiciary Law § 753 for the willful disobedience of court orders requiring the establishment and maintenance of an escrow to secure plaintiff's claims. Plaintiff separately moves for an order holding in contempt Tenzer Greenblatt, LLP and Blank Rome Tenzer Greenblatt, LLP pursuant to Judiciary Law § 753 for the willful disobedience of court orders requiring the establishment and maintenance of an escrow to secure plaintiff's claims.

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Upon the foregoing papers these motions and cross motion are consolidated for the purposes of a single order and are determined as follows:

Certilman Balin Adler & Hyman, LLP's motion to be relieved as counsel for defendants Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin:

CPLR 321 (b) (2), provides that "[a]n attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to 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."

An attorney may withdraw from representing a client on good and sufficient cause, upon reasonable notice to the client (*see Williams v Lewis*, 258 AD2d 974 [1999]; *LeMin v Central Suffolk Hosp.*, 169 AD2d 821 [1991]). An attorney does not have an unfettered right to unilaterally withdraw. Good cause is required, to be determined, ultimately, by the court. "Generally, there are three primary reasons allowing withdrawal of an attorney from a case: failure of a party to remain in contact with counsel; deterioration of the attorney/client relationship; nonpayment of legal fees (*Countryman v Watertown Hous. Auth.*, 13 Misc 3d 632, 633 [2006]; *see Tartaglione v Tiffany*, 280 AD2d 543 [2001]; *Lake v M.P.C. Trucking*, 279 AD2d 813 [2001]; *Galvano v Galvano*, 193 AD2d 779 [1993]). A client who fails to respond to communications from his or her attorney may render continued representation unreasonably difficult (*see Bok v Werner*, 9 AD3d 318 [2004]; *see also Tartaglione v Tiffany*, *supra*).

The order to show cause directed Certilman Balin Adler & Hyman LLP to serve on or before February 1, 2010, the order to show cause and supporting papers by overnight delivery to their clients, defendants Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc. and Robert Dolan, and to also serve the order to show cause by overnight delivery on counsel for the plaintiff, counsel for defendant Barry Lasky and all other appearing parties. The affidavit of service submitted herein establishes that Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc. and Robert Dolan were all served at the same address in Florida, on January 26, 2010, via Federal Express, overnight delivery; and that counsel for plaintiff and counsel for Mr. Lasky were served on

January 26, 2010, at their offices in New York, on January 26, 2010, via Federal Express, overnight delivery, in accordance with the provisions of the order to show cause. Contrary to the assertions of plaintiff's counsel, the order to show cause did not specifically require that he be served with a copy of the supporting papers.

Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc. and Robert Dolan have not responded to the order to show cause.

Martin Unger, an attorney and a member of Certilman Balin Adler & Hyman LLP, states in his affidavit that his clients have failed to comply with a retainer agreement and have refused to pay for legal services totaling $50,894.72; that there has been a complete breakdown in the attorney-client relationship; that said firm was retained in September 2002, and was substituted for prior counsel, and that for most of this period Telcoa International Corp. paid all legal fees and expenses, as counsel understood that the subsidiary companies Telcoa New York Corp. and Central Station Signals, Inc had no assets and that Mr. Dolan was indemnified by Telcoa International Corp; that Telcoa International Corp. continuously disregarded the law firm's request for payment of said sum; that on December 18, 2009, upon receipt of the referee's report and recommendations following trial, approximately two years before, said report was forwarded to the defendants for review and discussion; that since that time the law firm has been unable to contact Mr. Dolin, who is also in charge of the corporate clients, and therefore have not received any instructions as to how, or if, their clients wish to proceed. Counsel further states that the firm is in receipt of the plaintiff's motion to confirm the referee's report, and for a judgment thereon, which is returnable in this part on July 27, 2010.

The court does not dispute that counsel may be relieved where a client fails to communicate or fails to pay for legal services rendered. However, the court finds that Mr. Unger's affidavit is insufficient, as he has failed to set forth in detail the efforts made to contact Mr. Dolin and the corporate clients, and has failed to set forth in detail the dates and manner in which bills for legal services were sent to Mr. Dolin and the corporate clients. Counsel's motion to be relieved therefore is denied, with leave to renew.

Plaintiff's motion and cross motion for contempt:

In July 1998, plaintiff Joseph Collins was represented in this action by Cantor, Epstein, Bailey & Degenshein, LLP and the defendants were represented by Tenzer Greenblatt.

Edward Bailey, then a member of Cantor, Epstein, Bailey & Degenshein and Martin Unger, then a member of Tenzer Greenblatt, appeared for their respective clients at hearing

held on July 8, 1998, before the Hon. Simeon Golar. Justice Golar stated on the record that plaintiff had brought an order to show cause and that the court had granted a temporary restraining order; that the parties had appeared on that date for a hearing on whether or not the temporary restraining order should be continued, and whether the court should require the plaintiff to post a bond. Plaintiff had represented that he was unable to post a bond. Defendants offered to post a bond or otherwise put up shares or security in the total amount of $300,000.00. Justice Golar adjourned the hearing with regard to the application for a preliminary injunction until September 16, 1998, and stated on the record that "[t]he TRO was lifted on condition that the defendants post a bond in the sum of $300,000, with the further understanding that instead of the bond or in lieu of the bond, counsel can hold shares, stock in escrow with the present market value of $300,000, and the commitment by counsel on behalf of his clients, if those shares fall in value, cash is to be substituted for any deficiency up to and including $300,000 to be held in escrow pending disposition of this matter" (T15).

The parties in a so-ordered stipulation dated October 21, 1998, resolved the plaintiff's motion for a preliminary injunction as follows: "The defendants agree to hold in escrow cash or shares of Alarmguard stock with a value of $300,000 until final judgment in this case, subject, however, to further order of the Court; . . . the motions are withdrawn without prejudice; and . . . without prejudice to Collins' pending request to increase the escrow to $400,000."

Mr. Bailey and Mr. Unger appeared in Justice Golar's chambers on October 27, 1998, with respect to plaintiff's application to increase the amount held in escrow to $400,000. Justice Golar granted the application and instructed Mr. Unger "as escrow agent, escrow holder, that the fund be increased by cash or shares to $400,000 . . . subject to what may happen as a result of my determination of the motions that are pending . . . ."

Tenzer Greenblatt, LLP, thereafter, retained the stock certificates which represented a total of 59,000 shares of Alarmguard stock. In a letter dated January 27, 1999, Mr. Unger informed Mr. Bailey that the Telcoa shares held in escrow had been delivered to a brokerage firm for tender to Tyco; that assuming that the transaction closed, $400,000 in cash would be returned to the law firm which would be held in escrow; and that if the transaction did not close, then the law firm would continue to hold the shares in escrow. In a letter dated March 3, 1999, Mr. Unger informed Mr. Bailey that the Alarmguard shares in escrow had been tendered and that the funds had yet to be received from Tyco.

In 2000, Tenzer Greenblatt merged into Blank Rome LLP, and for a short period of time was known in New York as Blank Rome Tenzer Greenblatt LLP. This law firm is currently known as Blank Rome LLP. Martin Unger left the law firm of Blank Rome LLP

in 2002, and joined Certilman Balin Adler & Hyman. In September 2002, Certilman Balin Adler & Hyman was substituted as counsel for the defendants. All the files in this action previously maintained at the law firm of Blank Rome LLP were transferred to Certilman Balin Adler & Hyman. No shares of stock, cash funds, securities or any other property related to this action were transferred to Certilman Balin Adler & Hyman by any prior counsel of record or by the defendants.

As evidenced by correspondence from Mr. Unger, as of July 20, 2001, Edward G. Bailey was at a law firm known as Bailey & Sherman PC and continued to represent the plaintiff. Mr. Unger informed Mr. Bailey that the amount to be reserved was $400,000; that there was no formal escrow agreement and that while he received advice respecting the status of the account, Telcoa was required to reserve the $400,000. In letters dated July 27, 2001 and December 6, 2002, Mr. Unger reiterated that the October 21, 1998 stipulation required the defendants to hold cash or shares in escrow and not his law firm, and that Mr. Dolin had indicated that the defendants continued to fully comply with the stipulation. Although Mr. Bailey in his correspondence with Mr. Unger expressed concern about Mr. Dolin's control of the escrow funds, he did not take any action on behalf of his client until the service of the within order to show cause and cross motion for contempt in early 2010.

Mr. Dolin, in the non-jury trial before a court attorney/referee, in October 2007, stated on cross examination that upon receipt of the $400,000, half or $200,000 was placed in an income producing investment with McGuinness Smith, and half or $200,000 was placed with Smith Barney and then UBS. He stated that with regard to the $200,000 on account with Smith Barney, more than $200,000 remained in that account, as no dividends were taken and the dividends were reinvested, and with respect to the other account, he used the interest to pay bills, but that the principal of $200,000 remained in that account. Mr. Dolin testified that the entire $400,000, plus some unspecified amount of interest continued to be held in these two brokerage accounts. He did not state when any of the yearly interest was withdrawn from the McGuinness Smith account.

The referee's report and recommendations dated December 19, 2009, found in favor of the plaintiff on several causes of action, and plaintiff has served a motion to confirm said report. Plaintiff in his cross motion now seeks to hold Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin, and their attorneys Martin P. Unger, Esq., and Certilman Balin Adler & Hyman LLP in contempt of court, pursuant to Judiciary Law § 753 for the willful disobedience of court orders requiring the establishment and maintenance of an escrow to secure plaintiff's claims.

Plaintiff separately moves for an order holding in contempt Tenzer Greenblatt, LLP and Blank Rome Tenzer Greenblatt, LLP pursuant to Judiciary Law § 753 for the willful

disobedience of court orders requiring the establishment and maintenance of an escrow to secure plaintiff's claims.

Both of the contempt motions are based upon the statements made by Mr. Dolin on cross examination in the October 2007 trial regarding the investment of the $400,000, with the brokerage firms by the defendants, and the withdrawal and use of some interest payments.

In order to prove civil contempt, based upon a violation of a court order it must be shown that the mandate purportedly violated was clear and explicit and the violation established with reasonable certainty (*McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *Matter of McCormick v Axelrod*, 59 NY2d 574, 583 [1983]; *Matter of Daniels v Guntert*, 256 AD2d 940, 942 [1998]; *Coan v Coan*, 86 AD2d 640 [1982], *appeal dismissed* 56 NY2d 804, *leave dismissed* 57 NY2d 608). The court must also find that the contemnor's actions "were calculated to or actually did defeat, impair or prejudice the rights or remedies of the [complainant]" (*Powell v Clauss*, 93 AD2d 883 [1983]; *see also Matter of McCormick v Axelrod*, *supra*; *Matter of Planning Bd. v Zoning Bd. of Appeals*, 75 AD2d 686, 687 [1980]; *see also* Judiciary Law § 753, subd A). When the order "contains ambiguous and vague language, a finding of civil contempt is not tenable" (*Matter of Upper Saranac Lake Assn. v New York State Dept. of Envtl. Conservation*, 263 AD2d 916, 917 [1999]).

Justice Golar's order of July 8, 1998, which was conditional in nature, was superceded by the so-ordered stipulation of October 21, 1998, whereby the "defendants" agreed to hold in escrow the cash or shares of Alarmguard with a value of $300,000. Justice Golar, however, in his order of October 27, 1998, instructed Mr. Unger "as escrow agent, escrow holder, that the fund be increased by cash or shares to $400,000 . . . subject to what may happen as a result of my determination of the motions that are pending." These orders when read together, do not provide a clear and unequivocal statement as to who was to be the escrow agent for either shares of stock or its cash equivalent. To the extent that the October 27, 1998 order directed Mr. Unger, as escrow agent, or escrow holder, to increase the number of shares so that they had a value of $400,000, it is undisputed that Mr. Unger complied with said order.

In view of the ambiguities contained in the October 21, 1998 so-ordered stipulation and the October 27, 1998 order on the record, there was no clear directive that either Mr. Unger or counsel of record for the defendants maintain stock certificates valued at $400,000, or their cash equivalent in an attorney escrow account. Therefore, plaintiff's motion for an order of contempt against Mr. Unger, Tenzer Greenblatt, LLP and Blank Rome Tenzer Greenblatt, LLP, is denied. That branch of plaintiff's cross motion which seeks an order of contempt against Mr. Unger, and Certilman Balin Adler & Hyman, LLP, is also denied.

Although the defendants pursuant to the so-ordered stipulation were required to hold either the shares of stock or their cash equivalent $400,000 in escrow, said order does not require that the escrow account be an interest bearing account, or that any interest earned on the amount held in escrow remain in the escrow account. Nor does the so-ordered stipulation and subsequent order prohibit the escrow funds from being invested in a brokerage account. The fact that Mr. Dolin admittedly maintained two brokerage accounts each in the sum of $200,000.00 and invaded the interest on one escrow account in order to pay bills, thus does not constitute a violation of the court's prior orders. In addition, plaintiff has not shown that the defendants' actions were "calculated to or actually did defeat, impair or prejudice the rights or remedies" as plaintiff does not claim that the $400,000 is no longer available or not held in escrow. Therefore that branch of plaintiff's cross motion for an order of contempt against Telcoa International Corp., Telcoa New York Corp., Central Station Signals, Inc., and Robert Dolin, is denied.

Conclusion:

In view of the foregoing, Certilman Balin Adler & Hyman, LLP's motion to be relieved as counsel is denied with leave to renew. Plaintiff's cross motion and separate motion for contempt are denied in their entirety.

Dated: June 18, 2010

AUGUSTUS C. AGATE, J.S.C.