

<b>Contreras v City of New York</b>
2022 NY Slip Op 31398(U)
April 28, 2022
Supreme Court, New York County
Docket Number: Index No. 156731/2019
Judge: Leslie Stroth
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LESLIE STROTH PART 52**

*Justice*

-----X

HECTOR CONTRERAS,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE DEPARTMENT OF  
EDUCATION OF THE CITY OF NEW YORK,  
BEIENVENIDO PENA, RELIANT TRANSPORTATTION,  
INC.

Defendant.

-----X

INDEX NO. 156731/2019  
MOTION DATE 03/18/2022  
MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31

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

The motion before this Court is brought by the law firm of Landman, Corsi Ballaine and Ford, P.C. (Landman), which is moving to be substituted as counsel for defendants, Reliant Transportation, Inc. and Bienvenido R. Pena (defendants), in place of their current counsel Marshall Dennehey Warner Coleman & Goggin (Marshall Dennehey). Current counsel has neither made such motion nor submitted a substitution of counsel.

This matter arises out of an alleged motor vehicle accident that occurred on September 5, 2018 between a vehicle operated by plaintiff and a bus operated by individual defendant Bienvenido R. Pena and owned by Reliant Transportation, Inc. (Reliant). At the time of the incident, Mr. Pena was employed by Reliant as a bus driver.

On August 22, 2019, Marshall Dennehey filed an answer on behalf of Reliant and Mr. Pena. Subsequently, representatives of Reliant requested that the matter be "transferred" to Landman, who provided a consent to change attorneys form to both defendants. Dreisbach Affirmation in Support at ¶ 5.

While current law firm Marshall Dennehey and defendant Reliant have signed the consent to change attorneys, individual defendant Mr. Pena has not. (*See Exhibit C, Consent to Change Attorney*).

According to Landman attorney Elizabeth D. Dreisbach, Esq., Mr. Pena has not responded to his current attorney's written letter and calls regarding the proposed substitution. *See Dreisbach Affirmation in Support at ¶ 7*. No affirmation is provided by Mr. Pena's current attorney in support of the motion. As Exhibit "D" to the motion, movant Landman submits a letter, which is written in Spanish with no English translation, that was purportedly sent to Mr. Pena. No proof of mailing is attached nor are any further attempts to contact Mr. Pena detailed in Ms. Dreisbach's affirmation.

Pursuant to CPLR 321 (b) (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." Further, CPLR 321 (b) (2) mandates that, "[a]n 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*" (emphasis added).

Although this motion is procedurally defective, a change of counsel for Reliant can be effectuated by agreement through a jointly signed consent to change attorney, and no court order need be entered regarding Reliant's substitution of counsel. As such a signed consent exists, attorneys Dreisbach et al. may be substituted for the law firm of Marshall Dennehey.

As to Mr. Pena, he is allegedly not responding to his current counsel, although his own counsel does not so state, and he cannot otherwise be reached to execute or agree to a change of attorney. When client consent is lacking, a motion must be made "upon motion on such notice...as the court may direct" (i.e. by order to show cause). CPLR 321 (b) (2), *see also Vincent C. Alexander Practice Commentaries,*

McKinney's Cons Laws of NY Annotated, CPLR 321, C:321:2 (2011 ed) [Note: online version]; *Wong v Wong*, 213 AD2d 399 (2d Dept 1995).

The appropriate mechanism to seek substitution of counsel is by order to show cause so that the Court may exercise its discretion as to manner of service. *See Wong v Wong*, 213 AD2d 399 (2d Dept 1995); *Universal El. Co., Inc. v Jordan El. Co., Inc.*, 110 Misc 2d 670, 670 (NY County, Sup Ct 1981). Landman brings the instant motion by notice of motion. In addition to the defects stated above that require denial of this motion, it is also denied as to its reason. Given that failure of a party to remain in contact with counsel is a primary reason for allowing the withdrawal of counsel (*see Countryman v Watertown Hous. Auth.*, 13 Misc 3d 632, 633 [Jefferson County, Sup Ct 2006]), the Court declines to substitute counsel without Mr. Pena's approval.

Accordingly, Landman Corsi Ballaine & Ford, P.C.'s motion is denied, as follows:

It is hereby ORDERED that the part of the motion seeking to substitute counsel for Bienvenido R. Pena is denied, without prejudice, and it is further

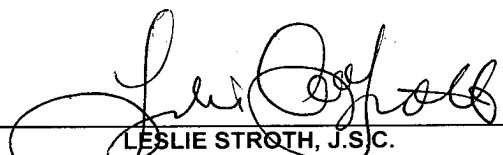
ORDERED that the part of the motion seeking to substitute Landman Corsi Ballaine & Ford, P.C. for defendant Reliant Transportation, Inc. is denied, and it is further

ORDERED that if Reliant Transportation Inc. consents to the proposed substitution of counsel,, Landman, Corsi Ballaine and Ford, P.C. must file a consent to change attorney as to Reliant Transportation, Inc. with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within 30 days from the date of this order, and it is further

ORDERED that the Landman Corsi Ballaine & Ford, P.C. shall, within 10 days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119), and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office, the filing of a consent to change attorney as provided herein, and the filing of papers as aforesaid 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.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

  
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 LESLIE STROTH, J.S.C.

4/28/2022  
 \_\_\_\_\_  
 DATE

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