

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MI)

TRIAL/IAS, PART 2  
NASSAU COUNTY

\_\_\_\_\_  
HIGH TIDES, LLC, a New York limited  
liability company,

Plaintiff,

INDEX No. 024029/09

MOTION DATE: Oct. 20, 2010  
Motion Sequence # 009

-against-

DON DEMCICHELE, CHRISTOPHER CORTESE,  
STEVEN A. GALLOWAY, BART D. THORNE,  
JEFFREY SERKES, KENNETH KELLAWAY,  
and DUNKIN' BRANDS, INC.,

Defendants.

\_\_\_\_\_  
The following papers read on this motion:

Notice of Motion..... X

Motion by Mayo Crowe LLC for leave to withdraw as counsel for defendant Steven Galloway is denied.

This is an action for fraud. Defendants DeMichele, Galloway, Serkes, Cortese, Thorne, and Kellway were officers or directors of Kainos Partners Holding Company LLC, an operator of Dunkin Donuts franchises. Plaintiff alleges that defendants misrepresented the financial condition of Kainos in order to induce plaintiff to invest in the company.

Kainos had a directors and officers liability insurance policy issued by Philadelphia Indemnity Insurance Company. Defendants requested Philadelphia Indemnity to provide

them with a defense in the present action. On December 29, 2009, Philadelphia Indemnity agreed to defend the defendants, subject to a reservation of its rights to disclaim coverage. In practice, each of the defendants was permitted to retain his own counsel, and the insurer agreed to pay the attorneys according to its billing rates. Defendant Galloway retained Mayo Crowe LLC with the understanding that its fees would be paid by Philadelphia Indemnity.

On March 31, 2010 Philadelphia Indemnity disclaimed coverage under the "Known Circumstances" exclusion in the policy. It appears that in the insurance application, Kainos had listed improper use of company funds by defendant Christopher Cortese as one of the known circumstances for which coverage would not be provided. In the complaint, plaintiff alleges that Cortese's use of Kainos' assets for personal benefit was one of the facts, material to Kainos' financial condition, which should have been disclosed. Nevertheless, it does not appear that defendants' allegedly fraudulent inducement of plaintiff to invest in Kainos was known to the company at the time of the insurance application.

Mayo Crowe moves for leave to withdraw as counsel for defendant Galloway on the ground that he is unable to pay for further legal representation. No motions for leave to withdraw have been filed by counsel for any of the other individual defendants. However, the court notes defendant Christopher Cortese has submitted a "consent to change attorney" form dated September 17, 2010 which states that Cortese would appear *pro se* "in place and stead" of his counsel of record.

The Rules of Professional Conduct provide that a lawyer may withdraw from representing a client when "the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees" (22 NYCRR § 1200.16[c][5]). Since Philadelphia Indemnity denied coverage, it is clear that defendant Galloway has not deliberately disregarded an agreement or obligation as to payment of legal fees. Thus, counsel has not established grounds for leave to withdraw. Moreover, because the motion was made by notice of motion, rather than order to show cause, it is procedurally defective (See CPLR § 321[b]). The motion by Mayo Crowe LLC for leave to withdraw as counsel for defendant Steven Galloway is **denied**.

On the court's own motion, the consent to change attorney form submitted by defendant Christopher Cortese is **vacated**, with leave for counsel to move by order to show cause for leave to withdraw pursuant to CPLR § 321.

So ordered.

Dated DEC 23 2010

**ENTERED**

JAN 10 2011

*Stephen A. Scurran*  
J.S.C.

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE