

Gibson, Dunn & Crutcher LLP v d'Anna
2019 NY Slip Op 31494(U)
May 28, 2019
Supreme Court, New York County
Docket Number: 160471/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 160471/2016

GIBSON, DUNN & CRUTCHER LLP,

Plaintiff,

MOTION SEQ. NO. 004

- v -

JOSEPH D'ANNA, ELIO D'ANNA JR., ELIO D'ANNA SR., ELIA
D'ANNA, and GEORGE KOUKIS,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for ATTORNEY -
DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW

In this action by plaintiff Gibson Dunn & Crutcher, LLP seeking, inter alia, to set aside allegedly fraudulent conveyances by defendants Joseph d'Anna, Elio d'Anna (Sr.), Elio d'Anna (Jr.), Elia d'Anna, and George Koukis, Santamaria & Associates ("the firm") moves, by order to show cause, to be relieved as counsel for defendants. Plaintiff opposes the motion. After oral argument and a review of the parties' papers and the relevant statutes and case law, the motion is denied.

On January 10, 2018, Joseph D'Anna retained the firm to represent him in this matter. Doc. 57. It is unclear from the retainer agreement whether the firm was retained to represent only Joseph D'Anna or all of the defendants. Specifically, although Joseph D'Anna signed the agreement "[i]ndividually and on behalf of Elio D'Anna Jr., Elio D'Anna Sr., Elia D'Anna and George Koukis" (Doc. 57), the agreement is addressed to Joseph D'Anna, refers to him as "you", which could be plural or singular, but it does not mention the other defendants. The agreement also contains the word "client" but not "clients." Doc. 57.

On March 18, 2019, the firm filed an answer on behalf of all of the defendants. Doc. 53.

The firm now moves, by order to show cause, to be relieved as counsel for all of the defendants, due mainly to their failure to pay their legal bills, as well as their “lack of responsiveness.” Doc. 56 at pars. 6, 8-9. In so moving, the firm notes that it has no contact information for the defendants other than Joseph D’Anna

because he signed the retainer agreement with [the] firm individually and on behalf of the co-defendants, and because the retainer was sent, and returned signed by email. This firm never had a mailing address for Joseph D’Anna or any other co-defendant, only Joseph D’Anna’s email address.

Doc. 58 at 2, fn 1.

In opposition to the motion, plaintiff argues, inter alia, that the firm has failed to show adequate grounds for withdrawal, and that it would be prejudiced by the granting of the firm’s application since defendants’ conduct has already significantly delayed this action.

The decision whether to allow the substitution of counsel for a party rests in the sound discretion of the court. *see Kaufman v Kaufman*, 63 AD3d 618 (1st Dept 2009). This Court agrees with plaintiff that the circumstances herein do not warrant the granting of the firm’s application.

Although the firm argues that it has not been paid for its services, it fails to set forth any detail whatsoever regarding how much it is owed, the type and amount of services rendered, how long the debt has existed, and what efforts, if any, it has made to collect its fees. “The mere fact that a client fails to pay an attorney for services rendered does not, without more, entitle the attorney to withdraw.” *Kaufman*, 63 AD3d at 618 (citations omitted). This is especially so here given the ambiguity in the retainer agreement regarding whether the firm represents all of the defendants and, if so, which defendant (or defendants) is responsible for paying the legal bills.

Since the firm concededly does not have contact information for any defendant, with the exception of having Joseph D'Anna's email address, it appears that the firm could not have made any attempt to collect its fees from any other defendant. However, nowhere does the retainer agreement indicate that Joseph d'Anna was to pay the legal fees incurred by the other defendants.

Also of major concern to this Court is that the firm does not explain how, in the event this motion were granted, any defendant other than Joseph D'Anna would be notified that he or she is no longer represented by counsel. This Court cannot take for granted that an email sent to Joseph D'Anna would satisfactorily notify those individuals of such fact.

Further, despite its claim of a "lack of responsiveness" on the part of the defendants, the firm has proffered no detail regarding their failure to cooperate.

Plaintiff correctly asserts that it would be prejudiced if this action were to be delayed further. This action was commenced in December, 2016. Doc. 2. After defendants failed to answer the complaint, plaintiff moved for a default judgment. Doc. 5. Defendants sought an extension of time to respond to the motion, which was granted by plaintiff. In opposing the motion for default defendants argued, among other things, that they were advised by a California attorney not to answer the complaint in the captioned action until a related action was commenced in the United Kingdom. Doc. 13 at par. 10. Given this excuse, as well as the policy of the courts of this state to resolve cases on the merits where possible, this Court, by order entered January 29, 2019, denied the motion for default and directed plaintiff to accept defendants' answer. Doc. 31. The answer was deemed served on January 29, 2019 (Doc. 31) and the preliminary conference was held on March 26, 2019 (Doc. 54), both events occurring over two years after the commencement of this action. Given the circumstances of this case,

this Court finds that the substitution of counsel for the defendants would further impede the progress of an action already badly delayed, thereby causing prejudice to plaintiff.

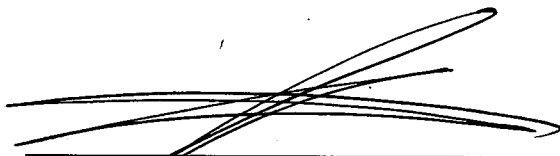
In accordance with the foregoing, it is hereby:

ORDERED that the motion is denied; and it is further

ORDERED that the parties are to appear for a previously scheduled compliance conference in Part 2 at 80 Centre Street, Room 280 at 2:15 p.m. on June 18, 2019; and it is further

ORDERED that this constitutes the decision and order of this Court.

5/28/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: