

Matter of Suss (Bronx Park Motel Corp.)
2024 NY Slip Op 35620(U)
December 11, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67453/2021
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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In the Matter of the Application of

MITCHELL R. SUSS, individually and as holder of fifty Percent (50%) of all outstanding shares of stock, suing in the right of BRONX PARK MOTEL CORP. and M.H.J. MOTEL CORP.,

Petitioner,

DECISION & ORDER

Index No. 67453/2021

Motion Seq. 10

For the Judicial Dissolution of

BRONX PARK MOTEL CORP., a domestic corporation and M.H.J. MOTEL CORP., a domestic corporation,

Respondents.
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MITCHELL R. SUSS, a shareholder of BRONX PARK MOTEL CORP., suing individually and in the right of BRONX PARK MOTEL CORP.,

Plaintiff,

-against-

EDWARD J. WALSH, JR., CHRISTOPHER WALSH, & TRACY WALSH, each successors to EDWARD J. WALSH and THE ESTATE OF EDWARD J. WALSH, and each Shareholders of BRONX PARK MOTEL CORP. & M.H.J. MOTEL CORP., each being sued in the name of BRONX PARK MOTEL CORP., M.H.J. MOTEL CORP., and individually,

Defendants.
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The following papers were read on the motion for an order pursuant to CPLR 321(b), permitting the Law Offices of Nicholas P. Barone to withdraw as counsel for plaintiff Mitchell Suss, individually and as holder of fifty percent (50%) of all outstanding shares of stock, suing in the right of Bronx Park Motel Corp. and M.H.J. Motel Corp., granting Nicholas Barone, Esq. a retaining lien and a charging lien in the sum of \$19,319.50 for legal fees and costs owed, directing the proceedings be stayed, permitting plaintiff thirty days to retain a new attorney, and granting such other and further relief as this Court deems just and proper.

PAPERSNUMBERED

Order to Show Cause / Affirmation in Support / Exhibits / Affidavits of Service	222-226
Consent to Change Attorney	239
Letter dated October 25, 2024	242
Notice of Withdrawal of Attorney	243

Plaintiff commenced this hybrid action seeking judicial dissolution of Bronx Park Motel Corp. and M.H.J. Motel Corp. pursuant to BCL 1104-a. Plaintiff also asserts claims against defendants for ongoing breaches of the operations of the corporate entities, and seeking an accounting. Plaintiff asserts causes of action sounding in breach of fiduciary duty, unjust enrichment, fraud, conversion, and diversion of assets (NYSCEF doc 2).

Movant seeks to be relieved as counsel for Mitchell Suss, arguing there has been a complete breakdown in the attorney client relationship, including plaintiff's repeated failure to respond to communications from counsel. After the present order to show cause was served, Albert Barkey, Esq. filed on October 22, 2024 a consent to change attorney signed only by Mr. Barkey and Mitchell Suss (NYSCEF doc 239). Insofar as the consent to change attorney is not signed by Nicholas Barone, Esq., it did not effectuate a change in counsel (*see* CPLR § 321[b][1]). On October 30, 2024, Albert Barkey filed a notice withdrawing as incoming attorney for Mitchell Suss, and noting that Law Offices of Nicholas P. Barone is the attorney of record for Mitchell Suss (NYSCEF doc 243). Despite service of the motion in accordance with the directives in the Order to Show Cause, the motion is unopposed.

An attorney may only withdraw as counsel upon a showing of good and sufficient cause and reasonable notice (CPLR § 321[b][2]; *Rivardeneria v New York City Health & Hosps. Corp.*, 306 AD2d 394 [2d Dept 2003]). The question of whether such cause exists is a matter addressed to the court's discretion (*Alvarado-Vargas v 6422 Holding Corp.*, 85 AD3d 829 [2d Dept 2011]).

An attorney may withdraw from representing a client if the client “fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively” (Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.16[c][7]; *Villata v Kokkinos*, 170 AD3d 1077 [2d Dept 2019]). An attorney may be permitted to withdraw if the client cannot be contacted or the client fails to respond to communication from the attorney (*Bok v Werner*, 9 AD3d 318 [1st Dept 2004]; *Tartaglione v Tiffany*, 280 AD2d 543 [2d Dept 2001]). Moreover, the failure to object to a motion to withdraw in itself has been noted as a factor justifying granting such a motion (*Alvarado-Vargas v 6422 Holding Corp.*, 85 AD3d 829 [2d Dept 2011]).

Here, movant demonstrates good cause for withdrawal due to a breakdown in the attorney client relationship and plaintiff’s failure to respond to communications from counsel. Insofar as CPLR 321(c) provides for an automatic stay of a matter where counsel is removed, the matter will be stayed for thirty days to provide plaintiff an opportunity retain a new attorney (*see* CPLR § 321[a]).

Movant seeks a lien, arguing that it is owed \$19,319.50 for work performed and expenses incurred in connection with this matter. A retaining lien permits counsel to retain the client’s litigation papers and file in his possession until all outstanding fees and disbursements are paid or security has been posted. Generally, counsel has a common law retaining lien on the litigation papers and file unless and until it has been judicially determined that counsel was discharged for cause (*Mosiello v Velenzuela*, 84 AD3d 1188 [2d Dept 2011]). Movant submits the retainer agreement, which appears to be signed by Nicholas Barone and Mitchell Suss (Exhibit A). Movant submits invoices demonstrating outstanding attorneys’ fees owed in the amount of \$19,319.50. (Exhibit B). Law Offices of Nicholas P. Barone shall have a retaining lien in the amount of \$19,319.50 for work performed and expenses incurred in connection with this action.

By Order dated January 8, 2024, this Court appointed Francis Malara, Esq. Temporary Receiver to operate Bronx Park Motel Corp. and M.H.J. Motel Corp. (NYSCEF doc 203). On October 25, 2024, Nicholas Barone filed a letter to the Court stating that the report and accounting filed by Receiver Francis Malara on September 26, 2024 states that Francis Malara had the sum of \$729,439.89 on hand in the Receiver’s accounts after payment of all expenses. Mr. Barone requests that the Court direct the Receiver to pay the legal fees due to movant from the assets on hand with the Receiver, and that same be charged against the assets to be distributed to plaintiff (NYSCEF doc 242). As such relief was not included in the Order to Show Cause, this request is denied. It is

unclear whether the parties and the Receiver are on proper notice of this relief sought, and whether they had an adequate opportunity to oppose the relief sought.

Judiciary Law 475 provides that from the commencement of an action or other proceeding, “the attorney who appears for a party has a lien upon his or her client’s cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment, or final order in his or her client’s favor, and the proceeds thereof in whatever hands they may come... The court upon the petition of the client or attorney may determine and enforce the lien.” Law Offices of Nicholas P. Barone shall have a charging lien in the amount of \$19,319.50 for reasonable attorney’s fees and expenses that remain unpaid at the conclusion of this action.

Insofar as CPLR 321(c) provides for an automatic stay of a matter where counsel is removed, the matter will be stayed for thirty days to provide plaintiff an opportunity retain a new attorney (*see* CPLR § 321[a]).

Accordingly, it is hereby

ORDERED that the branch of the motion seeking an order relieving Law Offices of Nicholas P. Barone as counsel for plaintiff is granted; and it is further

ORDERED that this action is stayed for a period of thirty days from the date of this Order to allow plaintiff time to retain new counsel. Plaintiff is directed to notify the Court and counsel for all parties in writing within the thirty day period as to the name and address of his new counsel; and it is further

ORDERED that incoming counsel shall either consent to e-filing on the NYSCEF website or file a Notice of Opt-Out from Participation in E-filing form with the Westchester County Clerk’s Office within the thirty day period; and it is further

ORDERED that new counsel is directed to file to NYSCEF a Notice of Appearance prior to January 22, 2025; and it is further

ORDERED that Law Offices of Nicholas P. Barone shall have retaining lien in the amount of \$19,319.50 for services rendered and expenses incurred in connection with this action; and it is further

ORDERED that Law Offices of Nicholas P. Barone shall have a charging lien in the amount of \$19,319.50 for reasonable attorney’s fees and expenses that remain unpaid at the conclusion of this action (Judiciary Law § 475); and it is further

ORDERED that all parties shall appear for an in person Status Conference on January 27, 2025 at 11:30 a.m. in Courtroom 102; and it is further

ORDERED that movant shall serve a copy of this Decision and Order with notice of entry upon all parties, including Mitchell Suss, within ten days. Prior to being relieved, movant shall file proof of service on NYSCEF within five days of service.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
December 11, 2024



HON. WILLIAM J. GIACOMO, J.S.C.