

**Riverside Capital Advisers, Inc. v First Secured
Capital Corp.**

2010 NY Slip Op 32943(U)

October 5, 2010

Sup Ct, Nassau County

Docket Number: 020600/1999

Judge: Ira B. Warshawsky

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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 8

RIVERSIDE CAPITAL ADVISERS, INC., as investment advisor to Winchester Global Trust Company Limited, and WINCHESTER GLOBAL TRUST COMPANY LIMITED, as trustee of the Factored Receivables Trust, as successor in interest to Highlands Financial Services, Inc.,

Plaintiffs,

INDEX NO.: 020600/1999

-against-

FIRST SECURED CAPITAL CORPORATION, WET RESOURCES CORP., THE THOMAS B. DONOVAN FAMILY TRUST and THOMAS E. WYNNE,

Action No. 1

Defendants.

WINCHESTER GLOBAL TRUST COMPANY LIMITED, as trustee of the Factored Receivables Trust,

Plaintiff,

-against-

INDEX NO.: 014163/2004
MOTION DATE: 05/19/2010
MOTION SEQUENCE: 018 and 019

THOMAS B. DONOVAN, PAMELA DONOVAN, FIRST SECURED CAPITAL CORPORATION, THE THOMAS B. DONOVAN FAMILY TRUST, FIRST SECURED LIEN CORPORATION, SECURED LIEN CORPORATION, SECURED PARTNERS CORPORATION, SECURED PROPERTY CORPORATION, REO CORP. and FIRST PAPER CORPORATION,

Action No. 2

Defendants.

The following papers read on this motion:

Order to Show Cause, Affirmations & Exhibit Annexed	1
Order to Show Cause, Affirmation & Exhibit Annexed	2
Affirmation of Jennifer L. Zuch in Opposition to the Donovans' Attorneys' Motions to Withdraw as Counsel & Exhibits Annexed	3
Memorandum of Law in Opposition to the Donovans' Attorneys' Motions to Withdraw as Counsel	4
Reply Affirmation of Peter J. Williams	5
Reply Affirmation of Kenneth J. Weinstein	6

Motions to be Relieved as Counsel

In Motion Sequence No. 018, the law firm of Rosenberg, Calica & Birney, LLP, by Peter J. Williams, Esq., has moved to be relieved as counsel for The Thomas B. Donovan Family Trust ("the Trust") and First Secured Capital Corporation ("First Secured") in each of the above captioned actions as to First Secured and the Trust in each of the above actions pursuant to CPLR § 321.

In Motion Sequence No. 019, Kenneth J. Weinstein, Esq. has moved to be relieved from representing Thomas B. Donovan and Pamela Donovan, non-parties in Action No. 1, and defendants Thomas B. Donovan, Pamela Donovan, First Secured Lien Corporation, Secured Lien Corporation, Secured partners Corporation, Secured Property Corporation, REO Corp. and First Paper Corporation in Action No. 2 pursuant to CPLR § 321, both motions have been opposed by plaintiff.

Both law firms argue that they are owed substantial sums by their respective clients.

Both counsel argue that their clients have failed to respond to statements for balances due and that they (counsel) expect to render substantial services going forward on three ongoing motions and an ongoing hearing on Motion Sequence No. 015 involving the possibility of a jail sentence for failure to pay a \$35 million fine and two pending contempt motions (Motion Sequence Nos. 016 and 017), all relating to the Donovans.

They request that all actions be stayed so the Donovans, the Trust and the corporation be given time to obtain new counsel. Counsel Weinstein stated he was

prepared to waive entitlement to a charging lien and a money judgment. He affirms that existing Court orders and judgments¹ have stripped them of their assets eradicating their ability to pay legal fees. Weinstein contends he is currently owed over \$40,000² in fees. Said fees cover his representation of the Donovans through the ongoing hearing in April 2010. Said hearing would have resumed on May 10, 2010, and continued on May 12, 2010, but for the filing of these motions on May 5, 2010. The Court does not, in any way, doubt the credibility of Mr. Weinstein's affirmation. The Court also finds Mr. Weinstein has forcefully, professionally and zealously represented his clients for seven years (the Court will address said representation further on in this decision), said representation occurring after this Court entered a judgment against the defendants in August 2003 for \$21 million.

In open Court, on the return date of the Orders to Show Cause (Motion Sequence Nos. 018 and 019), Mr. Weinstein stated his clients would not appear and they had no objection to his motion. A Court would normally expect something from the clients themselves, but that did not occur, and, even if there was a response, it most likely would have been written by counsel.

Counsel argues that he should not be forced to work without compensation and that the right to terminate an attorney-client relationship "is a shared right, not reserved solely for the client." He argues that when a "client's own failure or inability to pay clearly hinders that attorney's abilities to protect the client's best interests, it may become necessary for the attorney to seek leave to withdraw as counsel in order to further the interests of the client."

Bottom line, Mr. Weinstein argues that his "office cannot afford to remain as counsel and become an even more substantial creditor of Defendants." He further argues that an attorney "has the right to withdraw from a case when the client disregards an obligation to the attorney for payment of expenses or fees." See,

¹It should be clear that all money judgments of this Court, starting in 2003 for about \$22 million and the most recent contempt judgment have been affirmed by the Appellate Division, Second Judicial Department.

²\$9,600 accumulated in April alone which included a full day's hearing.

e.g., *Winters v. Winters*, 25 A.D.3d 601 (2d Dept. 2006); *Kay v. Kay*, 245 A.D.2d 549 (2d Dept. 1997); *Eldridge Realty Corp. v. Green*, 174 A.D.2d 564 (2d Dept. 1991); Rule 1.16(c)(5) of the Rules of Professional Conduct.

Rosenberg, Calica & Birney, LLP (“RCB”) argue similarly. They also point out all the work they have done for the Trust and the corporate clients. Said representation actually began in 2003, expanded in 2004, and expanded even further in 2008 to include other corporate entities when prior counsel was relieved.

RCB affirm that the Trust and First Secured owed them over \$100,000 which has been duly invoiced. They cite to 22 NYCRR § 1200.15(c)(1)(iv) [the old DR 2-110(c)] (withdrawal permitted where client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees); or (“[w]here a client repudiates a reasonable fee arrangement, there is no obligation on the part of counsel to finance the litigation or render gratuitous services.”) *citing Cullen v. Olins Leasing, Inc.*, 91 A.D.2d 537 (1st Dept. 1982).

Neither counsel has indicated to the Court the amount of the fees it has earned over the last seven years, and both argue there would be no prejudice to the plaintiffs to grant this motion since judgments have already been obtained against all defendants.

Counsel fails to mention (and why should they) that it is their efforts that have prevented the collection of these judgments for seven years. Of course, all counsel request their respective clients be given thirty (30) days to retain new counsel, a somewhat humorous request under the circumstances of these cases and the failure to pay as they set forth.

Plaintiff, Winchester, opposes, contending they would be prejudiced by the withdrawal of Weinstein and RCB. They argue that one or both law firms continue their representations until the conclusion of the hearing that is in progress with respect to the Donovan's inability to pay the contempt fine, and Motion Sequence Nos. 016 and 017, Winchester's motions to hold them in further contempt for violating a prior preliminary injunction.

Plaintiffs pose an interesting argument — if the Court relieves the defense counsel and the defendants continue without counsel, pro se, and there is a negative

outcome for them, then the appeal will be subjected to heightened scrutiny to Winchester's detriment.

This does not concern the Court. Plaintiffs will proceed to present their case and the Court will proceed to do its job in adjudicating the matter.

What does disturb the Court is the application itself and whether after seven years of preventing collection of an otherwise valid judgment, after a lengthy trial (not current counsel), and six years after filing of the fraudulent conveyance actions, and after sixty motions on the 1999 action, at least thirty-three by current counsel post-trial, nineteen motions on the 2004 action, after numerous appeals brought by defendants, the original hearing on the issue of liability for the contempt fine was scheduled for the fall of 2009, multiple adjournments occurred due to both sides' needs, mostly defense counsel scheduling problems, briefing were completed by January 10, 2010, but due to plaintiffs' counsel's back surgery in January and then Mr. Weinstein's trial schedule, the hearing commenced on April 6, 2010 and was continued to April 14, 2010. Then due to unavailability of defense counsel, was adjourned to May 10, 2010 and then came these motions to be relieved, which stayed the hearing.

Then came the coup de gras.³ On May 25, 2010, the Court received notice that the Donovans had filed for bankruptcy protection under Chapter 7 of Title 11 of the Bankruptcy Code as of May 23, 2010.

It is clear from both the oral discussions and the moving papers that the only basis for the motions is non-payment; further, that the non-payment issue has existed for some time (it takes at least some time to build up \$100,000 of legal fees). This is not a situation of attorney-client disagreement or refusal of a client to abide by an agreement, it is a client who, counsel says, cannot pay (and has the chutzpah to blame it on the Court). Is that sufficient in light of the history of this case to grant counsel's applications and now in light of the bankruptcy filing?

This case started in 1999. This Court inherited it when it became a Commercial Division Part. There followed a lengthy trial, a lengthy decision, and a judgment for \$21

³Wikipedia definition — The death blow to end the suffering of a wounded creature. It is often used figuratively to describe the last in a series of events which brings about the end of some entity.

million. Then there followed the arrival of current counsel and seven years of appeals, an additional action, decisions, contempts, decisions and appeals, numerous appeals.

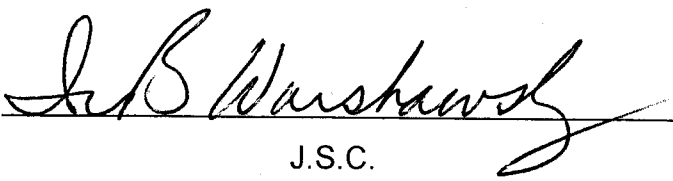
But for the bankruptcy filing, it was the Court's intent to deny the Weinstein application and grant that of Rosenberg, Calica & Birney, LLP. The Donovans are the real litigants in this case and always have been, not their sham corporations which they used as pieces in a shell game to transfer assets. However, it is now time to put an end to the suffering of these wounded creatures — the Winchester actions — at least until the Donovans come out of bankruptcy.

The applications to be relieved by Kenneth Weinstein, Esq. and the law firm of Rosenberg, Calica & Birney, LLP are granted.

All other open motions, including the pending application to incarcerate the Donovans for failure to pay the \$35 million contempt judgment, are stayed pending further order of the Court.

It is **SO ORDERED**.

Dated: October 5, 2010


J.S.C.

ENTERED
OCT 14 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE