

<b>Ellis v City of New York</b>
2022 NY Slip Op 32005(U)
June 23, 2022
Supreme Court, New York County
Docket Number: Index No. 157661/2021
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

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ANNA ELLIS AND BENJAMIN ZIMMERMAN, AS THE ADMINISTRATORS OF THE ESTATE OF E. D. Z., ANNA ELLIS, INDIVIDUALLY, BENJAMIN ZIMMERMAN, INDIVIDUALLY,

Plaintiff,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, THE NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for

ATTORNEY - DISQUALIFY/RELIEVE/SUBSTITUTE/WITHDRAW

Upon the foregoing documents, it is

Plaintiffs' counsel, Harris/Law, moves for an order pursuant to CPLR 321 (2) to be relieved as counsel for plaintiffs based on a conflict regarding the manner in which to proceed with this action, and staying all proceedings for a period of ninety (90) days to allow plaintiffs to retain new counsel. The underlying matter involves an action for negligence, failure to supervise, loss of companionship, and wrongful death of plaintiffs' Anna Ellis and Benjamin Zimmerman's infant son, Ellis Daniel Zimmerman, at a daycare facility. Plaintiffs seek damages for Ellis Daniel Zimmerman's pain and suffering as well as for their pain and suffering as a result of this tragic incident, in addition to an award of punitive damages.

An attorney may withdraw as counsel of record upon a showing of good and sufficient cause for withdrawal and where reasonable notice has been provided to plaintiffs. See Genn v

*Ratnathicam*, 187 AD3d 539 (1st Dept 2020). Deterioration of the attorney-client relationship is a commonly recognized ground for a withdrawal motion. Good and sufficient cause exists where there are "...irreconcilable differences between the attorney and the client with respect to the proper course to be pursued in litigation." *Winters v Rise Steel Erection Corp.*, 231 AD2d 626 (2d Dept 1996).

Plaintiffs retained Harris/Law in November 2020 to commence three separate lawsuits: (1) an action in the Court of Claims against New York State and the Office of Children and Family Services; (2) an action in the Supreme Court against the daycare facility and its employees; and (3) the instant action against the City of New York, the New York City Department of Health and Mental Hygiene, and the New York City Administration for Children's Services. Harris/Law assisted plaintiffs in obtaining a settlement in the action against the daycare and its employees, leaving only the actions against New York City and New York State.

Harris/Law moves to be relieved in the instant matter and in the pending Court of Claims action. Attorney Steven R. Harris affirms that he has spoken and met with plaintiffs several times, and it is apparent that his firm and plaintiffs have irreconcilable differences of opinions as to how the pending action should be prosecuted. (*See* Harris affirmation at ¶ 12, NYSCEF doc. 12). Attorney Harris further affirms that he is unable to represent plaintiffs due to an inability to collaborate and work together. (*Id.*). Attorney Harris maintains that preliminary discovery is complete, but neither a preliminary conference nor depositions in this matter have been scheduled. (*Id.* at 10). Mr. Harris notes that his firm is waiving all expenses incurred by his office in the prosecution of this case as well as his right to any retaining and charging lien. (*Id.*).

Plaintiffs oppose their attorney's motion to withdraw. Plaintiff Benjamin Zimmerman submits an affidavit in opposition, in which he argues that his counsel offers no details as to the

alleged irreconcilable differences and that there has been no breakdown in the attorney-client relationship. (*See* Zimmerman affidavit at ¶ 9, NYSCEF doc. 20). Mr. Zimmerman further avers that Harris/Law's motivation to withdraw is financial, which is an improper basis on which to be relieved as counsel. (*Id.* at ¶ 10). Given Harris/Law's familiarity with the case since its retention and the fact that the most lucrative portion of the case has settled, Mr. Zimmerman asserts that it would be extremely difficult to find new counsel and manifestly prejudicial to allow Harris/Law to withdraw from the case prior to completing the work agreed to upon its retention. (*Id.* at 12).

On the hearing date of this order to show cause, both Mr. Zimmerman and Mr. Harris appeared virtually. They each reiterated their positions at that time. Additionally, Mr. Zimmerman provided further clarification as to his view of the differences that have arisen with respect to the course to be pursued in this litigation. Mr. Zimmerman explained that he did not want to reveal any confidential communications or trial strategies to opposing counsel through papers submitted in support of his order to show cause.

The impact of the tragic and unexpected passing of the Zimmerman's son on his parents cannot be overstated. However, at this time, the Court is charged only with reviewing whether Harris/Law has demonstrated good and sufficient cause to withdraw as counsel on the record before it. Given the disputes between counsel and plaintiffs, including whether they agree or disagree as to how to proceed, Harris/Law has articulated good cause to be relieved as attorneys of record for plaintiffs in this matter. As this case is in its early stages, discovery is not complete, and no motion practice has yet ensued, the prejudice resulting from allowing Harris/Law to withdraw is minimal. In light of the concerns expressed by plaintiffs, the Court, in its discretion, will stay this matter for 120 days for plaintiffs to retain new counsel. If plaintiffs are unable to

retain new counsel in such extended time period, they may also proceed by representing themselves in this matter.

ORDERED that the motion of Steven R. Harris, Esq. to be relieved as attorney for Anna Ellis and Benjamin Zimmerman, as the Administrators of the Estate of E.D.Z., Anna Ellis, individually, and Benjamin Zimmerman, individually, is granted upon filing of proof of compliance with the following conditions; and it is further

ORDERED that, within 10 days from entry, said attorney shall serve a copy of this order with notice of entry upon the former client at their last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; and it is further

ORDERED that, together with the copy of this order with notice of entry served upon the former client, moving counsel shall forward a notice directing the former client to appoint a substitute attorney within 120 days from the date of the mailing of the notice and the client shall comply therewith, except that, in the event plaintiffs intends instead to represent themselves, they shall notify the Clerk of the Part of this decision in writing within said 120-day period; and it is further

ORDERED that any new attorney retained by plaintiffs shall file a notice of appearance with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within 130 days from the date the notice to retain new counsel is mailed; and it is further

ORDERED that no further proceedings may be taken against the former client without leave of this court for a period of 130 days after service on the former client of the aforesaid notice to appoint a substitute attorney; and it is further

ORDERED that the departing attorney 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 notice of appearance 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).

The foregoing constitutes the decision and order of the Court.

6/23/2022  
DATE

  
LESLIE STROTH J.S.C.

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