

**Flores v Acosta**

2017 NY Slip Op 33173(U)

December 5, 2017

Supreme Court, Nassau County

Docket Number: 603085/16

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK**

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

STEVEN FLORES,

Plaintiff,

- against -

TRIAL/IAS PART 35  
NASSAU COUNTY

Index No.: 603085/16  
Motion Seq. No.: 01  
Motion Date: 10/10/17

BENJAMIN ACOSTA a/k/a NESTOR GUERRA, NOBER  
BENITEZ, ENTERPRISE HOLDINGS, INC., PATRICIA  
BUCHENBERGER and THOMAS E. BUCHENBERGER,

Defendants.

**The following papers have been read on this motion:**

	Papers Numbered
Order to Show Cause, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Matthew R. Bruzzese, Esq. ("Bruzzese"), counsel for defendant Nober Benitez ("Benitez"), moves, pursuant to CPLR § 321(b), for an order permitting the law firm of Peknic, Peknic & Schaefer, LLC to be relieved as attorneys for defendant Benitez and for an order appointing the law firm of Reardon & Sclafani PC as attorneys for defendant Benitez. Counsel for defendant Patricia Buchenberger submitted opposition to the motion.

In support of the motion, Bruzzese submits, in pertinent part, that, "[t]his action stems from a motor vehicle accident that occurred on August 19, 2015 on Sunrise Highway and Jackson Avenue in Seaford, New York. This action was commenced by the filing of a Summons

and Verified Complaint dated May 2, 2016.... Issue was joined on behalf of Defendants BENJAMIN ACOSTA a/k/a NESTOR GUERRA and NOBER BENITEZ by service of a Verified Answer dated May 27, 2016.... Due to a conflict of interest, representation of Defendant BENJAMIN ACOSTA a/k/a NESTOR GUERRA was transferred from the office of the undersigned to Carman, Callahan & Ingham, LLP through a Consents (*sic*) to Change Attorney dated September 26, 2016.... On June 9, 2017, Honorable Denise L. Sher issued an Order consolidating the instant matter with *Luis Tucios Zuniga v. T. E. Buchenberger, P.M. Buchenberger and Benjamin Acosta*, Index No. 2283/16 and *Patricia Buchenberger and Cynthia O'Brien v. Enterprise Holdings, Inc., Benjamin Acosta a/k/a Nestor Guerra and Nober Benitez*, Index No. 5138/16 for joint trial.... These matters are not currently on the trial calendar. As previously stated, the office of the undersigned initially submitted an answer for Defendants BENJAMIN ACOSTA a/k/a NESTOR GUERRA and NOBER BENITEZ.... Due to a conflict of interest it was deemed that the representation of both Defendants was to be transferred from the office of the undersigned.... Upon information and belief, Reardon and Sclafani, P.C., had been retained to represent Defendant NOBER BENITEZ in the matter of *Patricia Buchenberger and Cynthia O'Brien v. Enterprise Holdings, Inc., Benjamin Acosta a/k/a Nestor Guerra and Nober Benitez*, Index No. 5138/16. Being in that Reardon and Sclafani, P.C. had already undertaken representation of Defendant NOBER BENITEZ on the consolidated matter, it was agreed by and between the office of the undersigned and Reardon and Sclafani, P.C. that they would take over representation of Defendant NOBER BENITEZ in the instant matter. Upon information and belief, the office of the undersigned, as well as Reardon and Sclafani, P.C., made numerous attempts to locate and contact Defendant NOBER BENITEZ in an effort to execute a Consent to Change Attorney but have (*sic*) unsuccessful to date. Being in that the office of the undersigned is faced with a conflict of interest and in the interest of moving this matter forward, the office of

the undersigned hereby requests that this honorable Court issue an Order appointing Reardon and Sclafani, P.C. as the attorneys of record for Defendant NOBER BENITEZ in the instant matter of *Steven Flores v. Benjamin Acosta a/k/a Nestor Guerra, Nober Benitez, Enterprise Holdings, Inc., Patricia Buchenberger and Thomas E. Buchenberger*, Index No. 603085/16 and relieving Peknic, Peknic & Schaefer, LLC as attorneys for Defendant NOBER BENITEZ." See Bruzzese's Affirmation in Support Exhibits A-H.

In opposition to the motion, counsel for defendant Patricia Buchenberger submits, in pertinent part, that, "[t]hese papers are in limited opposition to co-defendant's order to show cause to appoint a new attorney. The instant case is one of three personal injury actions that have been joined for trial.... The underlying car accident case is a 'question of lights' case where there are two independent witnesses listed on the police report dated August 19<sup>th</sup>, 2015.... Your affirmant recently went through the expense of hiring an investigator to locate the aforesaid witnesses and then coordinate with them of the logistics of attending a deposition during business hours on a work week. The non-party deposition of non-party witness Anthony Leone, who was subpoenaed is scheduled for October 10<sup>th</sup>, 2017, which is the return date for this Order to Show Cause and the other non-party witness Patrick Siegaler is scheduled for November 17<sup>th</sup>, 2017. Your affirmant has no issue with the requested relief in the order to show cause so long as the change in attorneys does not interfere with the currently subpoenaed non-party witness depositions." See Defendant Patricia Buchenberger's Affirmation in Opposition Exhibits A-C.

The decision to grant or deny permission for counsel to withdraw lies within the sound discretion of the Court. See *Zhan v. Sun Wing Wo Realty Corp.*, 208 A.D.2d 668, 617 N.Y.S.2d 523 (2d Dept. 1994). Pursuant to the Rules of Professional Conduct, 22 NYCRR 1200.00 Rule 1.16(c)(7), a lawyer may withdraw when his/her client renders it unnecessarily difficult for the lawyer to carry out the employment as counsel in an effective manner. See *Matter of Busby*, 207

A.D.2d 886, 616 N.Y.S.2d 755 (2d Dept. 1994). Where counsel has demonstrated good and sufficient cause, withdrawal is warranted. *See J.N. Heinike Assoc., Inc. v. Liberty National Bank*, 142 A.D.2d 929, 530 N.Y.S.2d 355 (4<sup>th</sup> Dept.1988). Under the circumstances herein, the Court is satisfied that defendant Benitez's counsel has demonstrated such good cause and, therefore, the motion for Peknic, Peknic & Schaefer, LLC to be relieved as counsel for defendant Benitez in the above captioned action, is hereby **GRANTED**.

Accordingly, it is

**ORDERED** that Peknic, Peknic & Schaefer, LLC is relieved as counsel of record for defendant Benitez, effective December 5, 2017; and it is further

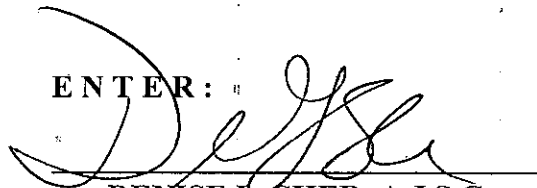
**ORDERED** that the outgoing counsel, Peknic, Peknic & Schaefer, LLC, shall serve a copy of this Order, by certified mail, return receipt requested, upon defendant Benitez, within ten (10) days of the date of this Order, and shall file proof of service with the clerk of IAS Part 35; and it is further

**ORDERED**, that the law firm of Reardon & Sclafani PC is hereby appointed as counsel for defendant Benitez in the above captioned matter.

All parties shall appear for a Certification Conference in IAS Part 35, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on January 16, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

  
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
December 5, 2017

**ENTERED**

DEC 07 2017

NASSAU COUNTY  
COUNTY CLERK'S OFFICE