

J.T. Magen & Co. Inc. v Nissan N. Am., Inc.
2019 NY Slip Op 30225(U)
January 28, 2019
Supreme Court, New York County
Docket Number: 160497/2017
Judge: Joel M. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. JOEL M. COHEN</u>	PART	IAS MOTION 3EFM
	<i>Justice</i>		
	-----X	INDEX NO.	<u>160497/2017</u>
	J.T. MAGEN & COMPANY INC. (COUNTERCLAIM-DEFENDANT),	MOTION DATE	<u>N/A</u>
	Plaintiff,	MOTION SEQ. NO.	<u>005</u>
	- v -		

NISSAN NORTH AMERICA, INC., GEORGETOWN ELEVENTH AVENUE OWNERS, LLC (COUNTERCLAIM PLAINTIFF) (CROSSCLAIM-PLAINTIFF), PHILADELPHIA INDEMNITY INSURANCE COMPANY, GARY FLOM, VEN NILVA,

Defendant.

DECISION AND ORDER

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 005) 199, 200, 201, 204, 205

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

Upon the foregoing documents:

This action was commenced by JT Magen & Company against Defendants Nissan North America, Inc. Georgetown Eleventh Avenue Owners, LLC, Philadelphia Indemnity Insurance, Company, Gary Flom and Ven Nilva, on November 27, 2018 alleging foreclosure of a mechanic's lien, quantum meruit, account stated and trust fund diversion. Defendants Gary Flom and Ven Nilva filed an Answer on April 24, 2017.

Now before the Court is Andrew Borsen Esq.'s motion, brought by Order to Show Cause, to be relieved as counsel on behalf of Defendants Flom and Nilva. Mr. Borsen cites unpaid legal fees and an unspecified conflict of interest as his reasons for being unable to continue to work with Defendants. *Borsen Aff.*, ¶3 (NYSCEF 200). The Order to Show Cause was signed on December 20, 2018 and directed opposition, if any, to this requested relief be filed by January 17, 2019 and further provided that a copy of the Order to Show Cause and the supporting papers upon which it is based shall be served upon all Defendants through NYSCEF and regular mail.

Defendants Flom and Nilva were to be served personally. Counsel filed affidavits of service attesting that copies were served upon the Defendants.¹ (NYSCEF 205)

No opposition having been filed, this motion is unopposed. For the following reasons, the Court grants counsel's motion to withdraw as attorney of record for Defendants Nilva and Flom.

Mr. Borsen asserts that Defendants have failed to remit payment for legal services rendered despite due demand. Mr. Borsen also complains of a "potential conflict relating to the representation". *Borsen Aff.*, ¶3-5. Supporting his motion, Mr. Borsen claims to have provided his client with advance 30-day notice of his impending withdrawal (such notice is not provided to the Court to review) and has "taken steps to avoid foreseeable prejudice to Defendants". *Id.* ¶5

Relieving counsel from its representation of a party is appropriate where, *inter alia*, there is adequate evidence showing a breakdown in the attorney-client relationship. *Robinson v Friedman Mgt. Corp.*, 49 A.D. 3d 436, 437 (1st Dep't 2008); *see also Bok v Werner*, 9 A.D.3d 318 (1st Dep't 2004) (reversing denial of motion to withdraw as counsel in view of counsel's claimed breakdown in relationship with client); *see also* Rule 1.16(c)(5) of the Rules of Professional Conduct (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). Movant has done so. Given that the case is at an early stage, and no discovery schedule has yet been entered, Defendants should not be prejudiced by a change in counsel.

The Court concludes that Andrew Borsen, Esq. has made a sufficient showing of entitlement to withdraw as counsel for Defendants Nilva and Flom and his motion is Granted.

¹ While Defendant Nilva was served personally, Defendant Flom was served through substituted service (left with building concierge and mailed a copy to Defendant).

Mr. Borsen is directed to advise Gary Flom and Ven Nilva that, as individually named Defendants, they may appear *pro se*. See, CPLR §321(a). Mr. Borsen is directed, however, to comply with his obligation under Rule 1.16(e) of the Rules of Professional Conduct as stated below.

It is therefore:

ORDERED that the motion of Andrew Borsen, Esq. to be relieved as attorney for Defendants Nilva and Flom in this action is granted without opposition, subject to the following conditions:

ORDERED that Andrew Borsen, Esq. is to comply with its obligation under Rule 1.16(e) of the Rules of Professional Conduct, as applicable to the facts presented, to “take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.”; it is further

ORDERED that, within 10 days from entry, Mr. Borsen shall serve a copy of this order with notice of entry upon both Gary Flom and Ven Nilva by email and by hard copy at their last known address by certified mail, return receipt requested, and upon the attorneys for all other parties appearing herein by posting to the New York State Courts Electronic Filing System; it is further

ORDERED that, together with the copy of this order with notice of entry served upon all parties, moving counsel shall forward a notice directing both Defendants Flom and Nilva to appoint a substitute attorney within 30 days from the date of the mailing of the notice and the client shall comply therewith, except that, in the event Defendants Flom and Nilva intend instead to represent themselves, they shall notify the Clerk of the Part of this decision in writing within said 30-day period; it is further

ORDERED that any new attorney retained by Defendants Flom and Nilva shall file a notice of appearance with the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and the Clerk of the Part within 40 days from the date the notice to retain new counsel is mailed; it is further

ORDERED that no further proceedings may be taken against Defendants Nilva and Flom without leave of this court for a period of 40 days after service on Defendants of the aforesaid notice to appoint a substitute attorney; it is further

ORDERED that the departing attorney shall, within 10 days from entry, serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (Room 119); and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office, the filing of a notice of appearance as provided herein, and the filing of papers as aforesaid shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that all parties are to appear on March 5, 2019 at 9:30 a.m. in Room 222 for a Preliminary Conference.

1/28/2019
DATE


JOEL M. COHEN, 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