

Maddock v Haines

2019 NY Slip Op 33902(U)

August 28, 2019

Supreme Court, Suffolk County

Docket Number: 601995/2017

Judge: Linda Kevins

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INDEX No. 601995/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

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RICHARD MADDOCK and BARBARA MADDOCK,
Plaintiffs,

-against-

DECISION AND ORDER
Motion Seq. #6 - MG

DENISE HAINES, as ADMINISTRATOR OF
THE ESTATE OF MICHAEL HAINES,
MICHAEL R. HAINES AGENCY, INC., SCDS
ENTERPRISES, LLC, AKG2, INC., COOL-TEMP
MECHANICAL, INC., AMERICAN PLUMBING
SOLUTIONS, INC., PETER ALBINSKI, R.A., and
LLOYD HOWELL, PE.,
Defendants.

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The following papers have been read on this unopposed Motion by Counsel Melick and Porter, LLP, Counsel of Record for Defendant Peter Albinski, R.A.:

Order to Show Cause, Affirmation & Affidavit of Service 1

Upon the foregoing papers, it is ordered that this Motion is decided as follows:

Movant, Melnick and Porter, LLP (hereinafter "M&P"), counsel of record for Defendant Peter Albinski, R.A. (hereinafter "Albinski"), requests leave of the Court, to withdraw as attorney. Movant alleges the Defendant Albinski, has failed to pay legal fees as agreed while litigation expenses are expected to increase, and such has substantially interfered with the attorney-client relationship. There is no opposition to this application.

The procedure under which an attorney of record may withdraw as counsel by Order of the Court is governed by CPLR 321(b). Such provision provides, in pertinent part, as follows:

"1. . . an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct." CPLR 321(b).

Consequently, a motion to withdraw as counsel without a properly acknowledged Consent to Change Attorney, should be made by Order to Show Cause, thereby enabling the Court to determine, on a case by case basis, who shall be notified, and how such notification should be accomplished *Wong v Wong*, 213 A.D.2d 399 (2nd Dept 1995). Where, as here, the Movant attorney is seeking to withdraw from representing a party in an action without the consent of the client, the attorney must make a motion to withdraw. Such Motion under CPLR 321(b)(2) "is made by Order to Show Cause, with appropriate notice to the client and all other parties." *Siegel, N.Y. Prac.* § 115 (6th ed.)

Here, the Movant, M&P, is seeking an Order permitting their Withdrawal as Counsel of Record for Defendant Albinski. Since the Motion is unopposed, the uncontroverted facts set forth in the motion papers are deemed admitted. *Kuehne & Nagel, Inc. v Baiden*, 36 N.Y.2d 539 (1975), *Tortorello v. Carlin*, 260 A.D.2d 201 (1st Dept. 1999), see also, *Hermitage Ins. Co. v. Trance Nite Club, Inc.*, 40 A.D.3d 1032 (2nd Dept. 2007).

With respect to the Movant's application, there are three primary reasons allowing withdrawal of an attorney from a case: 1. failure of a party to remain in contact with counsel; 2. deterioration of the attorney/client relationship; and 3. nonpayment of legal fees. *Benefield v. City of New York*, 14 Misc. 3d 603 (Sup. Ct. Bronx Co. 2006); *Countryman v. Watertown Housing Authority*, 13 Misc. 3d 632 (Sup. Ct. Jefferson Co. 2006). When a client "renders it unreasonably difficult for the lawyer to carry out employment effectively" the lawyer may request leave to withdraw from representing the client. *Green v. Gasparini*, 24 AD3d 505 (2nd Dept. 2005); 22 NYCRR 1200 Rule 1.16(c).

Once representation of a client in a litigation has begun, the right to withdraw as an attorney is not an absolute right, despite the understanding that a private attorney is not expected to perform legal services for free. The conditional nature of the right to withdraw is due in part to the traditional responsibility of the court to regulate the legal profession and its right to scrutinize fee arrangements between attorney and client. *Charles Weiner Corp. v. D. Jack Davis Corp.*, 113 Misc. 2d 263 (Civ. Ct. 1982) (citations omitted). The decision to grant or deny permission to withdraw lies within the discretion of the trial court. *Matter of Khan v. Dolly*, 39 A.D.3d 649 (2nd Dept. 2007)

Sufficient cause for an attorney's right to withdraw may be furnished by failure or refusal of a client to pay legal fees or expenses necessary to continue with the litigation. Where a client repudiates a reasonable fee arrangement, there is no obligation on counsel to finance the litigation or render gratuitous services, particularly where the client has been given every reasonable opportunity to pay his or her fee and has provided no excuse for not doing so. *Stephen Eldridge Realty Corp. v Green*, 174 A.D.2d 564 (2nd Dep't 1991); see *Galvano v. Galvano*, 192 A.D.2d 779 (2nd Dept. 1993). While nonpayment of fees alone does not automatically entitle counsel to withdraw from representation,

(*Cashdan v. Cashdan*, 243 A.D.2d 598 (2nd Dept. 1997), counsel will not be compelled to finance a litigation or render free legal services. *Galvano v. Galvano*, *supra*.)

Here, Defendant Albinski agreed to the terms of a retainer agreement executed February 23, 2017, for representation in the action filed by Plaintiff's Richard and Barbara Maddock and to timely replenish, upon demand, a retainer to cover the costs of his defense. Since that time, M&P has prepared discovery demands and appeared for several conferences including a preliminary conference. At the preliminary conference it was agreed that Defendant Albinski was to respond to Plaintiff's discovery demands by May 21, 2019. M&P alleges the initial retainer has now been exhausted and Defendant Albinski has failed to replenish same despite M&P's demand for same. M&P also alleges that they have made ongoing good faith efforts to work with Defendant to meet the preliminary conference deadline. However, there has been a breakdown in the attorney client relationship, and despite repeated requests, Defendant Albinski has failed to respond to inquiries by M&P regarding his intentions related to his ongoing relationship with M&P. Under such circumstances, Movant M&P, has demonstrated good cause sufficient to be relieved as counsel for Defendant Albinski.

Based on the foregoing, counsel's unopposed application to withdraw as attorney of record for the Defendant Albinski is GRANTED.

Accordingly, it is

ORDERED, that the Motion (Seq. #6) by Melick & Porter, LLP, to withdraw as Attorney of Record for Defendant Peter Albinski, R.A., in this action, is **GRANTED**; and it is further

ORDERED, that within 30 days of the date of this Decision and Order, Movant Melick and Porter, shall (1) serve Defendant Peter Albinski, R.A., with a copy of this Decision and Order, by certified mail, return receipt requested, and by first class mail with proof of mailing, which shall constitute notice to appoint another attorney pursuant to CPLR 321(c) and (2) serve a copy of this Decision and Order by first class mail with proof of mailing, upon counsel for all additional Defendants, and shall thereafter promptly file a copy of the affidavit(s) of such service with the Clerk of the Supreme Court, Suffolk County; and it is further

ORDERED, upon the filing of proof of such service with the Clerk of Supreme Court, Suffolk County, the Movant Melick and Porter, LLP shall be relieved as counsel for Plaintiff; and it is further

ORDERED, that all proceedings in this matter are stayed until 30 days after service upon Plaintiff is complete; and it is further

ORDERED, that all Parties' Counsel, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on Tuesday, **October 15, 2019, at 9:30 A.M.**, for a conference with the Court; and it is further

ORDERED, that, prior to the next court conference, moving counsel shall provide a copy of the aforesaid Affidavit(s) of Service to Chambers, as well as to opposing counsel to be tendered by opposing counsel to the Court at the time of the next conference; and it is further

ORDERED, that failure of a party to appear at the next court conference, or to otherwise comply with the directives set forth in this Order, may result in a dismissal of this case, the striking of a party's pleadings, and/or any other appropriate sanction under the CPLR and/or Court Rules.

Any requested relief not specifically granted herein is hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: August 28, 2019
Riverhead, New York



HON. LINDA KEVINS
J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION