

**Khan v Garg**

2024 NY Slip Op 33239(U)

September 14, 2024

Supreme Court, New York County

Docket Number: Index No. 652334/2013

Judge: Andrea Masley

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

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RAZA KHAN,

Plaintiff,

- v -

VISHAL GARG, EDUCATION INVESTMENT FINANCE CORPORATION, 1/0 CAPITAL LLC, and EMBARK HOLDCO I, LLC,

Defendants.

INDEX NO. 652334/2013

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 046

**DECISION + ORDER ON MOTION**

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 046) 1863, 1864, 1865, 1866, 1868, 1869, 1870, 1871, 1885, 1886, 1887, 1888, 1892, 1896, 1897, 1901, 1903

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

Blank Rome LLP (BRL) moves pursuant to CPLR 321(b)(2) for permission to withdraw as counsel for plaintiff Raza Khan, individually, in his official capacity as 50% owner of, and on behalf of Education Investment Finance Corporation because Khan has not paid BRL. (NYSCEF 1863, BRL’s Notice of Motion.)

BRL was engaged as trial counsel. (NYSCEF 1864, BRL’s Lisa M. Coyle, Esq., ¶4.) While Khan has not paid BRL, BRL has been paid to serve as Khan’s trial counsel by a litigation funder. (NYSCEF 1868, Khan aff ¶5.) However, “the fees [] far exceed the specified retainer amount Blank Rome had agreed to accept from the funder, thereby requiring the firm to look to Plaintiff for payment of such fees.”<sup>1</sup> (NYSCEF 1886,

<sup>1</sup> Whether Kahn owes BRL additional fees or BRL’s fee was capped at the retainer amount paid by the litigation funder is not before the court on this motion.

BRL's Craig Weiner, Esq. ¶13.)<sup>2</sup> The motion is denied because BRL has been paid an amount it believed would be sufficient for its services as trial counsel, albeit perhaps not paid entirely. The court also finds that trial counsel's duties include post-trial motions because the retainer agreement<sup>3</sup> is ambiguous as to the term of this representation. The court reads the ambiguity or omission against BRL, for the purposes of this motion, because BRL clearly drafted the agreement. (*Saxon Capital Corp. v Wilvin Assoc.*, 195 AD2d 429, 430 [1st Dept 1993] ["any ambiguity or genuine issue as to the completeness of the document should be construed against [the drafter]."]) BRL's invoice, which Khan disputes, does not modify the terms of the retainer agreement or provide a definition of "trial counsel." (NYSCEF 1886, BRL May 13, 2024 Invoice at 7/7.) Indeed, following the jury verdict<sup>4</sup> in Khan's favor, BRL continued to represent Khan through settlement negotiations with defendants. (See NYSCEF 1868, Weiner aff ¶4; Khan aff ¶¶7-10; see Coyle's in camera July 29, 2024 email submission with snippets of texts and emails between BRL and Khan from May 2 to July 2, 2024 and Khan's in camera July 30, 2024

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<sup>2</sup> "Blank Rome agreed to a retainer fee to be paid by the funder to handle the trial (two weeks in the courtroom). This amount was agreed to as it was all the funds that were left in the funder's trial commitment. Blank Rome would not look to the funder for additional trial fees. Blank Rome maintains, however, that amounts over and above the retainer were the responsibility of Mr. Khan." (NYSCEF 1886, BRL's Craig Weiner, Esq. ¶13.)

<sup>3</sup> Since the litigation funding agreement is not before the court, the court relies on BRL's May 12, 2023 retainer agreement, provided to the court in camera, for guidance on the extent of BRL's representation. (NYSCEF 1868, Khan aff fn 2.)

<sup>4</sup> The case was tried before a jury from May 6 to 17, 2024. Plaintiff was also represented by Rachel Kierych since April 2019 and James Chou formerly of Morrill Hock & Hamroff LLP. (NYSCEF 1868, Khan aff, fn 1; NYSCEF 1864 Coyle aff ¶5.) Since the trial, Kierych has been on medical leave and unavailable until recently. (NYSCEF 1869, Kierych aff ¶2.) She has not been involved in this case since the trial ended. (*Id.* ¶3.) Chou did not appear at trial, but recently appeared with Kierych for Khan on his appeal perfected for the November 2024 term. (NYSCEF 1903, Berland's September 6, 2024 letter; NYSCEF 1904 September 9, 2024 Kierych letter.)

email submission to court with emails, texts, and usage charts.) BRL's argument that it was hired to support Kierych in a two-week trial and nothing more is undermined by BRL's own subsequent acts.

Moreover, BRL fails to establish irreconcilable differences with Khan. When BRL's one-sided communications with Khan are put in context with Khan's communications, it is clear to the court that Khan and BRL were effectively communicating post-trial about negotiations with Garg. (See Coyle's in camera July 29, 2024 email submission with snippets of texts and emails between BRL and Khan from May 2 to July 2, 2024 and Khan's in camera July 30, 2024 email submission to court with emails, texts, and usage charts.) Contrary to Coyle's affirmation, there is no evidence before the court of "irreconcilable differences with respect to post-trial strategy in connection with this action." (NYSCEF 1864, Coyle aff ¶10.) Indeed, BRL's alleged frustration to communicate with Khan on post-trial strategy demonstrates BRL's intention to continue its representation post-trial. (*Id.*)

While BRL's failure to communicate with Khan from June 7 to June 30 is not evidence of irreconcilable differences, it is troubling in light of the July 26, 2024 deadline for post-trial motions. (See Khan July 30, 2024 in camera email submission p 6; NYSCEF 1856, Order.) Therefore, BRL's withdrawal as counsel by a July 2024 letter to Khan days before the July 26, 2024 deadline for post-trial motions was prejudicial to Khan and thus ineffective. (Khan aff ¶14.)<sup>5</sup>

Accordingly, it is

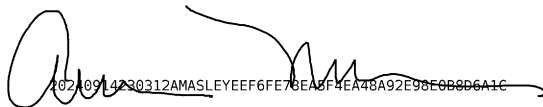
ORDERED that Blank Rome LLP's motion is denied; and it is further

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<sup>5</sup> This letter was not provided to the court.

ORDERED that post trial motions are due September 30, 2024 consistent with CPLR 4405; and it is further

ORDERED that interest on the judgment against Garg is stayed as of the date of the jury verdict.



9/14/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE