

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

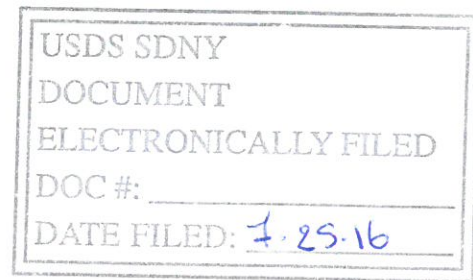
CAPITOL RECORDS LLC,

Plaintiff,

-v-

REDIGI INC., *et al.*,

Defendants.



No. 12-cv-95 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

Now before the Court are the sealed motions of Adelman Matz P.C. (“Adelman Matz”) and Mishcon de Reya New York LLP (“Mishcon de Reya”) to withdraw as Defendants’ counsel in this action. (Doc. Nos. 233 and 234.) The Court has also reviewed the declaration of Defendant John Ossenmacher (Doc. No. 249) and a reply from Adelman Matz (Doc. No. 252), which was filed under seal. For the reasons set forth below, the motions to withdraw are granted, and the Court also grants the firms’ motions for a retaining lien.

I. DISCUSSION

A. Motion to Withdraw

Withdrawal of counsel is governed by Local Civil Rule 1.4, which provides that:

An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the court and may not withdraw from a case without leave of the court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien.

Local Civil Rule 1.4. “It is well settled that nonpayment of fees is a legitimate ground for granting counsel’s motion to withdraw.” *Cower v. Albany Law Sch. of Union Univ.*, No. 04-cv-0643 (DAB), 2005 WL 1606057, at *5 (S.D.N.Y. July 8, 2005); *see also Emile v. Browner*, No.

95-cv-3836 (SS) (THK), 1996 WL 724715, at *1 (S.D.N.Y. Dec. 17, 1996) (“When a client fails to pay legal fees, fails to communicate or cooperate with the attorney, . . . these are more than sufficient reasons for counsel to be relieved.”).

Here, Defendants do not appear to contest that they have not paid their lawyers. Although Defendant Ossenmacher does not address Mishcon de Reya in his declaration, he acknowledges that “[w]hat we have not been able to do is to offer any current payment to the Adelman firm, because there is simply no money with which to pay them.” (Doc. No. 249 at 2.) Given this statement, along with the representations under seal of Adelman Matz and Mishcon de Reya that they have not received payment for their services, the Court concludes that both firms have demonstrated sufficient grounds to support their motions to withdraw. The Court also notes that Defendants will not be left without representation, as they have retained BakerHostetler for their appeal. (See Doc. No. 240.) Accordingly, the Court grants the motions to withdraw of Adelman Matz and Mishcon de Reya.

B. Retaining Lien

The Second Circuit has stated that “[i]t is settled that an attorney may claim a lien for outstanding unpaid fees and disbursements on a client’s papers which came into the lawyer’s possession as the result of his professional representation of his client.” *Pomerantz v. Schandler*, 704 F.2d 681, 683 (2d Cir. 1983); see also *In re San Juan Gold*, 96 F.2d 60, 60-61 (2d Cir. 1938). Failure to impose a retaining lien requiring “payment of outstanding charges or posting of adequate security for payment” is an “abuse of discretion.” *Pomerantz*, 704 F.2d at 683. The Second Circuit has further recognized that only the most exceptional circumstances may justify a decision not to impose a retaining lien, such as when a criminal defendant has made a clear showing of “the need for the papers [to defend his case], the prejudice that would result from

denying him access to them, and his inability to pay the legal fees or post a reasonable bond.” *Id.* The simple fact that a party is “without funds” is “immaterial,” and the “attorney’s lien cannot be disregarded merely because the pressure it is supposed to exert becomes effective.” *In re San Juan Gold*, 96 F.2d at 60.

Here, Defendants have not shown any exceptional circumstances that might justify not imposing a lien. Although the Court is mindful of Defendants’ need for their files for the case’s appeal, such a need does not excuse them from the requirement that they pay their counsel. *See Melnick v. Press*, No. 06-cv-6686 (JFB) (ARL), 2009 WL 2824586, at *12 (E.D.N.Y. Aug. 28, 2009) (denying “the turnover of all of the documents in [counsel’s] possession related to this case, given that plaintiffs have not demonstrated extreme hardship or posted security for such a lien”). This case also does not involve the type of federal statute with a fee-shifting provision, for which courts have recognized that retaining liens might go against the public interest. *See, e.g., Casper v. Lew Lieberbaum & Co.*, No. 97-cv-3016 (JGK) (RLE), 1999 WL 335334, at *9 (S.D.N.Y. May 26, 1999) (denying retaining lien where plaintiffs were functioning as “private attorneys general”), *reconsideration denied*, 182 F. Supp. 2d 342 (S.D.N.Y. 2002); *Cower v. Albany Law Sch. of Union Univ.*, No. 04-cv-0643 (DAB), 2005 WL 1606057, at *6 (S.D.N.Y. July 8, 2005) (“[I]n certain actions, brought under federal statutes that contain fee-shifting provisions, . . . such liens rarely are granted.”). In light of the fact that the Court finds no exceptional circumstances that might warrant not imposing a retaining lien here, the Court concludes that Adelman Matz and Mishcon de Reya are each entitled to a retaining lien.

With respect to the amount of the payment due, Adelman Matz states that the firm has an outstanding balance of \$102,513.88. Mishcon de Reya has not indicated what amount the firm is owed. Although Defendant Ossenmacher conclusorily states that he “dispute[s] that the full

amount of fees and costs claimed by the Adelman firm is properly owing,” he offers no specific information as to why that amount might be incorrect. (Doc. No. 249 at 2.) The Court finds that this vague statement is insufficient to merit an evidentiary hearing or further briefing on the subject, particularly since Adelman Matz has not received any payment in months for its extensive work in this matter and further briefing would only impose additional financial hardship on the firm. Accordingly, the Court concludes that Defendant ReDigi, Inc. owes Adelman Matz \$102,513.88 in fees and that the retaining lien shall remain in place until such payment is made or such security is posted. Mishcon de Reya shall file a supplementary submission regarding the amount owed by Defendants no later than July 29, 2016.

II. CONCLUSION

Accordingly, IT IS HEREBY ORDERED THAT the motions of Adelman Matz and Mishcon de Reya to withdraw as counsel are GRANTED. IT IS FURTHER ORDERED THAT each firm’s motion for a retaining lien is also GRANTED. Adelman Matz shall not have an obligation to turn over any files the firm has retained in this matter until payment of the \$102,513.88 in attorneys’ fees or the posting of a security to cover such payment. IT IS FURTHER ORDERED THAT Mishcon de Reya shall file a submission on the amount of payment owed to the firm by July 29, 2016.

SO ORDERED.

Dated: July 25, 2016
New York, New York


RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE