

Pupilla Garcia v Emerson
2015 NY Slip Op 30910(U)
May 18, 2015
Supreme Court, Suffolk County
Docket Number: 36260/2012
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 36260/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

BERNADETTE PUPILLA GARCIA, dba
 LITTLE RIPPLE FARM,

Plaintiff,

-against-

KERI EMERSON, dba VINTAGE HILL FARM,
 BARBARA METCALF and THE QUOGUE
 PONY FARM, L.L.C.,

Defendants.

ORIG. RETURN DATE: JUNE 10, 2013
 FINAL SUBMISSION DATE: JULY 18, 2013
 MTN. SEQ. #: 001
 MOTION: MG

ORIG. RETURN DATE: JUNE 13, 2013
 FINAL SUBMISSION DATE: JULY 18, 2013
 MTN. SEQ. #: 002
 CROSS-MOTION: XMD

ORIG. RETURN DATE: JUNE 10, 2013
 FINAL SUBMISSION DATE: JULY 18, 2013
 MTN. SEQ. #: 003
 MOTION: MG

PLAINTIFF'S ATTORNEY:

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Upon the following papers numbered 1 to 13 read on these motions _____
TO WITHDRAW AS ATTORNEY, TO POST BOND AND IMPOSE SANCTIONS, AND TO
STRIKE CROSS-MOTION

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Notice of Motion and supporting papers 7-9; Affirmation in Opposition to Motion to Strike and supporting papers 10, 11; Reply Memorandum of Law 12; Memorandum of Law in Opposition to Cross-Motion 13; it is,

ORDERED that this motion (seq. #001) by RACHEL E. KOSMAL McCART, ESQ. of EQUINE LEGAL SOLUTIONS, PC for an Order, pursuant to CPLR 321 (b) (2), permitting that firm to withdraw as counsel of record for plaintiff BERNADETTE PUPILLA GARCIA, dba LITTLE RIPPLE FARM based upon her alleged non-payment of legal fees and an irreconcilable disruption of the attorney-client relationship, is hereby **GRANTED**, without opposition from plaintiff, good cause having been shown (*see e.g. Appolino v Delorbe*, 24 AD3d 252 [2005]); and it is further

ORDERED that this cross-motion (seq. #002) by defendants, BARBARA METCALF and THE QUOGUE PONY FARM, L.L.C. (collectively "Metcalf"), for an Order: (1) directing Ms. McCart to post a bond in the amount of \$14,333.93, Metcalf's attorneys' fees and costs to date, in exchange for her withdrawal as plaintiff's counsel, for bringing a frivolous action against Metcalf; and (2) imposing sanctions against Ms. McCart for violating Judiciary Law § 470 and referring these matters to the disciplinary committee, is hereby **DENIED** in its entirety for the reasons set forth hereinafter; and it is further

ORDERED that this motion (seq. #003) by EQUINE LEGAL SOLUTIONS, PC for an Order striking Metcalf's cross-motion, is hereby **GRANTED** as set forth hereinafter.

The Court has received a Supplemental Affirmation from Metcalf after the submission date of the instant applications, which has been objected to by counsel for Ms. McCart as an unauthorized sur-reply. As such, the Court has not considered the Supplemental Affirmation in rendering the within decision and Order.

This action was commenced on or about November 26, 2012, by plaintiff BERNADETTE PUPILLA GARCIA, dba LITTLE RIPPLE FARM, to recover damages allegedly suffered as a result of the purchase of a show pony by plaintiff named Pajon's Royal Mischief ("Pony") from defendant KERI EMERSON ("Emerson"), and the subsequent ownership dispute that ensued. Plaintiff alleges that after she expressed dissatisfaction with the Pony, Emerson took possession of the Pony without plaintiff's permission, and with the assistance of Metcalf. Plaintiff further alleges that Emerson refused to refund plaintiff's deposit or pay plaintiff the cost of boarding, training, and caring for the Pony.

Plaintiff asserts causes of action herein for breach of contract, unjust enrichment, breach of express warranty, breach of warranty for a particular purpose, breach of implied warranty of merchantability, and conversion. The only cause of action asserted against Metcalf is conversion. Metcalf has interposed a Verified Answer with Counterclaim for legal fees and expenses incurred in this matter, alleging that "the action is totally without merit and was brought against Metcalf . . . only to attempt to create a rationale to bring the action in New York instead of South Carolina, where . . . Plaintiff is contractually bound with Defendant Emerson to bring suit." Metcalf claims that plaintiff conducted herself in bad faith in her dealings with Metcalf, by, among other things, lying about her ownership of the Pony and creating a false identity for the Pony. Metcalf argues that such actions by plaintiff constitute bad faith conduct, and that the instant action is, therefore, frivolous within the meaning of the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1.

The parties have now filed the instant applications as delineated hereinabove. As noted, the Court finds that EQUINE LEGAL SOLUTIONS, PC, counsel of record for plaintiff, has demonstrated good cause to withdraw from representation of plaintiff herein, and therefore its motion is **GRANTED**, without opposition from plaintiff.

Next, Metcalf has filed a cross-motion seeking an Order directing Ms. McCart to post a bond in the amount of \$14,333.93, representing Metcalf's attorneys' fees and costs to date, in exchange for her withdrawal as plaintiff's counsel, for allegedly bringing a frivolous action against Metcalf, and imposing sanctions against Ms. McCart for violating Judiciary Law § 470 and referring this matter to the disciplinary committee. In opposition thereto, EQUINE LEGAL SOLUTIONS, PC seeks an Order "striking" Metcalf's cross-motion.

With respect to Metcalf's application to direct Ms. McCart to post a bond in the amount of \$14,333.93 for Metcalf's claimed attorneys' fees and costs to date in exchange for her withdrawal as plaintiff's counsel, based upon an alleged frivolous cause of action for conversion against Metcalf, the Court finds that such cause of action is not frivolous within the meaning of the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 and, therefore, this branch of Metcalf's motion is **DENIED**.

Regarding that branch of Metcalf's motion to impose sanctions against Ms. McCart for violating Judiciary Law § 470, and referring this matter to the disciplinary committee, Metcalf contends that Ms. McCart is not authorized to practice law in the State of New York, as she does not maintain a law office in New York in violation of Judiciary Law § 470. Metcalf indicates that Ms. McCart's office address is located in Beaver Creek, Oregon. As such, Metcalf seeks to impose sanctions against Ms. McCart for, among other things, signing the summons and complaint as an attorney authorized to practice in this state.

In opposition, Ms. McCart initially alleges that Metcalf's cross-motion is untimely pursuant to CPLR 2215, thereby depriving Ms. McCart an opportunity to defend against the accusations against her therein. Ms. McCart argues that the conversion cause of action has merit, as the facts underlying the claim are in sharp dispute and Metcalf has not moved to dismiss the claim. Further, Ms. McCart indicates that Judiciary Law § 470 was declared unconstitutional in *Schoenefeld v New York*, 907 F Supp 2d 252 (NDNY 2011). Finally, Ms. McCart contends that Metcalf has cited no authority for the request that she post a bond in the amount of \$14,333.93 in exchange for her withdrawal of counsel.

This Court is mindful that Judiciary Law § 470 was challenged in *Schoenefeld v State of New York*, 907 F Supp 2d 252 (NDNY 2011), where the federal district court held that the law was unconstitutional because it violated the Privileges and Immunities clause of the U.S. Constitution. On appeal, the question as to what minimum requirements would satisfy the statute mandating a nonresident attorney to maintain an office for the transaction of law business in New York was certified by the Second Circuit to the New York Court of Appeals (*see Schoenefeld v New York*, 748 F 3d 464 [2d Cir 2014]). On May 6, 2014, the Court of Appeals accepted the certified question (*see Schoenefeld v New York*, 23 NY3d 941 [2014]). Thereafter, on March 31, 2015, the Court of Appeals held that Judiciary Law § 470 requires nonresident attorneys to maintain a *physical office* in New York (*see Schoenefeld v State of New York*, 2015 NY Slip Op 02674 [emphasis supplied]).

Here, it is undisputed that Ms. McCart does not maintain a physical office in New York. As a general rule, the fact that a party has been represented by a person who was not authorized or admitted to practice law under the Judiciary Law whether a disbarred attorney or a person practicing law without a license does not create a “nullity” or render all prior proceedings void *per se*. The same principle applies when a party is represented by an attorney who, although a member in good standing of the bar of the State of New York, has failed to demonstrate compliance with Judiciary Law § 470 (see *Elm Mgt. Corp. v Sprung*, 33 AD3d 753 [2006]). Thus, the Second Department has held that a violation of Judiciary Law § 470 does not provide a basis for a defendant to have the complaint against it dismissed (see *Sovereign Bank v Calderone*, 84 AD3d 778 [2011]; *Elm Mgt. Corp.*, 33 AD3d 753; see also *Webb v Papaspiridakos*, 23 Misc 3d 1136[A] [Sup Ct, Queens County 2009] [noting that the First Department applies Judiciary Law § 470 so strictly that it requires dismissal of the action, albeit without prejudice, for a violation of the statute, while the Second Department is not as strict about this requirement]). Furthermore, a defendant may not take advantage of a plaintiff’s counsel’s noncompliance with Judiciary Law § 470 (see *Elm Mgt. Corp.*, 33 AD3d 753).

In view of the foregoing, and in view of the fact that the Court has now permitted Ms. McCart to withdraw as counsel herein, that branch of Metcalf’s motion to impose sanctions against Ms. McCart for violating Judiciary Law § 470 and to refer this matter to the disciplinary committee, is **DENIED**.

The parties are directed to appear for a Preliminary Conference of this matter on **June 11, 2015, at 9:30 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead.**

The foregoing constitutes the decision and Order of the Court.

Dated: May 18, 2015



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION