

**Penafiel v Britt Realty, LLC**

2024 NY Slip Op 33219(U)

September 10, 2024

Supreme Court, Kings County

Docket Number: Index Number 538106/2022

Judge: Devin P. Cohen

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This opinion is uncorrected and not selected for official publication.

**Supreme Court of the State of New York  
County of Kings**

**Index Number** 538106/2022  
Seqs. 001

Part LL1

**DECISION/ORDER**

\_\_\_\_\_  
ROLANDO PENAFIEL,

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Plaintiff,

**Papers Numbered**

against

Notice of Motion and Affidavits Annexed . . .	<u>    </u>
Order to Show Cause and Affidavits Annexed. . .	<u>  1  </u>
Answering Affidavits . . . . .	<u>  2  </u>
Replying Affidavits . . . . .	<u>    </u>
Exhibits . . . . .	<u>  Var.  </u>
Other . . . . .	<u>    </u>

BRITT REALTY, LLC AND 1504 JEFF LLC,

Defendants.

\_\_\_\_\_  
BRITT REALTY, LLC AND 1504 JEFF LLC,

Third-Party Plaintiff,

against

MEC GENERAL CONSTRUCTION/REV, INC. d/b/a MEC  
GENERAL, INC. d/b/a MEC GENERAL, INC.,

Third-Party Defendants.

Upon the foregoing papers, Subin & Associate (Subin)’s order to show cause (OSC) to be relieved as counsel (Seq. 001) is decided as follows:

Generally, an attorney is permitted to withdraw as counsel upon “such notice . . . as the court may direct,” after a reasonable “showing that good cause exists to end the attorney client relationship” and that the motion is not being made as a tactic to delay a hearing or trial (CPLR 321 [b] [2]; *Matter of Cassini*, 182 AD3d 13, 40 [2d Dept 2020]; *see also Rivardeneria v New York City Health and Hospitals Corp.*, 306 AD2d 394 [2d Dept 2003]). “The decision to grant or deny permission for counsel to withdraw lies within the discretion of the trial court” (*Bank of Am., N.A. v Chadha*, 214 AD3d 695, 695 [2d Dept 2023]). Break-downs of the attorney-client relationship, failure of cooperation by a client, and actions or requests by clients that would

cause the attorney to violate the Rules of Professional Conduct by continuing representation, among other reasons, serve as good cause for ending the attorney-client relationship (*see Farage v Ehrenberg*, 124 AD3d 159, 165 [2d Dept 2014]; *see also Green v Gasparini*, 24 AD3d 505 [2d Dept 2005]).

Here, Subin served the instant OSC upon the plaintiff individually and upon defense counsel as directed by the court. Plaintiff individually did not oppose the motion. The note of issue has not been filed and the case is not on the trial calendar. However, defendants filed written opposition to this motion.

As an initial matter, it is not clear that defendants have standing to oppose plaintiff's counsel's motion, as the motion is made against the plaintiff individually, not the defendants, and defendants would not be "aggrieved" as defined by the Appellate Division if this motion were granted (*see Mixon v TBV, Inc.*, 76 AD3d 144, 156–157 [2d Dept 2010]). Moreover, defendant does not actually state opposition to Subin withdrawing as counsel *per se*, but rather objects to the justification Subin has offered for withdrawal, objects to Subin's request to disclose additional information *in camera* if it is required, and demands that the relief requested be conditioned upon the exchange of attorney-client communications and attorney records.

Defendants are incorrect that allowing Subin to provide additional details or information *in camera* is impermissible. "Where withdrawal may be accomplished simply on the basis of counsel's statement that professional considerations require it, no more should be disclosed" (NYS Bar Ethics Opinion 1057 [6/5/2015] at ¶ 14). Where withdrawal cannot be so accomplished, the court may conduct an *in camera* hearing to assess the validity of counsel's request (*id.* at ¶ 15). This practice is permitted to "prevent a party from being prejudiced by the application of counsel to withdraw" (*ISC Holding AG v Nobel Biocare Investments, N.V.*, 759 F

Supp 2d 289, 294 [SDNY 2010] [*aff'd sub nom. ISC Holding AG v Nobel Biocare Fin. AG*, 688 F3d 98 (2d Cir 2012)]). “A judge may initiate or consider any *ex parte* communications when authorized by law to do so” (NY Rules of Chief Administrative Judge § 100.3 [e]).

