

Firoru Intl. Corp. v Empire State Med. Testing, P.C.

2011 NY Slip Op 33647(U)

July 12, 2011

Supreme Court, Nassau County

Docket Number: 003164-10

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
FIRORU INTERNATIONAL CORP.,

Plaintiff,

-against-

**EMPIRE STATE MEDICAL TESTING, P.C. and
WILLIAM TODD PORDY,**

Defendants.
-----x

**TRIAL/IAS PART: 20
NASSAU COUNTY**

Index No: 003164-10

**Motion Seq. No: 4
Submission Date: 5/25/11**

The following papers having been read on this motion:

- Order to Show Cause, Attorney's Affirmation and Exhibit.....x**
- Affirmation in Opposition and Exhibits.....x**

This matter is before the Court for decision on the Order to Show Cause filed by the law office of Friedman Harfenist Kraut & Perlstein LLP ("FHKP") seeking to be relieved as attorneys for Plaintiff Firoru International Corp. ("Plaintiff"). For the reasons set forth, the Court denies the application.

BACKGROUND

A. Relief Sought

FHKP moves for an Order 1) relieving FHKP as attorneys for Plaintiff in the above-captioned action; 2) declaring that FHKP has no further responsibility in this action; and 3) staying all present and future proceedings in this matter for a period of thirty (30) days.

Defendant William Todd Pordy (“Pordy”) opposes the application.¹

B. The Parties’ History

The parties’ history is set forth in detail in a prior decision of the Court dated August 25, 2010 (“2010 Decision”). As noted in the 2010 Decision, this is an action to recover damages for financing provided by the Plaintiff to the Defendants for purposes of funding the start up costs of a medical professional corporation, which funds were not repaid. In the 2010 Decision, the Court, *inter alia*, granted Pordy’s motion to dismiss counts five (5) and six (6) of the Complaint. In dismissing those counts, the Court noted as follows:

The Court is mindful of the almost glaring weaknesses of Plaintiff’s case including 1) the absence of any reference to a loan in relevant correspondence, 2) the absence of any loan documents, 3) the suspicious convenience of the Letter, whose authenticity Pordy disputes, to provide some writing evidencing the alleged loan, and 4) Plaintiff’s failure to produce the Checks. The Court, however, is constrained to deny Defendant’s motion to dismiss the remaining counts of the Complaint. With respect to the Statute of Frauds, Pordy argues that Plaintiff alleges that it loaned Defendant over \$100,000 but was only paying Defendant \$50,000 per year and, therefore, repayment of the loan could not be performed within one year. While it is Pordy’s position that he was to receive \$50,000 annually, however, Plaintiff does not concede that agreement in its supporting papers. Finally, the Letter does provide at least some evidence that the loan existed. Thus, there are disputed issues of fact that prevent the Court from voiding the purported agreement based on the Statute of Frauds and dismissing the remaining counts of the Complaint.

2010 Decision at p. 10

In his Affirmation in Support of FHKP’s application, Andrew C. Lang (“Lang”), an attorney with FHKP outlines the procedural history of this case, including prior motions, conferences and decisions by the Court. Lang affirms that there has been a breakdown of communication between FHKP and Plaintiff, which has “hampered” (Lang Aff. at ¶ 13) FHKP’s ability to represent Plaintiff adequately. He affirms, further, that Plaintiff has consulted with outside counsel (“Outside Counsel”) when Plaintiff disagrees with FHKP’s advice and that Outside Counsel has not responded to FHKP’s efforts to discuss the matter with him. Lang also

¹ By decision dated January 5, 2011, the Court 1) granted Plaintiff’s motion for a severance of the third and fourth causes of action against Defendant Pordy and directed that the severed causes of action against Pordy will proceed; and 2) denied Plaintiff’s motion for a default judgment against Defendant Empire State Medical Testing, P.C. on the first and second causes of action, with leave to renew.

avers that Plaintiff “has ceased giving FHKP clear instructions on how to proceed with the prosecution of this matter, leaving FHKP in limbo with respect to meeting discovery deadlines or making motions in a timely manner” (*id.*). Lang affirms that FHKP’s attempts to resolve this issue have been “ignored” (*id.*).

In opposition, counsel for Pordy (“Pordy’s Counsel”) affirms that, by letter to FHKP dated March 16, 2010 (Ex. B to Schwartz Aff. in Opp.), he outlined the weaknesses of Plaintiff’s claims, and provided supporting documentation in support of Pordy’s position. That letter included the following language:

It is our intention to proceed no further with this frivolous and malicious complaint. Should your client, you and your firm not cease and desist and immediately dismiss with prejudice, our client will however proceed expeditiously through all available avenues. He reserves all of his rights to protect his name, and reputation both personally and professionally.

March 16, 2010 Letter at p. 3

Pordy’s Counsel affirms that, notwithstanding this letter, Plaintiff pursued this action. Pordy’s Counsel notes that the Court, in the 2010 Decision, observed and described at length the weaknesses of the Plaintiff’s case. Pordy’s Counsel affirms that Plaintiff’s counsel assured Pordy’s Counsel that he would provide documentation in support of Plaintiff’s allegations, which it has failed to do. Notably, Plaintiff has still failed to produce the loan letter (“Loan Letter”) on which it relies. Pordy’s Counsel affirms that this Loan Letter “purportedly gives Plaintiff’s attorney permission to sign Defendant’s name and utilize the IOLA account for the deposit of certain checks” (Schwartz Aff. in Opp. at ¶ 13) and suggests that FHKP’s application to be relieved may be related to its own possible involvement in the preparation of the alleged Loan Letter. This suggestion is buttressed by the November 2, 2010 letter from FHKP to Pordy’s Counsel (Ex. C to Schwartz Aff. in Opp.) in which FHKP advised Pordy’s Counsel that it had “three persons who are willing to testify under oath that they personally witnessed [Pordy] sign the letter, including an attorney, a paralegal and a principal of Firoru.”

Pordy’s Counsel affirms that Pordy “has suffered both economically and emotionally” from Plaintiff’s allegations (Schwartz Aff. in Opp. at ¶ 15). Pordy’s Counsel characterizes FHKP’s current application as “inexcusable” (*id.*).

[* 4]

C. The Parties' Positions

FHKP submits that, although Outside Counsel has not been formally retained, the Court should permit FHKP to withdraw from this matter because of its inability to work with co-counsel. FHKP argues, further, that there has been a breakdown in communications that has resulted in its inability to obtain from Plaintiff clear instructions on how to proceed, rendering it impossible for FHKP to prosecute this matter effectively.

Pordy opposes FHKP's application, submitting, *inter alia*, that 1) FHKP has not demonstrated sufficient cause to withdraw; 2) in light of the weaknesses of Plaintiff's case, as outlined by Pordy's Counsel in the March 2010 letter, FHKP should have dismissed this matter; and 3) in light of Plaintiff's failure to provide certain discovery, the Court should not now permit FHKP to withdraw.

RULING OF THE COURT

A lawyer may withdraw from representing a client if the client's conduct renders it unreasonably difficult for the lawyer to carry out employment effectively. *Misek-Falkoff v. MTA*, 65 A.D.3d 576, 577 (2d Dept. 2009), quoting Code of Professional Responsibility DR 2-110(C)(1)(iv) [22 NYCRR 1200.15(c)(1)(iv)]. Moreover, a lawyer may withdraw from representing a client if the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees. *Id.*, quoting Code of Professional Responsibility DR 2-110(C)(1)(f) [22 NYCRR 1200.15(c)(1)(vi)].

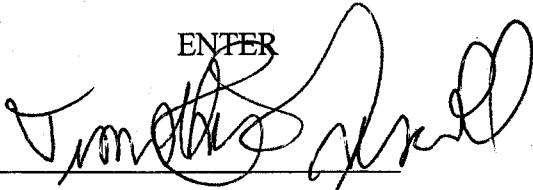
The Court denies the application of FHKP to be relieved as counsel for Plaintiff based on many factors, including but not limited to 1) FHKP's lengthy involvement in this matter, 2) FHKP's knowledge of the alleged weaknesses of Plaintiff's case, as outlined by Pordy's Counsel in prior correspondence, 3) FHKP's representations to Pordy's Counsel regarding the strength of Plaintiff's case and, specifically, its knowledge of witnesses who can support Plaintiff's claims, and 4) the lack of specificity in the application of FHKP regarding the circumstances that now allegedly warrant its withdrawal.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court for a conference on August 9, 2011 at 9:30 a.m.

DATED: Mineola, NY
July 12, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
JUL 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE