Grayco Alternative Partners II, LP v 5 Stone Green Capital LLC
2024 NY Slip Op 30818(U)
March 11, 2024
Supreme Court, New York County
Docket Number: Index No. 652377/2021
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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GRAYCO ALTERNATIVE PARTNERS II, LP,

Plaintiff,

- v -

5 STONE GREEN CAPITAL LLC, 5 STONE GREEN CAPITAL - BAINBRIDGE GP LLC, 5 STONE GREEN CAPITAL - BAINBRIDGE REAL ESTATE FUND LP, DOUGLAS LAWRENCE, LEWIS JONES, and ANTHONY ROBERTS,

Defendants.

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INDEX NO. 652377/2021

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 83[1]
were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

Respondents' motion 002 to vacate the judgment is denied. Respondents were continuously represented by Cohen & Marderosian, and thus, CPLR 321's automatic stay was never triggered.[2] Indeed, in the absence of a motion to be relieved as counsel or signed substitution of counsel, Steven L. Cohen of Cohen & Marderosian continues

[1] The court has read and where appropriate considered additional documents mentioned in the parties' papers but omitted in this autogenerated caption.

[2] Respondents move to vacate the judgment, not the June 23, 2023 decision. Cohen was served with notice of entry of the decision on August 21, 2023. (NYSCEF 77.) However, at argument on January 26, 2024, respondents expressed their intention to challenge the June 23, 2023 decision, arguing, as they did to Justice Reed in 2021, that the arbitrator exceeded her authority under the arbitration agreement. Indeed, Martin Miranda Esq., respondents' new counsel, filed a notice of appeal of the June 23, 2023 decision on October 17, 2023. (NYSCEF 57.)

to represent respondents in this proceeding until he makes an application to this court or files a notice of substitution pursuant to CPLR 321.

The issue here is what is the obligation of an attorney to the court and his partnership's clients when his partner dies. CPLR 321 provides:

> "(a) Appearance in person or by attorney. A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney, except that a corporation or voluntary association shall appear by attorney, except as otherwise provided in sections 1809 and 1809-A of the New York city civil court act, sections 1809 and 1809-A of the uniform district court act and sections 1809 and 1809-A of the uniform city court act, and except as otherwise provided in section 501 and section 1809 of the uniform justice court act. If a party appears by attorney such party may not act in person in the action except by consent of the court.
>
> (b) Change or withdrawal of attorney.
>
> 1. Unless the party is a person specified in section 1201, 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.
>
> (c) Death, removal or disability of attorney. If an attorney dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

(d) Limited scope appearance. [3]

1. An attorney may appear on behalf of a party in a civil action or proceeding for limited purposes. Whenever an attorney appears for limited purposes, a notice of limited scope appearance shall be filed in addition to any self-represented appearance that the party may have already filed with the court. The notice of limited scope appearance shall be signed by the attorney entering the limited scope appearance and shall define the purposes for which the attorney is appearing. Upon such filing, and unless otherwise directed by the court, the attorney shall be entitled to appear for the defined purposes.

2. Unless otherwise directed by the court upon a finding of extraordinary circumstances and for good cause shown, upon completion of the purposes for which the attorney has filed a limited scope appearance, the attorney shall file a notice of completion of limited scope appearance which shall constitute the attorney's withdrawal from the action or proceeding."

The following background is relevant to this decision. On April 26, 2021, petitioner filed this proceeding to confirm an arbitration award.[4] (NYSCEF 1, Petition.) On June 23, 2023, Justice Robert Reed issued a decision confirming the arbitration award. (NYSCEF 46, Decision.) While Mark D. Marderosian, Esq. registered in NYSCEF individually as representing respondents, the documents he filed included either a letterhead or signature block with the name of the firm Cohen & Marderosian. (*See e.g.* NYSCEF 11, April 20, 2021 Letter; NYSCEF 25, Opposition and Cross-Motion; *see also* NYSCEF 75, April 20, 2021 Marderosian Email [stating to Albertson that he was checking with his partner Cohen].) Marderosian passed away on

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[3] This provision for a limited scope appearance went into effect on December 16, 2022. (Vincent C. Alexander, Practice Commentary CPLR 321:4.) However, Cohen has not followed these procedures to make such an appearance.

[4] Hon. Helen Freedman (ret.) issued a 22-page decision on March 8, 2021 awarding petitioner (1) $3,911,094.72 inclusive of interest from July 31, 2019 at 6% to the date of the decision and (2) reimbursement of JAMS' fees incurred by petitioner, but denied attorneys' fees or witness fees. (NYSCEF 3.)

December 6, 2021. (NYSCEF 64, Jones aff ¶1.) Respondents became aware of Marderosian's death within weeks. (NYSCEF 83, tr at 15:24-16:2 [January 10, 2024 argument before Justice Reed].) Petitioner submitted a bill of costs and proposed judgment on June 30, 2023, including interest at 9% and court costs such as service of process fees. (NYSCEF 51, Bill of Costs; NYSCEF 50, Proposed Judgment.) On August 17, 2023, a final judgment was entered. (NYSCEF 53, Judgment.)

On August 18, 2023, Albertson emailed respondents, copying their arbitration attorney, inquiring whether they had new counsel in this special proceeding. (NYSCEF 64, Jones aff ¶1.) Cohen states that, on August 18, 2023, he advised respondent Jones that Cohen did not represent Jones and respondents in this proceeding. (NYSCEF 67, Cohen aff ¶1.) Nevertheless, he generously offered to respond to Albertson's inquiry of respondents as to the attorney representing them. (*Id.*) Cohen states that he learned of the decision and judgment on August 21, 2023 when Albertson served him with notices of entry of the decision and judgment. (*Id.* ¶2.) On August 21, 2023, Cohen informed respondents about the decision and judgment. (NYSCEF 64, Jones aff ¶2.) On August 22, 2023, Cohen advised Albertson that Cohen did not represent respondents. (NYSCEF 67, Cohen aff ¶3.) Martin A. Miranda, Esq. filed a notice of appearance for respondents on September 26, 2023 and a document entitled consent to change attorney with an empty signature line for Marderosian.[5] (NYSCEF

[5] If a stay was triggered on Marderosian's death, it ended on September 26, 2023. New counsel's resumption of litigation activity constitutes a waiver of the stay's nullification effect on court proceedings taken while the stay was in effect. (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3219:3)

55 and 56.) Miranda filed this motion by OSC on December 19, 2023. (NYSCEF 61, Proposed OSC.)

If Cohen was unaware that Marderosian was holding himself out as Cohen & Marderosian, and as Cohen's partner, then when Cohen learned that Marderosian was doing so in this special proceeding, Cohen was obligated to come to this court and inform the court otherwise. Informing respondent Jones that Cohen does not represent respondents is not sufficient to withdraw as counsel in this proceeding without telling the court. (*See Hall v Middleton*, 2023 NY Slip O. 30847[U] fn* [NY Sup Ct, New York County 2023].) Informing Albertson that he does not represent respondents is also not sufficient to withdraw as counsel in this proceeding without informing the court. (*Id.*) Likewise, it is not dispositive that Cohen did not appear personally as respondents' counsel in this case nor that he was not listed in NYSCEF individually as respondents' attorney.

"[A]bsent special circumstances, there may be only one attorney of record for a party in a single action." (*Matter of Cassini*, 182 AD3d 13, 41 [2d Dept 2020] [citations omitted].) "To allow more than one attorney for a party in a single action would play havoc with the established responsibility in respect to professional representation in civil proceedings and in the processes of litigation." (*Kitsch v Riker Oil Co.,* 23 AD2d 502, 503 [2d Dept 1965].) When a firm is listed as attorney for a party, then it is the firm that represents the client not the individual attorney. (*Matter of Cassini*, 182 AD3d at 42 ["Where a client is represented by a law firm with multiple attorneys, it may be argued that the death, suspension, or disability of one attorney in that law firm does not trigger application of CPLR 321 (c)." The automatic stay was not triggered because Sills

Cummis was also attorney of record.].) Indeed, it is not the practice in the Commercial Division, New York County, for a law firm to list in NYSCEF every attorney working on a case.

However, Cohen was aware that Marderosian held himself out as Cohen's partner. Cohen states

> "I worked with Mr. Marderosian as a solo practitioner for many years. The name 'Cohen and Marderosian' signified my long-term professional relationship with Mr. Marderosian. This title was never associated with a legally recognized partnership, law firm or entity. I never shared an office with Mr. Marderosian and we never used the same business contact information."

(NYSCEF 67, Cohen aff ¶5.) Cohen's contradictory understanding and denial of his relationship with Marderosian is also not dispositive. Therefore, from this court's perspective, respondents were represented by the firm Cohen & Marderosian and the stay was not triggered.

After Cohen, respondents were in the best position to notify the court. Since respondents knew of Marderosian's death soon thereafter, the court wonders how respondents expected to learn of the decision in this matter or the court proceedings. Either they were relying on Cohen to keep them informed or they intended to proceed *pro se* but failed to inform the court for 20 months. There is no stay when an attorney's absence is caused by the client. (*Matter of Cassini*, 182 AD3d at 49,citing *Matter of Wiley v Musabyemariya*, 118 AD3d at 899-900 [where client voluntarily discharged attorney, no stay]; *Sarlo-Pinzur v Pinzur*, 59 AD3d 607,608 [2d Dept 2009] [where client refused to cooperate with counsel, no stay]; *Graco Constr. Corp. v Eves*, 232 AD2d 370, 370-371 [1996] [where client voluntarily discharged attorney, no stay]; *see also RDLF Fin. Servs., LLC v Bernstein*, 93 AD3d 421 [2012] [where attorney, representing

both himself and his law firm, was disbarred, no stay because his removal was the product of his own wrongdoing].) While respondents here are obviously not responsible for Marderosian's death, the court finds that respondents are responsible for an attorney's absence here. At argument on this motion, Miranda explained as the reason for respondents' failure to inform the court the very serious personal matters befalling respondents Jones and Lawrence. Miranda's explanation is insufficient because he has no personal knowledge.

As between Cohen, respondents, Albertson, and the court, Albertson and the court were the least informed here. Accordingly, the court finds that Albertson had no duty to file a notice to appoint new counsel as the automatic stay was never triggered. (*Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 389 [2010], quoting Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C321:3, at 183 ["It lies within the power of the other side to bring the stay to an end by serving a notice on the affected party to appoint new counsel within 30 days . . . If, at the end of the period, the party has failed to obtain new counsel (or elected to proceed pro se), the proceedings may continue against the party.") Though the automatic stay was never triggered, Albertson effectively served such a notice when he sent respondents the August 18, 2023 email, copying their arbitration counsel, and asking whether they had appointed new counsel and it had precisely the effect that CPLR 321 intended: respondents communicated with Cohen and engaged Miranda.

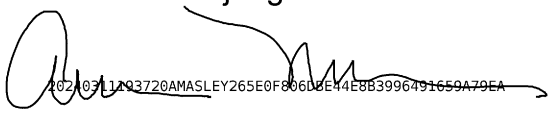
Respondents' alternate argument to vacate the judgment based on the contents of the judgment is also denied. Respondents challenge the judgment on the grounds that it included statutory interest at 9% from the date of the arbitration decision and the

actual cost of service of process. However, interest is mandatory. (*Bd. of Ed. of Cent. School Dist. No. 1 of Towns of Niagara, Wheatfield, Lewiston and Cambria v Niagara-Wheatfield Teachers Assn.*, 46 NY2d 553 [1979].) The cost of process servers is also a recoverable cost. (CPLR 8301[d].) Respondents also challenge Justice Reed's use of the word "respondent" instead of "respondents" in the decision. While the absence of an "s" may be a mistake, it is without consequence as it is clear from the decision that there is more than one respondent. There is no mistake in the judgment. Accordingly, it would be futile to vacate the judgment. Even if the court found the automatic stay triggered, then respondents would make the same argument against it, which would be rejected.

The court has considered all other arguments made by all parties and finds that they do not change the outcome.

Accordingly, it is

ORDERED that respondents' motion by OSC to vacate the judgment is denied.



3/11/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE