

Doma, Inc. v 885 Park Ave. Corp.
2020 NY Slip Op 32019(U)
June 24, 2020
Supreme Court, New York County
Docket Number: 159775/2016
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

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INDEX NO. 159775/2016

DOMA INC.,

MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

885 PARK AVENUE CORPORATION and JAN GILMAN,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 41, 42, 43, 44, 45, 46

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

In this action for breach of contract and to foreclose a mechanic's lien, Zetlin & De Chiara LLP ("the firm"), counsel for defendant Jan Gilman ("Gilman"), seeks permission, pursuant CPLR 321(b)(2), to withdraw as counsel based on Gilman's nonpayment of legal fees (Doc. 41). After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court entered March 16, 2018 ("the 3/16/18 order"), which denied plaintiff Doma Inc.'s ("Doma") motion for a default judgment against defendant 885 Park Avenue Corporation ("88 Park") and granted 88 Park's cross motion to dismiss the complaint against it (motion sequence 001) (Doc. 31). The facts are briefly summarized as follows.

Doma commenced this action against Gilman and 88 Park on November 18, 2016 by filing a summons and complaint (Doc. 1). Gilman was the tenant of a cooperative unit in a building owned by 88 Park and located at 885 Park Avenue, New York, NY ("the premises") (Doc. 1 ¶ 8-9). Pursuant to a written agreement executed between Doma and Gilman, Doma allegedly performed certain renovations to the unit for which payment totaling \$177,268.20 remained outstanding (Doc. 1 ¶ 10, 15). In January 2017, Gilman, represented by the firm, interposed an answer raising affirmative defenses and counterclaims (Doc. 6). Since issue was joined, all causes of action were dismissed as against 88 Park, and the remaining parties have proceeded with discovery (Docs. 35-39).¹

On May 4, 2020, the firm filed a notice of motion, pursuant to CPLR 321(b)(2), seeking to be relieved as counsel due to Gilman's alleged failure to pay its legal fees (Doc. 41). In support of its motion, the firm submits the affidavit of Michael Zetlin ("Zetlin"), one of its partners, who affirms, *inter alia*, that Gilman has failed and/or refused to pay for the legal services provided by the firm for more than two years (Doc. 42 ¶ 11). Gilman signed a retainer agreement with the firm in November 2016 in connection with the defense of this action (Doc. 42), pursuant to which he was advised that the firm would cease work and withdraw as counsel if any invoices were not paid within 30 days of receipt (Doc. 42 ¶ 4). Zetlin asserts that the firm made several requests since October 2019 for payment of the outstanding balance (Doc. 4 ¶ 7-8). He further avers that, on April 20 and April 27, 2020, the firm advised Gilman that it would withdraw as counsel if the outstanding fees were not paid or another attorney was not substituted in voluntarily (Doc. 4 ¶ 7-8).

¹ 88 Park is no longer a defendant in this action and, as reflected in the decretal, the caption and the County Clerk's records should reflect that change.

The firm maintains that Gilman will not be adversely affected by the withdrawal of counsel because, as reflected by the last status conference order dated January 21, 2020, this action is still in the preliminary stages of discovery (Doc. 42 ¶ 11).

LEGAL CONCLUSIONS:

"When an attorney feels that he or she can no longer represent a client, a motion must be made pursuant to CPLR 321(b)(2) for permission to withdraw" (*Doe v City of New York*, 2014 NY Slip Op 31015[U], 2014 NY Misc LEXIS 1854, *7-8 [Sup Ct, NY County 2014]). "Generally, there are three primary reasons allowing withdrawal of an attorney from a case: failure of a party to remain in contact with counsel; deterioration of the attorney-client relationship; [or] nonpayment of legal fees" (*Countryman v Watertown Hous. Auth.*, 13 Misc 3d 632, 633 [1st Dept, App Term 2006] [internal citations omitted]; see *Galvano v Galvano*, 193 AD2d 779, 780 [2d Dept 1993]). However, an attorney's right to withdraw as counsel, even under these circumstances, is not absolute (see *Matter of Jamieko*, 193 AD2d 409, 410 [1st Dept 1993]), and he or she may do so "only . . . upon reasonable notice to the client" (*Vargas v Go. W Entertainment, Inc.*, 28 Misc 3d 1223[A], 2010 NY Misc LEXIS 3881, *13 [Sup Ct, NY County 2010]).

"Where, as here, the [m]ovant 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" (*Maddock v Haines*, 2019 NY Slip OP 33902[U], 2019 NY Misc LEXIS 7063, *2 [Sup Ct, Suffolk County 2019]). However, "[t]his pathway requires the attorney of record to move, *by order to show cause*, on such notice as the court may direct, to be relieved" (*Matter of Cassini*, 182 AD3d 13, ___, 2020 NY APP Div LEXIS 1139, *49 [2d Dept 2020] [emphasis added]; see *Maddock v Haines*, 2019 NY Misc LEXIS 7063 at *2; *Forbs v Giacomo*, 2013 NY Slip Op 32685[U], 2013

NY Misc LEXIS 4972, *13 [Sup Ct, NY County 2013]). The firm's failure to request this relief by order to show cause warrants denial of the motion (*see Gilhooley v Hewitt*, 2017 NY Misc LEXIS 6390, *1 [Sup Ct, Suffolk County 2017]; *James v Bellhaven Ctr. For Rehab & Nursing Care*, 2016 NY Misc LEXIS 6312, *1 [Sup Ct, Suffolk County 2016]).

Even if, *arguendo*, this Court were to accept this motion in its current form (*see Singh v Upnext Real Estate LLC*, 2017 NY Misc LEXIS 6330, *1 [Sup Ct, NY County 2017, No. 158859/2015]), the firm nevertheless fails to submit proof to establish that Gilman had reasonable notice of the relief sought. The firm's notice of motion and the supporting affirmation reflect that the motion papers were sent to Doma. However, there is no proof that Gilman was served with said papers (*see Matter of Gonzalez v Bebee*, 177 AD3d 1274, 1275 [4th Dept 2019]; *Birky v Katsilogiannis*, 37 AD3d 631, 632 [2d Dept 2007]; *Matter of Kindra B.*, 296 AD2d 456, 458 [2d Dept 2002]; *Williams v Lewis*, 258 AD2d 974, 974 [4th Dept 1999]; *LeMin v Central Suffolk Hosp.*, 169 AD2d 821, 821 [2d Dept 1991]; *compare Vargas v Go. W Entertainment, Inc.*, 2010 NY Misc LEXIS 3881 at *13). Since "[a] purported withdrawal without proof that reasonable notice was given is ineffective" (*Matter of Gonzalez v Bebee*, 177 AD3d 1274, 1275 [4th Dept 2019]), the motion is denied.

In accordance with the foregoing, it is hereby:

ORDERED that the motion by Zetlin & De Chiara LLP for leave to withdraw as counsel for defendant Jan Gilman is denied without prejudice to renew upon proper papers; and it is further

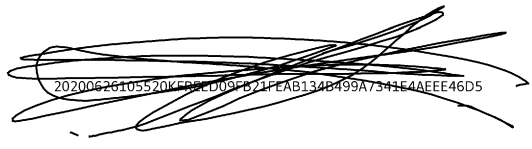
ORDERED that within 30 days, Zetlin & De Chiara LLP shall serve a copy of this order, with notice of entry, on all parties in this action and on the Clerk of the Court, who is directed to amend their records to reflect that 885 PARK AVENUE CORPORATION is no longer a party to this action; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.govisupctmanh)]; and it is further

ORDERED that the parties are directed to appear for a status conference on October 6, 2020, at 80 Centre Street, New York, NY, Room 280, at 2:15 pm; and it is further

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

6/24/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	DENIED	SUBMIT ORDER	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	REFERENCE