

Andreou v Extreme Constr. & Devs. Inc.

2011 NY Slip Op 33663(U)

June 22, 2011

Supreme Court, Nassau County

Docket Number: 015661-07

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**ANDREW ANDREOU and MARGARET
ANDREOU,**

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

Plaintiffs,

-against-

**Index No: 015661-07
Motion Seq. No: 1
Submission Date: 5/9/11**

**EXTREME CONSTRUCTION & DEVELOPERS
INC., P.S. MICAZA INTERIORS INC., DANIEL HO
a/k/a DANNY HO; PATRICIA SAKEDO; ACE
LANDSCAPING SERVICES, INC.; FRANK
ALBARRADO; N&J IRONWORKS, INC.; SUPERIOR
AIR CONDITIONING & HEATING SYSTEMS INC.;
ROY ROBINSON; PAYLESS P & P CORP.; and
JOSE MONTOYA;**

Defendants.

-----x

The following papers have been read on this motion:

- Notice of Motion, Affirmation in Support,**
- Affidavit in Support and Exhibits.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affidavit.....x**

This matter is before the Court for decision on the motion filed by Robert J. La Reddola, Esq., incoming counsel ("Incoming Counsel") for Plaintiffs Andrew Andreou ("Andrew") and Margaret Andreou ("Margaret") (collectively "Plaintiffs") on April 25, 2011 and submitted on May 9, 2011. For the reasons set forth below, the Court 1) grants the branch of the motion to substitute Incoming Counsel as counsel of record for Plaintiffs; and 2) refers the remaining branches of the motion to an expedited hearing to fix the amount, if any, due to Brian M.

Limmer, Esq., outgoing counsel (“Outgoing Counsel”) for Plaintiffs, and the manner in which that sum should be paid or secured.

BACKGROUND

A. Relief Sought

Incoming Counsel moves for an Order, pursuant to CPLR § 321, 1) substituting Incoming Counsel as counsel of record for Plaintiffs; 2) fixing the fee and lien of Outgoing Counsel for services allegedly rendered; and 3) compelling Outgoing Counsel to turn over his file on this matter to Incoming Counsel.

B. The Parties’ History

The Amended Verified Complaint (“Complaint”) (Ex. D to Limmer Aff. in Opp.) reflects that Plaintiffs, who are husband and wife, reside at a home (“Premises”) located in Wantagh, New York. This action involves a dispute over home improvements performed at the Premises.

In his Affidavit in Support, Andrew affirms that he and his wife initially retained Outgoing Counsel as their attorney in this matter which was commenced in 2007. They subsequently executed a Consent to Change Attorney dated January 17, 2011. Andrew affirms that based on Outgoing Counsel’s alleged “lack of attention” to this matter (Andrew Aff. in Supp. at ¶ 4), Plaintiffs believe it is now in their interest for Incoming Counsel to handle this matter. Andrew avers that he previously notified Outgoing Counsel of Plaintiffs’ desire to replace him, but that there is a disagreement as to how much money Plaintiffs owe Outgoing Counsel for the work he has performed on their behalf. Plaintiffs did not execute a retainer agreement as to Outgoing Counsel.

Andrew affirms that Outgoing Counsel’s lack of attention included 1) “wait[ing] until December 1, 2008 to obtain the RJI Number (Andrew Aff. in Supp. at ¶ 6); 2) adjourning, or agreeing to adjourn, the matter twenty-five times since February of 2009, without Plaintiffs’ consent; 3) agreeing to have this matter referred to a referee, without Plaintiffs’ consent; 4) agreeing to discontinue the action against certain Defendants, without Plaintiffs’ consent; and 5) “refusing” to return their telephone calls (*id.* at ¶ 10). Andrew concedes that Plaintiffs received emails and text messages from Outgoing Counsel but affirms that Outgoing Counsel refused to meet with Plaintiffs.

Andrew also affirms that, despite Plaintiffs’ request, Outgoing Counsel did not provide

them with bills for work he had performed on their behalf, except for a bill dated October 10, 2007. He affirms that the bill submitted to Plaintiffs contains hours that “are grouped together” (Andrew Aff. in Supp. at ¶ 13) and suggests that Outgoing Counsel is uncertain how much time he spent on this matter. In addition, Plaintiffs and Outgoing Counsel disagree as to the amount of money that Plaintiffs have paid him to date.

In light of the foregoing, Plaintiffs ask the Court to discharge Outgoing Counsel as their attorney, and direct him to turn over all papers, pleadings and other matters to Incoming Counsel. They also request that the Court direct Outgoing Counsel to commence a plenary action to fix the value of the services allegedly rendered by him, on a quantum meruit basis, so that the issue of his fee can be resolved.

In his Affirmation in Support, Incoming Counsel affirms that Outgoing Counsel has refused to turn over the file on this matter to Incoming Counsel. In addition, Outgoing Counsel has allegedly advised opposing counsel not to produce records obtained during discovery to Incoming Counsel. Incoming Counsel provides a letter (Ex. 2 to La Reddola Aff. in Supp.) from opposing counsel to Incoming Counsel reflecting the fact that 1) Outgoing Counsel is pursuing his legal fees from Plaintiffs and is exercising his retaining lien; and 2) if opposing counsel provides documents to Incoming Counsel, Outgoing Counsel will consider that conduct a tortious interference with his agreement with Plaintiffs. Incoming Counsel provides a proposed Order (*id.* at Ex. 3) that includes provisions directing that the fee (“Fee”) of Outgoing Counsel be fixed at an amount to be determined by the Court or, alternatively, that the Fee be determined in a plenary action brought by Outgoing Counsel, should he elect to pursue that avenue.

In his Affirmation in Opposition, Outgoing Counsel describes Andrew’s Affidavit in Opposition as “patently false” and containing “numerous fabrications which are being voiced for the first time now that he has decided for reasons personal to him not to pay my invoice” (Limmer Aff. in Opp. at ¶ 2). Outgoing Counsel provides a copy of the last invoice (“Invoice”) to Plaintiffs, dated October 10, 2007 (Ex. A to Limmer Aff. in Opp.). The last paragraph of that Invoice reads as follows:

Note: You have not been charged for numerous conferences; many letters written and calls made; as well as what it took to properly respond to discovery demands, etc. as a courtesy to you both as former clients and friends. I will extend this courtesy based upon prompt payment of the outstanding amount owed.

Outgoing Counsel affirms that he treated Plaintiffs “like family” (Limmer Aff. in Opp. at ¶ 2) due to a long-standing relationship, and the Invoice he provided to Plaintiffs represented only one-third of the time actually spent on the case. Outgoing Counsel affirms that he is now exercising his right to recalculate the Invoice in light of Plaintiffs’ breach of their agreement to pay the Invoice promptly as a “quid pro quo” (*id.*) for the reduced fee. Outgoing Counsel submits that, in light of Plaintiffs’ failure to object to the Invoice, the agreement now constitutes an account stated.

Outgoing Counsel also affirms that there exists a letter of engagement between Plaintiffs and Outgoing Counsel (Ex. B to Limmer Aff. in Opp.). Andrew specifically directed Outgoing Counsel not to prepare a retainer agreement for his signature, but rather “just...to state our agreement” (Limmer Aff. in Opp. at ¶ 4). Margaret was upset with Andreou “for getting them in such a mess with the Defendants and giving [Defendant] Danny Ho a huge check and disproportionate amount ‘up front’ only to get ‘ripped off’” (*id.*). Outgoing Counsel was advised that Margaret was “livid” and “the situation would become intolerable for Andrew if she (or he) signed a retainer with [Outgoing Counsel]” (*id.*). Because Outgoing Counsel trusted Plaintiffs, and knew that the written letter of engagement was sufficient to memorialize their agreement, they proceeded solely with that documentation.

Outgoing Counsel also strongly disputes Plaintiffs’ claims that he handled this matter improperly. He notes 1) the detail and thoroughness of the Complaint that he prepared, 2) the discovery demands he prepared (Limmer Aff. in Opp. at Ex. E), and 3) the numerous conferences that he attended. Outgoing Counsel also submits that the case law on which Plaintiffs rely in support of their application is inapposite because it pertains to cases in which counsel was retained on a contingency basis, which is not the situation in this matter.

Outgoing Counsel submits that, in the matter at bar, he has both a charging lien, which addresses his ability to be compensated from the proceeds of an asset or monies obtained in this action, and a retaining lien, which allows him to retain the file until he is paid. At a minimum, Outgoing Counsel suggests that the Court should conduct a hearing to determine the amount of Outgoing Counsel’s lien.

In reply, Andrew 1) affirms that he never received the letter of engagement provided by

Outgoing Counsel and disputes that he agreed to waive monthly billing; 2) notes that the Invoice refers to time periods in late 2007 and April of 2009 and suggests that it is fraudulent because “[o]bviously 2009 time cannot appear on a bill dated October 10, 2007” (Andrew Reply Aff. at ¶ 4); and 3) avers that he has received “strange e-mails and communications from [Outgoing Counsel] which I do not wish to discuss here” (*id.* at ¶ 5).

C. The Parties’ Positions

Incoming Counsel, and Plaintiffs, ask the Court to 1) substitute Incoming Counsel as counsel of record for Plaintiffs; 2) fix the fee and lien of Outgoing Counsel for services allegedly rendered; and 3) compel Outgoing Counsel to turn over his file on this matter to Incoming Counsel.

Outgoing Counsel opposes the application and submits that, at a minimum, the Court should conduct a hearing to determine the amount of Outgoing Counsel’s lien.

RULING OF THE COURT

An attorney who has been discharged by his client without cause has a retaining lien on the clients’ litigation papers and files in his possession. *Mosiello v. Velenzuela*, 2011 N.Y. App. Div. LEXIS 4302, ** 2 (2d Dept. 2011), citing, *inter alia*, *Lai Ling Cheng v. Modansky Leasing Co.*, 73 N.Y.2d 454, 457-458 (1989). Absent exigent circumstances, the attorney may generally not be compelled to surrender the papers and files until an expedited hearing has been held to ascertain the amount of the fees or reimbursement to which he may be entitled. *Id.*, citing, *inter alia*, *Theroux v. Theroux*, 145 A.D.3d 625, 626 (2d Dept. 1988).

In *Mosiello*, *supra*, the trial court 1) granted the motion by one nonparty law firm to direct another nonparty law firm to surrender the plaintiffs’ litigation file to the moving nonparty law firm; and 2) denied the second law firm’s cross motion to require that, after an expedited hearing, it be reimbursed for its disbursements or, in the alternative, an amount be fixed for an undertaking to be posted by the first law firm to secure repayment of its disbursements. *Mosiello*, 2011 N.Y. App. Div. LEXIS 4302 at ** 1. The Second Department reversed the trial court’s ruling and directed that 1) the moving law firm’s motion to direct the second law firm to surrender the file was denied; and 2) the second law firm’s cross motion was granted. *Id.* at ** 1-2. Concluding that no exigent circumstances had been established that would warrant an order compelling the surrender of the papers and files prior to a hearing, the Second Department

remitted the matter to the trial court for an expedited hearing to fix the amount, if any, due to the cross moving law firm and the manner in which it should be paid or secured. *Id.* at * 2.

Guided by these principles, the Court 1) grants the branch of the motion to substitute Incoming Counsel as counsel of record for Plaintiffs; and 2) based on the Court's conclusion that Plaintiffs have not established exigent circumstances, refers the remaining branches of the motion to an expedited hearing to fix the amount, if any, due to Outgoing Counsel and the manner in which that sum should be paid or secured.

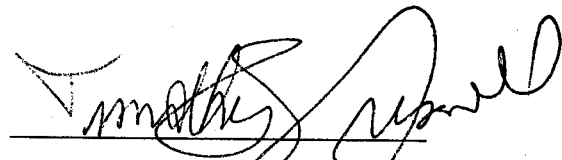
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a conference on July 6, 2011 at 9:30 a.m, at which time the Court will schedule the hearing as directed herein. **The Court directs Outgoing Counsel to attend the conference before the Court on July 6, 2011.**

DATED: Mineola, NY
June 22, 2011

ENTER



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

ENTERED
JUN 27 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE