Ruiz v Torres
2013 NY Slip Op 33611(U)
December 3, 2013
Supreme Court, Bronx County
Docket Number: 302026/09
Judge: Mark Friedlander
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NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

MERCEDES RUIZ,

Plaintiff,

-against-

FAZEENA, PETER E. TORRES, ESQ.
LAW OFFICES OF PETER E. TORRES, ESQ.,
and RAYMOND G. PEREZ a/k/a RAYMOND G.
PEREZ, ESQ.,

Defendants.

MEMORANDUM DECISION/ ORDER
Index No. 302026/09

HON. MARK FRIEDLANDER:

There now come before this Court five separate motions and two cross-motions, all arising out of transactions between plaintiff and defendants, which related to the after-effects of a mortgage foreclosure. Plaintiff had sought help to keep her home, and defendants, in response to plaintiff's plight, engaged in a complicated series of transactions, which led plaintiff, rightly or wrongly, to sue one or more of them for conversion, professional malpractice, breach of fiduciary duty, conflict of interest and fraud. Certain defendants have, in turn, asserted counterclaims, which include fraud, libel and slander. The action begun by plaintiff in 2009 has spawned extensive motion papers in the past, leading to a lengthy decision by the undersigned in 2010, which dismissed plaintiff's claim for rescission of the transfer of her home, but let stand her claims for money damages, pending the conduct of discovery.

The underlying events which gave rise to these claims and counter-claims took place in 2006, and are sufficiently convoluted so that a complete recitation of them (and, of each party's version of them) would require a decision of inordinate length. Because the instant applications turn mostly on procedural grounds, the Court will avoid re-tracing here most aspects of the 2006 events which are described in the aforementioned

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2010 decision.

I. The Seven Applications.

For the sake of convenience, the four motions brought on by notices of motion, all submitted on the same date, will be denominated (in the order in which they were served and/or filed) as motions one through four. A fifth motion, brought on by order to show cause, will be denominated as motion five. To ensure that the motions and motion papers are readily identifiable, and that motion papers remain in their proper folders, the Court has marked the folders and the motion papers themselves with the prominent markings of "one" through "five."

Motion one is brought by defendants Peter E. Torres, Esq. and the Law Office of Peter E. Torres, Esq. (collectively "Torres"), and seeks the imposition of sanctions on plaintiff's counsel, as well as the recusal of the undersigned. In response to motion one, plaintiff's counsel, Christopher P. Bilski, Esq. ("Bilski") cross-moves to sanction defendant Torres, as well as his attorneys, Balwan Robert Singh, Esq. ("Singh") and Lorenzo W. Tijerina, Esq. ("Tijerina") for frivolous conduct.

Motion two is brought by Torres, seeking dismissal of the claims against him, and a ruling on Torres' prior dismissal motion. Opposition to this motion does not appear in the Court file for motion two, but is contained in the papers filed as part of plaintiff's cross-motion to motion three.

Motion three is brought by Torres to seek further sanctions against Bilski for Bilski's non-appearance at a court-ordered conference held on the day after the filing of motion one. In response, perhaps predictably, Bilski cross-moves once again to sanction Torres and his counsel for frivolous conduct, including the bringing of two applications for sanctions. As part of the cross-motion, Bilski sets forth plaintiff's arguments for opposing the dismissal sought in motion two.

Motion four is brought by Torres, and filed four days after motions one and two, seeking a default judgment because Bilski failed to appear at the court conference which is the subject of motion three. The

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motion also seeks the "awarding of defendant's affirmative defenses Eighth through Twentieth" (sic). Although no opposition to the motion is contained in the Court folder for motion four, it appears that the cross-motion to motion three, filed by plaintiff's counsel after service of motion four, also contains opposition to this application.

In addition to the above, Torres has filed an extensive document, merely denominated as an "affirmation," which appears, from its content, to be a reply in further support of motions one through four, as well as opposition to both cross-motions. Because the item was the last to be filed, it is included in the folder of motion four.

Motion five, brought on by order to show cause, is an application by Bilski to be relieved as counsel for plaintiff. The application is opposed by Torres.

Where to begin? It cannot be gainsaid, at the outset, that this extensive and repetitious set of applications, and the grounds set forth as justification for them, do not serve to convey a favorable impression of counsel for either side. Counsel would do better to concentrate on the strengths of the claims of their clients, rather than on their evident animus toward each other.

In defendant's papers, there is repeated reference to Tijerina as a Texas attorney, admitted pro hac vice. No document is attached showing the granting of any application for such admission. The Court has no memory of granting it, although so many cases are adjudicated each year that the specific recall of any such admission would in itself be unusual. That is why it is always appropriate to attach to a submission the evidence of the granting of pro hac vice admission. In any event, this is not an issue here, because all of defendant's papers are signed by Singh, an attorney admitted in New York. As such, Tijerina need not have been mentioned at all.

II. Motion One

The basis for the requested sanction of Bilski in motion one is two-fold. First, Torres asserts that plaintiff has served no discovery during the nearly three years since the Court's last decision, and has done

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nothing to move plaintiff's case closer to resolution. Torres notes that the Court in 2010 would not grant summary judgment or dismissal until discovery was conducted, and rightly concludes that it was the Court's expectation that such discovery would follow the issuance of the previous decision. Torres notes Bilski's statement at a court conference in early 2013 to the effect that Bilski and his client had not been in contact for over a year, and Torres therefore concludes that plaintiff has abandoned the action.

It need not be belabored that the above is a totally insufficient basis for a seeking of sanctions against an attorney. The remedy available to a defendant when it appears that an action might have been abandoned is well known, and so specifically delineated in the CPLR, that the thought of seeking to sanction an attorney, rather than simply acting as prescribed by statute, raises more questions as to movant, than as to his target.

a. The Reference to Attorney Disciplinary Proceedings.

The second ground for the requested sanction is that Bilski, in the three year old motion decided by the Court, made reference to the fact that Torres had been the subject of a complaint made to the Disciplinary Committee ("DC") by plaintiff herself, and Bilski further submitted, as part of plaintiff's opposition to the 2010 motion, statements made by Torres in his response to the DC, which reflected on Torres' transactions with plaintiff. Bilski, in response, has acknowledged that plaintiff herself gave Bilski a copy of Torres' letter to the DC, but emphasizes that he did not represent plaintiff, and had not yet met her, when the DC proceeding occurred.

Movant asserts that Bilski's actions are a violation of Judiciary Law section 90(10) ("JL90"), which requires that matters submitted to the DC be kept confidential. Movant submits not a single case citation or other authoritative source to support the idea that an attorney should be sanctioned by the trial court for a use of such material. It appears that the purpose of JL90 is to ensure that items confidentially submitted in DC proceedings be shielded from freedom of information disclosure, or from other dissemination by the governmental or disciplinary authorities (until such time as a penalty may be imposed). Nothing in the statute

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speaks to the use that may be made of this material by an individual who happens to come into possession of it, and finds such material relevant to preventing dismissal of his client's claims.

In this case, the material that Torres submitted to the DC did shed some light on what may have happened in the course of his dealings with plaintiff. As such, the material constituted a possible admission by Torres and was relevant to the claims herein, regardless of whether Torres should, or should not, be disciplined.

The cases cited by movant in the "reply" affirmation are inapposite. Johnson v. Melino, 77 N.Y.2d 1, deals with the public right to access to such information, and not with the response to any private use made of such information by someone who had a right to possess it (in this case, plaintiff). Matter of Chatarpaul, 271 A.D.2d 76, is utterly irrelevant, as it deals with an attorney being disciplined for threatening to reveal his client's sealed criminal record (in an effort to collect his fee), not with anyone revealing an attorney's appearance before a DC. In Hill v. Committee on Professional Standards, 5 A.D.3d 835, the matter turned on which judicial department had jurisdiction. There, an implication emerges that, if an attorney improperly reveals the existence of a DC complaint involving another attorney, the second attorney may in turn bring on a DC complaint against the first for revealing such information. However, it must be noted that the only remedy discussed there was the bringing of a DC complaint, not the imposition of sanctions by a trial court. Further, the information in that case was revealed at a press conference, which is vastly different scenario from including such information in a submission on a motion. Finally, there is no indication in that case that any DC ever took adverse action against the revealer of the information.

Finally, in both Sinrod v. Stone, 33 Misc.3d 1230, and Weiner v. Weintraub, 22 N.Y.2d 330, the issue was not whether an individual could or should be disciplined or sanctioned for revealing matters that occurred before a DC, but rather what effect revelation of such matters might have on subsequent suits claiming defamation. The description of these cases in defendant's submissions merely reveal how completely movant's counsel misapprehends the legal principles being discussed.

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In reviewing JL90, as contained in the annotated statutes of this state, it is clear that there is not a single word in the statute, or case law interpreting it, or legal treatise, article or monograph, cited in the voluminous entries contained in the annotations, which either supports or even refers to the imposition of court sanctions on private parties for the use of these "confidential" items which come into their possession. It would seem that a more appropriate remedy might be for Torres to seek a sealing of the court record, to the extent that any document contains reference to the DC proceeding. Such request, however, would be limited to protecting Torres, and would not be directed against Bilski.

In view of the lack of any authority for the application of sanctions to this situation, the Court concludes that the request for such sanctions must be denied.

b. The Request for Recusal.

Motion one also asks that the Court recuse itself from further involvement with the instant matter, for the purported reason that the Court is prejudiced against Torres and cannot be fair to him, based on findings and conclusions contained in the Court's 2010 decision. It is clear from the assertions in motion one that movant fails to comprehend the basis for a recusal request.

The Court had no knowledge of these parties prior to receiving the 2010 motion papers. To the best of the Court's recollection, the Court has never met personally with them, or their attorneys, (although it is likely that the attorneys have met with the law clerk to the undersigned). The Court has no impression whatsoever of the parties or their attorneys, except for what is presented in their motion papers. If, after reading the papers, the Court draws certain conclusions, such conclusions are not only within the proper province of the Court, they reflect precisely what a judge gets paid to do. The mere fact that a Court concludes that one party is in the wrong, or has acted inappropriately, is therefore no basis at all for a recusal request regarding future proceedings.

The Court characterized what emerged from the 2010 motion papers as best as possible, given what was

described in that decision as the "inartful" drafting of the submissions. The Court stands by what was concluded in 2010 and, finds now that such conclusions in no way prejudice the Court going forward. Because recusal is within the discretion of the judge in question, the Court finds that, in the exercise of such discretion, not only would recusal be unwarranted, but recusing one's self on this evidence would likely draw a well-deserved rebuke from court administrators for needlessly burdening other judges with one's own assigned workload.

It is to be noted that the Court, in its 2010 decision, stated specifically (p.11): "This Court also will not prejudge the result of any disciplinary inquiry into (Torres') acts, and it may be that (he) has a satisfactory answer to any questions raised above as to his conduct." The Court meant that sincerely, and this should allay any concern Torres has about the DC proceeding serving to prejudice the Court against him. The instant papers refer to the fact that the DC proceeding is not yet concluded. Any inferences in the 2010 decision which Torres believes are negative derive only from the transactions described in the 2010 motion papers and not from the fact that plaintiff, who felt injured enough to sue him, also brought a DC complaint against him. This is not necessarily surprising to the Court, and establishes nothing.

Motion one also contains materials by Torres further describing his activities at the closing which is the subject of the Complaint. These materials are irrelevant to the relief sought in the motion. In any event, they are submitted far too late to be considered now, and, even if they were to be considered, they would not change the conclusions reached by the Court in 2010.

There is also some reference in motion one to the absence of "indispensable" parties, but this too is irrelevant to the relief requested in motion one, and will be considered separately infra, in the discussion of the other motions.

Motion one is therefore denied in all respects.

III. The First Cross-Motion.

In his cross-motion to motion one, Bilski responds that defendant too had failed to prosecute his counter-claims for nearly three years. This is not particularly persuasive, as the very nature of a counter-claim is that it is reactive to the assertion of a claim, and might not have been put forward at all, but for the initiation of a lawsuit by the plaintiff. However, Bilski also notes that defendant had failed to conduct discovery over the three year period, and this is more relevant. Because the Court denied defendant's dismissal motion until after the conduct of discovery, it would stand to reason that defendant should have been motivated to notice some discovery so as to elicit a basis for demonstrating, in any renewal motion, that dismissal is warranted. In the absence of conducting discovery, defendant cannot make any progress, under the terms of the 2010 decision, toward ultimate success in getting plaintiff's remaining claims dismissed. Thus, both parties are remiss in not moving forward with discovery.

Bilski emphasizes that he could not conduct discovery because his client would not respond to him, and was therefore unavailable. He asserts that he has had no contact with her from December 2010 onward. This is in itself meaningful, as the Court contemplates how much in the way of judicial resources is now expended on a matter which has such questionable prospects. In the end, Bilski's cross-motion is limited to the assertion that Torres' motion is frivolous, given the posture of this action, and that Torres and his counsel should be sanctioned.

The Court does not find that the mere making of motion one is sanctionable, however unwise such effort may be. Giving Torres the benefit of the doubt, the submission of materials regarding his DC proceeding could have led him to believe (although wrongly, as shown above) that Bilski was subject to some form of sanction for having acted improperly. Under such circumstances, the motion, while not sufficiently researched, perhaps not even goal oriented, was not entirely frivolous. Its extreme lateness, coming three years after the 2010 motion, is inexplicable, but also not in itself sanctionable. In any event, the Court finds no basis in the papers submitted

on motion one and the responding cross-motion to sanction either party, or any attorney. The cross-motion is therefore denied.

IV. Motion Two.

In motion two, Torres seeks dismissal of the claims against him, based on plaintiff's failure to conduct discovery, and on the consequent inference, according to movant, that plaintiff has abandoned the action. This motion must be denied. There is a procedure for achieving defendant's goal, but, once again, movant has demonstrated blissful ignorance of the most elementary principles of litigation, in failing to precede his effort with a 90-day notice, as required by the CPLR. When parties fail to follow the most basic procedural steps, their applications are a waste of judicial resources and an imposition on the court system.

In the motion to dismiss, Torres repeats the material contained in motion one as to his explanation for his actions at the closing, and his objection to the references to his DC proceeding, but these matters, no matter how many times repeated, are neither persuasive nor relevant to the dismissal motion. Torres also complains, after a recitation of much boiler plate law with little applicability here, that this Court erred in various ways in its 2010 decision. It is to be noted, though, that this argument comes nearly three years too late. A motion for re-argument is time bound, pursuant to the appropriate CPLR section, and, in this instance movant has failed to denominate the motion as one for re-argument, and has failed to submit it timely, both of which failures would preclude consideration of the arguments. In any event, the purported errors cited by Torres are not errors at all, as a quick perusal of his materials would make evident.

Even if the material submitted by Torres in purported explanation of his actions were to be considered to be an effort to renew his previous motion, such effort would have to fail. In any renewal motion, the motion must be so denominated, which was not done here. Even more important, there must be demonstrated a reason for failure to provide the evidence or information on the earlier motion, and such excuse, or claim of inability to timely provide the information, is completely absent here. Everything that Torres now says by way of seeking

to justify his actions could have been offered in 2010. Thus, even as part of a renewal motion, the material offered here must be rejected. The Court made clear in its 2010 decision that any renewal should be based on material unearthed during discovery, and no side has bothered to move forward on that basis.

In one part of the motion, defendant seeks to argue that the claims against him are time-barred, but this assertion is seriously undermined by his contention that the entire cause of action arose no later than the first week that plaintiff engaged him, when in fact his representation of plaintiff, which forms the heart of plaintiff's claims, continued at least until the closing three months later.

In defendant's various submissions, he asserts more than once that this Court held the previous motion "in abeyance," and, as a consequence, the notice of motion two seeks, as one form of relief, a "ruling upon defendant's prior motion." Plaintiff's counsel has pointed out, in responsive papers, that this is an inaccurate view of the disposition of the previous motion and, in defendant's reply papers, defendant seems to concede this point. In any event, suffice it to say here that the Court has never held any motion "in abeyance," and that the 2010 dismissal motion was denied, except for dismissal of plaintiff's first cause of action. By consequence, motion two is denied as well.

V. Motion Three and the Second Cross-Motion.

In Motion three, defendant seeks sanctions against Bilski for his failure to appear at a "mandatory appearance" hearing on May 21, 2013. Bilski cross-moves, seeking sanctions against defendant for making a second frivolous motion. This set of papers, more than all the others, raises serious question about both counsel's abuse of motion practice. Bilski asserts that the making of a second motion on the same subject, in itself, demonstrates frivolousness. Defendant responds that the first motion for sanctions was made the day before the scheduled court appearance, when defendant could not yet know that Bilski would fail to appear the following day, and thus two motions were warranted.

The latter response is not quite accurate, in that defendant could have invoked the May 21 failure to

appear in his reply on his first motion, as an additional reason to impose sanctions, based on such initial application. At most, using the May 21 incident in a reply would have opened the door to a request by plaintiff for the right to submit a sur-reply, but it would have been a better option than bringing two separate motions.

In any event, the whole dispute reflected in motion three and its cross-motion is unworthy of the Court's time and attention. Bilski asserts that he was told by the court attorney, in February, that his appearance on May 21 was unnecessary, because he intended to seek to withdraw as attorney for plaintiff. Defendant complains bitterly that Bilski did not phone in advance to say that he was not attending, and that defendant and counsel waited until 10:50 A.M. for no reason. While the absence of courtesies between adverse counsel is never appropriate, all trial attorneys have experienced this on occasion. Indeed, the Court has seen it happen on many occasions, and never once saw it result in a motion for thousands of dollars in sanctions. Clearly, one or both of these attorneys may not have enough to do.

Defendant's notice of motion is defective in that it seeks sanctions for non-attendance at a court hearing on May 22, 2013, when in fact, the court session in question was a conference on May 21, 2013. Furthermore, none of the conferences discussed in these papers, whether in May 2013, in February 2013, or earlier, took place before the undersigned, or was scheduled to be held in the undersigned's part. At the time these conferences were scheduled or held, the undersigned was unaware of their existence. Therefore, the undersigned cannot opine on the supposedly mandatory nature of the conference, on whether failure to appear was to carry any particular penalty, or on what may or may not have been said to Bilski about appearing on May 21. Neither side has submitted a single document to the Court reflecting the event around which these applications revolve.

Under the circumstances, this Court cannot and will not go so far as to impose the draconian penalty of sanctions on either side, on any counsel or party. Motion three and its corresponding cross-motion are thus denied.

The Court will, however, caution both sides that the submission of the motion and cross-motion does not

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do them credit and will be further considered to their detriment, should their conduct of this litigation show further instances of a proclivity to bring unnecessary applications. The Court notes, though, that Bilski's cross-motion does contain, as was mentioned supra, plaintiff's opposition to motions two and four, and Bilski's papers in that regard are therefore considered on such motions, as if there were no cross-motion for sanctions.

One of plaintiff's arguments not mentioned heretofore (and described in the aforementioned papers) is that the DC proceeding discussed in this Court's 2010 decision was also referred to by a Housing Court judge in a 2008 decision on a Landlord-Tenant action brought against plaintiff by defendant Jagroop, when plaintiff, in 2007, continued to reside in the home she had lost. Because that mention of the DC proceeding preceded its use by Bilski in this action, Bilski asserts that the information was already in the public domain. Torres has responded that the Housing Court decision merely referred to the proceeding, while Bilski's submission to the Court in 2010 made use of Torres' actual letter to the DC.

With regard to the foregoing, though, it should be noted that the sole use made of that information, by either the Court or plaintiff, was to highlight how Torres, in his letter to the DC, characterized the transactions and parties involved in the dispute, and to use such information to shed light on the details of the transaction, as seen by Torres. The fact of the DC proceeding itself was not of importance to the Court or to the result reached in the decision. It is noteworthy in this regard that Torres did not invoke JL90 in his reply papers submitted in 2010, did not move to strike the material back then, and then waited three years to charge the Court with prejudice and seek sanctions against his adversary.

VI. Motion Four.

In motion four, defendant seeks to take a default judgment against plaintiff for the failure of Bilski to appear at the May 21, 2013 conference. The Court will not grant such default. As already noted above, the Court is not in possession of information as to the details of the scheduling or conduct of such conference(s). An application to the judge under whose auspices the conference was held might have been more appropriate,

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but it is doubtful that it would have been more successful. As has been set forth supra, there is a proper procedure for eliciting a dismissal of a proceeding, where a plaintiff does not go forward, and such procedure has not been employed here.

The second prong of motion four appears inexplicable, even by the standard of the other applications and arguments advanced herein. Movant first asks to be "awarded" his affirmative defenses "eighth through twentieth," but thereafter supports such request with the mere assertion that plaintiff, in responding to defendant's counterclaims, did not specifically "deny" Torres' affirmative defenses. Movant asserts that CPLR 3018 requires such denial, and, in its absence, the affirmative defenses should be regarded as conceded. This is a gross misreading of CPLR 3018. Movant has apparently conflated its two sub-sections, without realizing that they describe separate aspects of pleading. An assertion in a complaint or a counterclaim must be specifically denied (or there must be a denial of information and belief), or else it is deemed admitted. There is absolutely no requirement for a plaintiff to do the same with regard to each and every affirmative defense asserted in a defendant's answer.

In motion four, defendant also seeks to take a default based on plaintiff's "failure to plead" to allegations 15, 23 and 24 of defendant's counterclaim. If plaintiff did not address these paragraphs, they would indeed be deemed admitted by her. There are several problems with this prong of defendant's motion. First, it is nowhere mentioned in the notice of motion, but instead relegated to the penultimate sentence of the second supporting affidavit. This is insufficient notice for a purported basis for dismissal. Second, and more important, plaintiff did in fact deny paragraph 24 of the counterclaim. Paragraph 15 of the counterclaim merely recounts which parties were present at the closing, and paragraph 23 asserts that Torres is not a public figure. Plaintiff's admission of these facts is obviously not a basis for a default judgment against her, or for a dismissal of her claim.

In defendant's final affirmation, treated here as a reply, certain further arguments are raised, which

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require brief discussion. Defendant claims that Bilski misrepresented what plaintiff has done regarding discovery in the Bilski affirmation, p. 33 (reply, p.6). However, there is no page 33 anywhere in plaintiff's submissions, nor even a paragraph 33. Defendant emphasizes that his counterclaims remain viable, despite his failure to engage in discovery, because the Court has not set a time limit on the conduct of discovery, which is true. It is, however, jarring to hear this point made by a defendant who is demanding the dismissal of plaintiff's claims for, inter alia, the very same failure to conduct discovery.

More significantly, defendant is in error when he argues that the Court's 2010 dismissal of plaintiff's first cause of action demonstrates Torres' blamelessness in the transactions with plaintiff. The dismissal of the first cause of action was precipitated by the Court's conclusion that plaintiff could not sustain her claim to ownership of the house, no matter what Torres did or did not do. This result had no connection to Torres' conduct.

Finally, defendant makes some effort at arguing that the instant action should be dismissed for lack of indispensable parties. However, defendant makes no attempt to show that the parties he mentions meet the criteria of necessary parties, or that the Court should order their joinder under the tests prescribed in CPLR 1001. Specifically, defendant names other persons who took part in the transaction and closing which gave rise to this action, and suggests that all of them are indispensable, without justifying the contention. The mere fact that defendant would like them joined does not make them indispensable.

It was defendant Torres who undertook a fiduciary duty to plaintiff and guided events from the beginning. Defendant always has the option of impleading the other persons mentioned by him, as third party defendants. In the alternative, if the role of these persons might be as witnesses to the various events, they can be deposed as non-parties. Defendant has not indicated how he would be prejudiced, or how an effective judgment would be precluded, in the event of non-joinder, which would be key considerations in an effort to dismiss on this basis. For these reasons, the brief reference to a possible dismissal for non-joinder of

purportedly indispensable parties is insufficient. Therefore, motion four is denied as well.

VII. Motion Five.

Motion five was initiated by an order to show cause brought by Bilski, seeking to be relieved as counsel for plaintiff. Bilski cites the fact that plaintiff has not responded to his communications and has not been in contact with him for over two years. Defendant opposes the motion, which is somewhat odd, in that a motion of this kind is frequently a prequel to the complete abandonment of an action, as even a plaintiff anxious to proceed often encounters difficulty finding a second lawyer after the first has withdrawn. One would think defendant should find this motion to be an encouraging sign of a good result to come, and encourage the withdrawal.

Perhaps defendant's response is yet another manifestation of the fact that his animus toward plaintiff's attorney has greater importance for him than the issues in this lawsuit. In any event, defendant will have his chance to ultimately either enjoy or regret the choice to keep Bilski in the action, because he is correct in his basis for opposing motion five. In a previous motion to withdraw, Bilski failed to serve plaintiff, causing the Court to deny the application with leave to renew, in an order dated March 15, 2013. In that order, the Court specified the conditions under which the renewed application was to be made, stating: "Any renewed application shall be made by Order to Show Cause, include a copy of this Order, and specify and document the steps taken to locate plaintiff, and, at the very least, provide in the order for service upon plaintiff at her last known address." In motion five, Bilski has complied with all of the above conditions, except, arguably, the most important – that of specifying and detailing the steps taken to locate plaintiff.

Bilski's exhibits to the motion show that he last attempted to contact plaintiff by mail over two years ago, at the "last known address" now used to inform her of the motion. He states that he attempted to telephone her in 2013 without success, but does not state whether he could discern that it was her proper number, based on any answering message. He also attempted to send her an e-mail message in 2013, and claims that there was no

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response, but he does not specifically state whether the e-mail was deliverable or undeliverable.

The Court clearly directed Bilski to specify and document the steps taken to locate plaintiff and provide for service at her last known address. The wording of the order was changed from "or" to "and," which the Court emphasized by initialing the change. Under the circumstances here prevailing, the Court cannot be assured that plaintiff had notice of the motion by any means at all, let alone by mailing to her two year old address.

In his "reply," (p. 15), defendant's counsel asserts that, on the submission date of the withdrawal motion, defendant's counsel intimated to Bilski that he had information as to a phone number and work address which would enable Bilski to contact plaintiff, and that Bilski expressed no interest. Whether this is accurate or not, it is imperative for an attorney who seeks to be relieved that he take all reasonable measures to ensure that the client is informed as to the withdrawal motion, and has an opportunity to respond. Consequently, the motion is denied, with leave to renew as aforesaid.

By reason of the foregoing, defendant Torres' motions one, two, three and four are denied in all respects, as are the two cross-motions of plaintiff's counsel, Christopher Bilski. The motion of Bilski to withdraw as counsel is denied, with leave to renew.

This constitutes the Decision and Order of the Court.

Dated: 12/3/13

MARK FRIEDLANDER, J.S.C.