

SUPREME COURT - STATE OF NEW YORK
IAS TERM, PART 23 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 1-28-03
Submission Date: 7-25-03
Motion Sequence No.: 005,006,007,008/MOT D

WILLIAM HARRIS,
Plaintiff,

ATTORNEY FOR PLAINTIFF
Agovino & Asselta, LLP
170 Old Country Road - Suite 608
Mineola, New York 11501

- against -

SEARS ROEBUCK and CO. and DIAMOND
EXTERIORS, INC.,
Defendants

ATTORNEY FOR DEFENDANTS
Malapero & Prisco, Esqs.
485 Fifth Avenue
New York, New York 10017

SEARS ROEBUCK and CO. and DIAMOND
EXTERIORS, INC.,
Third Party Plaintiff,

Mitchel & Incantalupo, Esqs.
98-20 Metropolitan Avenue
Forest Hills, New York 11375-9998

- against -

MICHAEL GEYDA, d/b/a INDEPENDENT
ISLAND CONTRACTORS, CHARLES HALEY
& SONS HOME IMPROVEMENTS AND
SIDING CONTRACTORS INC. and FATHER
AND SON FENCE, INC.
Third Party Defendants.

_____x

The following papers were read on Defendants/third party Plaintiffs' motion to dismiss for failure to comply with discovery demands and orders and for summary judgment on behalf of Defendant Diamond on its counterclaim; on third-party Defendant Father & Son Fence, Inc.'s motion to dismiss for failure to comply with discovery demands and order; or the cross-motion of Agovino & Asselta, LLP seeking leave to withdraw as attorney for Plaintiff and on the Order to Show Cause brought on by Agovino & Asselta, LLP seeking leave to withdraw as attorney for Plaintiffs: In Support of Defendants motion (Seq. # 6);

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Notice of Motion dated December 4, 2002;
Amended Notice of Motion dated January 15, 2003;
Affirmation of Frank Lombardo, Esq. Dated December 4, 2002;

In Support of Third Party Defendant's Motion (Seq. # 7);
Notice of Motion dated January 31, 2003;
Affirmation of Thomas V. Incantalupo, Esq. dated January 31, 2003;

In Support of the Cross-motion of Agovino & Asselta, LLP for Leave to Withdraw
(Seq. #5);
Notice of Cross-motion dated January 10, 2003;
Affirmation of John L. Meunkle, Esq. dated January 10, 2003;

In Support of the Order to Show Cause of Agovino & Asselta, LLP Seeking Leave to
Withdraw (Seq. #8);
Order to Show Cause dated June 5, 2003;
Affirmation of Eric Su, Esq. dated June 2, 2003;
Affirmation of Eric Su, Esq. dated June 3, 2003;
In Opposition to Order to Show Cause;
Affidavit of Anthony Harris sworn to on July 18, 2003.

Defendants/Third Party Plaintiffs Sears Roebuck and Co. ("Sears") and
Diamond Exteriors, Inc. ("Diamond ") move for an order, pursuant to CPLR 3126,
dismissing this action on the ground that Plaintiff has failed to provide discovery as
directed by order of this Court and for an order, pursuant to CPLR 3212, granting
summary judgment on their counterclaims. Third Party Defendant Father and Son
Fence, Inc. ("Fence") also moves for an order, pursuant to CPLR 3216, dismissing the
complaint and the third party complaint on the ground that Plaintiff has failed to comply
with a court ordered discovery.

Agovino & Asselta, LLP ("Agovino") has made two motions for leave to withdraw
as attorney for the Plaintiff. The first motion (Motion Seq. 5) was made by notice of

cross-motion in response to Defendant and Third -Party Defendants' motion. The second motion (Motion Seq. 8) was made by order to show cause.

BACKGROUND

In 1998, Plaintiff's decedent, William Harris ("Harris"), entered into written agreements with Diamond whereby Diamond was to perform certain work on two residential of properties Harris owned in Hempstead. Diamond was a Sears authorized contractor.

Diamond alleges that it performed all of the work that it was hired to perform in a workmanlike manner. Harris was dissatisfied with the quality of the work performed. Diamond billed Harris for the work in accordance with the terms of the written agreements. Harris refused to pay.

By written retainer, Harris retained John L. Meunkle, P.C. ("Meunkle") to represent him in connection with any claims he had against Sears and/or Diamond "based upon alleged violations (of) the General Business and Obligations Law, as well as breach of an express warranty." Harris paid the Meunkle retainer fee. The retainer provided that upon payment of the fee that Meunkle would represent Harris "to disposition." The retainer acknowledged that the one time fee was payment in full for all legal services to be rendered in this matter inclusive of court costs.

This action was commenced on March 2, 1999. The summons reflects Plaintiff's attorney as Meunkle & Meunkle, P.C. During the prosecution of this action, John L. Meunkle, Esq. became a member of the Agovino law firm. When he joined the firm, he

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brought this action with him and the Agovino law firm, thus, became the attorney of record for Plaintiff.

In this action, Plaintiff seeks to recover an unspecified amount of damages from Sears and Diamond alleging fraud, violation of the General Business Law and breach of warranty.

Diamond and Sears appeared and served an answer denying the material elements of the complaint. Diamond interposed a counterclaim seeking to recover the balance due for the work in accordance with the terms of the written agreements.

By order granted on December 12, 2000, this Court directed the Plaintiff to serve a bill of particulars in response to Defendants' demand dated September 2, 1999 and to respond to Defendants' discovery demands within 20 days of the date of the order. The order also directed the parties to appear for a Preliminary Conference on January 11, 2001.

Harris died during the pendency of this action. His death automatically stayed this action. His date of death is unclear. An affirmation submitted to the Court indicates that Harris died in October, 2001, yet by "So Ordered" Stipulation dated September 21, 2001, Anthony Harris, as Executor of the Estate of William Harris, was substituted as the Plaintiff in this action so that prosecution of the action could resume.

In March, 2002, Meunkle and an attorney for Sears negotiated a settlement of this action. The executor refused to accept the settlement and did not sign the documents necessary to effectuate the settlement.

Thereafter, in early 2003, the Defendants have moved to dismiss this action on the grounds that Plaintiff has failed to serve a bill of particulars or respond to Defendants' discovery demands and the prior court orders directing Plaintiff to serve a bill of particulars and respond to Defendants' discovery demands and for summary judgment on its counterclaims. Third Party Defendant Fence has also moved for the same relief on the same grounds. In response to these motions, Agovino moved, by notice of cross-motion served solely upon the attorneys for the parties for leave to withdraw as attorney for the Plaintiff.¹ The various motions were adjourned several times on consent.

While the motions were pending, Muenkle was suspended from the practice of law in March, 2003. Anthony Harris and the other members of Harris family were notified by Agovino of Muenkle's suspension. The estate was advised that Agovino would require an additional retainer to continue with the prosecution of this action. The estate refused to pay any additional retainer asserting that its retainer with Muenkle required Agovino to prosecute this action through completion.

In response, Agovino moved by order to show cause for leave to withdraw as attorney for the Plaintiff.

¹ Although Michael Geya d/b/a/ Independent Island Contractors and Charles Haley & Sons Home Improvements and Siding Contractors Inc., have been named as third-party Defendants, it is unclear whether they have ever been served. Neither has appeared in this action.

DISCUSSION

A. Agovino's Application to Withdraw

An attorney may withdraw from the representation of a client if the client's conduct "renders it unreasonably difficult for the lawyer to carry out employment effectively." 22 NYCRR 1200.15(c)(1)(iv) [DR 2-110(c)(1)(iv)]. This includes the party questioning the attorney's strategy or where there is a dispute between the attorney and the client regarding the proper course of the litigation. See, Kiernan v. Kiernan, 233 A.D.2d 867 (4th Dept. 1996); and Winters v. Rise Steel Erection Corp., 231 A.D.2d 626 (2nd Dept. 1996). See also, Lake v. M.P.C. Trucking, Inc., 279 A.D. 2d 813 (3rd Dept. 2001).

In this case, it appears that irreconcilable differences have arisen between Agovino and the executor making it unreasonably difficult for Agovino to continue to represent the Plaintiff. The affirmation of John Meunkle dated January 10, 2003 submitted in connection with Agovino's cross-motion to be relieved indicates that he had requested the information needed to complete the bill of particulars and to respond to the discovery demands on eight separate occasions dating back to December, 2001 and that had not received a response. Further, Meunkle negotiated a tentative settlement to this action in March, 2002 which was rejected by the Plaintiff.

This is clear evidence that the attorney-client relationship has deteriorated to the point where it is no longer proper for Agovino to represent Plaintiff. See, Lake v. M.P.C. Trucking, Inc., *supra*; and Winters v. Rise Steel Erection Corp., *supra*.

However, where an attorney who has been paid a fee withdraws from representation of party, the attorney is required to promptly refund "any part of the fee paid in advance that has not been earned. 22 NYCRR 1200.15(a)(3) [DR 2-110(a)(3)]. In this case, Meunkle was paid for all legal service through disposition of this action. This action has not yet been resolved or disposed. Therefore, a portion of the fee may have to be returned to the Plaintiff. See, Matter of Hirsch, 226 A.D.2d 41 (1st Dept. 1996); and Matter of Horak, 224 A.D.2d 47 (2nd Dept. 1996). Therefore, a hearing is necessary to determine the amount the retainer previously paid to John L. Muenkle, P.C. that should be refunded, if any. Upon payment of the sum determined to be due or the determination that no moneys are due, Agovino is granted leave to withdraw as attorney for the Plaintiff.

Agovino's argument that it should be permitted to withdraw because Plaintiff refuses to pay an additional retainer is unpersuasive. Plaintiff retained Meunkle and paid him a retainer to represent him through disposition of this action. When Mr. Meunkle became a member of the firm, he brought this case with him. Agovino became the attorney of record for the Plaintiff when Meunkle joined Agovino. Agovino is bound by the provisions of that agreement as the successor in interest of John Muenke and has the obligation to prosecute this action unless discharged by the client or relieved by the Court.

CPLR 321(c) mandates a 30 day stay of all proceedings against a party when a party's attorney is granted leave to withdraw. CPLR 2201 permits the Court to stay any

proceeding pending before it “upon such terms as may be just.”

In this case, it is appropriate to stay the hearing and determination of Defendant and Third Party Defendant’s motions to dismiss pending the withdrawal of Agovino as attorneys for the Plaintiff. Plaintiff should be given the opportunity to retain new counsel who can either promptly serve a bill of particulars and comply with the Defendant and third party Defendants discovery demands or properly oppose the motions to dismiss and for summary judgment. As it now stands, those motions are unopposed.

Agovino is directed to notify the Court when it has paid to Plaintiff the sum fixed after hearing, if any, as a refund of the overpayment of the retainer and provide proof of payment. The 30 day stay required by CPLR 321(c) shall go into effect as of that date. The Defendants’ and third party Defendant’s motions shall be re-scheduled for hearing at that time.

Agovino’s initial motion to withdraw (Motion Seq. 5) which was made by notice of motion not served upon the Plaintiff must be denied. See, LeMin v. Central Suffolk Hosp., 169 A.D.2d 821 (2nd Dept.1991); and CPLR 321(b)(2).

Accordingly, it is,

ORDERED, that the motion of Agovino & Asselta, LLP, is granted to the extent of setting this matter down for a hearing before Special Referee Thomas V. Dana on November 19, 2003 at 10:00 a.m. to hear and determine the amount of the retainer paid by Plaintiff to John Meunkle that shall be refunded to Plaintiff, if any; and it is further,

ORDERED, that Agovino & Asselta, LLP shall serve a copy of this order with Notice of Entry upon the Estate of William Harris at 1139 Curry Ford Road, Fayetteville, North Carolina 28314 and at P. O. Box 8061, Las Vegas, Nevada 89119 by certified mail, return receipt requested and by regular mail with a Certificate of Mailing and upon the attorneys for the Defendants and Third-Party Defendants pursuant to CPLR 2103(b)(2); and it is further,

ORDERED, that Agovino & Asselta, LLP shall be **granted** leave to withdraw as attorney for the Plaintiff upon tender of payment to Plaintiff within 10 days of the date of the decision of the Special Referee fixing the amount to be refunded to the Plaintiff from the retainer paid to John Meunkle, if any. If payment of such sum is not tendered within 10 days of the Special Referee's decision, the motion is **denied**. If no sum is determined to be refunded then, upon service of the Special Referee's decision, upon Plaintiff and counsel, the motion shall be deemed **granted**; and it is further,

ORDERED, that Agovino & Asselta, LLP, shall serve upon the Plaintiff with payment of the sum fixed by the Special Referee, if any, together with the Special Referee's decision, a Notice to Appoint Another Attorney as provided by CPLR 321(c) by Certified Mail, Return Receipt Requested and by regular mail with a Certificate of Mailing and upon the attorneys for the Defendants and the third party Defendant pursuant to CPLR 2103(b)(2) ; and it is further,

ORDERED, that all proceedings herein are stayed for a period extending up to 30 days after the date of payment by Agovino & Asselta, LLP to Plaintiff or the Special

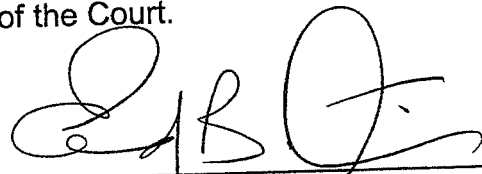
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Referee's decision of no payment due and service by Agovino & Asselta, LLP of the
Notice to Appoint Another Attorney upon the Plaintiff and the attorneys for the
Defendant and Third Party Defendants as provided for herein; and its further,

ORDERED, that counsel for the Defendants and Third Party Defendants shall
promptly notify the Court upon receipt of a copy of the Notice to Appoint Another
Attorney and Special Referee's decision to schedule a conference date to reset their
motions.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
October 14, 2003



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

OCT 20 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**