However, notwithstanding the propriety of an *in camera* showing, Subin represented to the court in the presence of opposing counsel that the motion to withdraw was filed on the advice of the firm’s ethics counsel. This reason satisfies the “good cause” standard for attorney withdrawal in light of disciplinary rules which mandate withdrawal (*see* NY RPC 1.16 [b] and [c]). Indeed, when an attorney believes that continued representation may result in a violation of the disciplinary rules or laws, counsel is obligated to seek withdrawal (*see Matter of Blatt*, 217 AD3d 113 [2d Dept 2023]). After Subin’s representation that the request to withdraw was made on the advice of ethics counsel, the court neither sought nor accepted *ex parte* communication in this application.

The remainder of defendants’ papers are essentially requests for discovery of attorney-client communications and other seemingly privileged information. Making affirmative discovery requests in the opposition papers to a motion to be relieved as counsel is procedurally improper for at least two reasons. First, the request is made without the notice ordinarily required by a motion requesting affirmative relief (CPLR 2215; *see Fried v Jacob Holding, Inc.*, 110 AD3d 56 [2d Dept 2013]). Second, even if the court were inclined, *arguendo*, to treat the request as a cross-motion in an exercise of discretion, there is no properly executed discovery instrument for the court to enforce (*see* CPLR 3102).

Finally, defendants’ request is improper insofar as it asks the court to condition Subin’s withdrawal on a breach of client confidence and/or of a violation of attorney-client privilege. Rule 1.6 (a) prohibits attorneys from “knowingly [revealing] confidential information to the

disadvantage of a client or the for the advantage of the lawyer or a third person” absent 1) the consent of the client; 2) the disclosure is “impliedly authorized to advance the best interest of the client”; or 3) the disclosure is permitted by Rule 1.6 (b). None of the permissions in Rule 1.6 (b) apply here. Defendants make clear in their opposition that the request for Subin’s disclosure is to improve their ability to litigate this action (*see* aff. in opp. at ¶ 14), which means that Subin’s disclosure would be “for the advantage of . . . a third person.” Moreover, attorney-client privilege can only be waived by the client and generally survives the termination of the attorney-client relationship—Subin is therefore prohibited from revealing confidential or privileged information without the consent of the client (*see* CPLR 4503).

Therefore, Subin’s OSC to be relieved as counsel is granted upon the individual plaintiff’s default. The action is stayed until November 10, 2024, although the stay shall end earlier if plaintiff retains new counsel (*Wells Fargo Bank, N.A. v Kurian*, 197 AD3d 173 [2d Dept 2021]). This determination is made without prejudice to any legitimate discovery rights parties may have in this or any other properly commenced action.

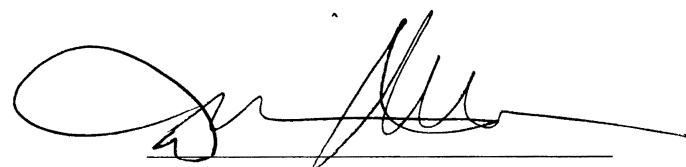
Counsel shall serve this order upon Rolando Penafiel by the same means as the underlying OSC within 10 days of the notice of entry, and upon opposing counsel via NYSCEF.

**Conclusion**

Subin’s OSC to be relieved (Seq. 001) is granted.

This constitutes the decision and order of the court.

September 10, 2024  
 \_\_\_\_\_  
**DATE**

  
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**DEVIN P. COHEN**  
 Justice of the Supreme Court