

Fruhling v Westreich
2020 NY Slip Op 32080(U)
June 26, 2020
Supreme Court, New York County
Docket Number: 161487/2017
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

-----X

MICHAEL FRUHLING and ADAM HOCHFELDER,

INDEX NO. 161487/2017

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 009

ANTHONY WESTREICH, MAX GLOBAL, LLC, FRIEDMAN,
LLP, RICHARD KLASS, JOHN DOE, XYZ CO.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 196, 197, 198, 199, 206, 210, 214, 215, 216, 217

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

In motion sequence number 009, the law firm of Alonso, Andalkar & Facher, P.C. (AAF) moves to withdraw as counsel for plaintiff Adam Hochfelder and requests a 30-day to stay.

In support, AAF submits the affirmation of Mark J. Alonso, Esq. (NYSCEF Doc. No. [NYSCEF] 197, Affirmation of Alonso.) Alonso asserts that AAF and Hochfelder have “had major disagreements as to strategy, communications with Defendant’s counsel, direction of AAF, and client conduct within the context of proceedings.” (*Id.* ¶ 4.) Alonso further states that Hochfelder “has engaged two lawyers (Jed Rubinfeld, Esq. of Yale Law School and Michael Fruhling, Esq.) as respectively his ‘special counsel’ and ‘private counsel’ which has created a further irrevocable deterioration of the attorney-client relationship.” (*Id.*) Additionally, Alonso asserts that Hochfelder “has failed, refused, or has been unable to compensate [AAF] for its time and the costs and disbursements incurred herein.” (*Id.* ¶ 7.) Lastly, Alonso requests that pending the resolution of motion sequence number 008, the

court should direct that the terms of December 13, 2019 Confidentiality Stipulation previously signed by the attorneys on behalf of the parties shall govern the treatment of any documents produced by any party or non-party in this case. (*Id.* ¶ 1.)

Hochfelder does not dispute that AAF has not been paid. (NYSCEF 215, Hochfelder Aff. ¶ 26.) Hochfelder appends the affirmation of his “personal” counsel Michael Fruhling whose role is allegedly “limited to acting as an intermediary between AAF and ... Hochfelder.” (NYSCEF 214, Affirmation of Fruhling ¶ 4.) Despite being the “personal attorney” for Hochfelder, Fruhling admits that he nor his firm have been retained for this matter. (*Id.*) Hochfelder and Fruhling also argue that Hochfelder would be prejudiced if AAF were to withdraw at this juncture because Hochfelder “cannot possibly retain replacement counsel and bring them up to speed prior to ... the meeting with the Taxing Authorities. Nor will there be enough time for them to learn the facts of the case and argue the motions necessary to obtain production of the worksheets ... and comply with the NYS Department of Finance’s timetable.” (*Id.* ¶ 25.)

Alonso replies that Fruhling was needed to serve as a mediator between Hochfelder and Hochfelder’s retained counsel AAF because Hochfelder allegedly fired AAF several times after February 21, 2020. (NYSCEF 216, Second Affirmation of Alonso ¶ 6.) Apparently, Hochfelder fired AAF because he was not pleased with what appears to be AAF’s reasonable explanation as to why AAF could not argue a particular motion if this court had not scheduled that motion for argument. (*Id.*) Nevertheless, Fruhling subsequently communicated to AAF that Alonso wanted AAF to continue representing Hochfelder in this matter. (*Id.* ¶ 8.)

In yet another bizarre turn of events, Alonso asserts in reply that this court should only make any decision permitting AAF leave to withdraw operative *after* this court decides motion sequence number 008. (*Id.* ¶ 15.) The reason is that AAF wishes to continue

working on certain matters concerning motion sequence number 008. (*Id.* ¶ 14.) Indeed, Alonso states, “As much as I and my attorneys with [sic] to be done with this, we believe that the best result would be for us to complete the task for which we were hired - to obtain the explanatory documents and shepherd them safely to Plaintiff’s accountant and then to the taxing authorities.” (*Id.* ¶ 13.)

CPLR 321 (2) provides, “An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.” “[A]n attorney may withdraw as counsel of record upon a showing of good and sufficient cause, and reasonable notice to the client.” (*Mason v MTA New York City Transit*, 832 NYS2d 153, 154 [1st Dept 2017]).

AAF’s requests to this court are contradictory. First, AAF requests permission to withdraw. Second, AAF wishes to continue for an indeterminate period of time ending when documents are delivered to the taxing authority. (NYSCEF 216, Second Affirmation of Alonso ¶ 13.) While AAF may wish to complete certain matters not yet resolved in connection with its representation of Hochfelder, it is clear to this court that continuing this attorney client relationship is impossible. The record demonstrates an attorney and client who are not able to communicate without an intermediary. Clearly, communication between attorney and client has broken down. The client is admittedly not compensating this attorney for its work.

Meanwhile, other attorneys are popping into this case without filing notices of appearances. CPLR 321 (a) provides that a party may “prosecute or defend a civil action in person or by an attorney.” However, where there is no appearance, an attorney lacks authority to make any motion on behalf of a party. (*Worme v Merrill*, 24 Misc 2d 1006, 1007

[Sup Ct, Nassau County 1960.) To the extent that a party appears by an attorney, such party may not act in person in the action except by consent of the court. (CPLR 321 [a].) Here, neither Rubinfeld, nor Fruhling have filed a notice of appearance for Hochfelder. Until now, only AAF has filed an appearance and only AAF has had authority to represent Hochfelder. While there is legal authority that would recognize the email communications with this court by Rubinfeld (March 17, 18 and 23, 2020) and Fruhling (June 15, 2020) on behalf of Hochfelder as notices of appearance, the attorneys argue against such a reading. As Judge McLaughlin pointed out in his practice commentaries to McKinney's Consolidated Laws of N.Y., Book 7B [CPLR C320:1, p. 363] "(t)here is no express provision as to the contents of a notice of appearance. A notice from an attorney or even a litigant indicating a willingness to litigate any question in connection with the lawsuit should suffice, no matter what form it takes." (*Viera v Uniroyal, Inc.*, 142 Misc 2d 1099, 1108 [Sup Ct, NY County 1988], *aff'd*, 148 AD2d 349 [1st Dept 1989].) This court prefers clear intent to represent a party.

Hochfelder shall represent himself unless an attorney files a notice of appearance. The court will not recognize or give attention to any communications by attorneys on behalf of Hochfelder unless that attorney has filed with the court in NYSCEF a notice of appearance in this case.

Accordingly, it is

ORDERED that the motion of AAF (moving counsel) to withdraw as counsel for plaintiff Adam Hochfelder is granted to the extent directed in this order, upon moving counsel's filing proof of compliance with all of the following conditions; and it is further

ORDERED that within 3 days of entry of this order on NYSCEF, moving counsel shall serve a copy of this order with notice of entry upon Adam Hochfelder at his last known address by USPS Priority Mail, or other overnight express mail, with proof of service to be filed in NYSCEF, and by electronic mail, if known; moving counsel shall also serve a copy of this order with notice of entry upon all counsel of record through NYSCEF within 3 days of this order; and it is further

ORDERED that Adam Hochfelder may, within 10 days of this order, appoint substitute counsel and he is referred to the New York City Bar Association's Legal Referral Service (212) 626-7373 for assistance with engaging substitute counsel. Otherwise, the court will presume that he is self-represented; and it is further

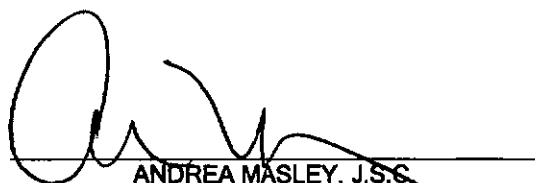
ORDERED that no further proceedings may be taken against defendant Adam Hochfelder without leave of this court until 30 days after the date of this order; and it is further

ORDERED that Alonso's request regarding the December 13, 2019 Confidentiality Stipulation is denied without prejudice to Hochfelder, or his new counsel, making such a motion expect that any agreement entered by the attorneys for the parties, also binds the parties to this action.

Motion Seq. No. 009:

June 26, 2020

DATE


ANDREA MASLEY, 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