

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ABHISHEK VERMA,

Plaintiff,

-against-

C. EDMONDS ALLEN,

Defendant.
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USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/12/13

MEMORANDUM AND ORDER

12 Civ. 1182 (ALC)(KNF)

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KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE

INTRODUCTION

Lynn E. Judell, Esq. (“Judell”), counsel to Shechtman Halerin Savage, LLP (“SHS”), attorneys for the plaintiff, Abhishek Verma (“Verma”), has made a motion for an order relieving her and SHS of the obligation of continuing to represent Verma in this action. The defendant, C. Edmonds Allen (“Allen”), who is proceeding pro se, opposes the motion.

BACKGROUND

On November 1, 2012, Judell attempted to file the instant motion to withdraw as Verma’s counsel; however, on that date, the Electronic Case Filing System (“ECF”) for the Southern District of New York rejected her filing, and sent her an e-mail notification directing her to “RE-FILE” the motion. Although no motion was pending, because of ECF’s rejection of Judell’s filing, Allen submitted to the Pro Se Office for this judicial district, a response in opposition to Judell’s rejected filing, which the Pro Se Office filed on November 21, 2012. Judell failed to comply with ECF’s charge; therefore, on January 11, 2013, the Court issued an Order directing her to “re-file the motion . . . unless she has determined not to pursue the motion.” On January 22, 2013, Judell re-filed her November 1, 2012 motion to withdraw, without alteration. In

response to Allen's opposition to her motion to withdraw, Judell filed a reply affirmation in further support of her motion; that document is dated December 5, 2012.

Judell's Motion to Withdraw as Counsel to the Plaintiff

Through her declaration filed in support of her motion to withdraw, Judell indicates that "on June 8, 2012, Plaintiff was arrested by the Central Bureau of Investigation . . . in India." According to Judell, she has "not been able to communicate with Plaintiff since his incarceration in June 2012. He is still in prison and there is no definite release date." In addition, Judell avers that "[e]ven before Plaintiff was incarcerated, he ceased paying SHS's legal fees. SHS received only one payment from Plaintiff at the commencement of the matter. There are five outstanding invoices for services rendered from February 2012 through September 2012 that total almost \$20,000. In addition, Plaintiff has provided no assurances that any past fees or fees incurred in the future will be paid." Furthermore, Judell notes that "[o]n or about October 8, 2012, [she] advised [Allen] that SHS was intending to make this Motion [to Withdraw]. [Allen] advised [her] that he consents to this Motion to permit SHS to withdraw as counsel."

Allen's Opposition to Judell's Motion

On November 21, 2012, in response to Judell's motion to withdraw, Allen filed an affirmation in opposition accompanied by a Notice of Motion seeking "an order pursuant to Rule 11 of the Federal Rules of Civil Procedure . . . dismissing the instant action with prejudice as counsel for plaintiff has commenced a frivolous action and has discovered that there is no evidence to support the action and would like to withdraw to protect the law firm from sanctions under Rule 11."¹ According to Allen, Judell's motion to withdraw as plaintiff's counsel should

¹ Through his "motion," Allen appears to be seeking the dismissal of the plaintiff's complaint, pursuant to Rule 11, and opposing Judell's motion to withdraw. Although Allen reproduced the full text of Rule 11

(continued...)

be denied because, inter alia, “her contention that she is unable to communicate with the Plaintiff, [since his incarceration in June 2012,] is untrue.” Allen maintains that Judell’s law firm, SHS, was retained by Verma through his Indian attorney, Gaurang Kanth, Esq. (“Kanth”).² Allen contends that Judell’s contention that her ability to represent Verma has been adversely affected by his incarceration is unfounded. To support this contention, Allen attached to his submission, as Exhibit A, a September 25, 2012 e-mail message sent by Judell to Kanth, in which Judell writes:

I appreciate your willingness to discuss the balance due with AV [Abhishek Verma]. In addition to the money, there is the issue of the lack of evidence that the transfer of funds from AV to CEA [C. Edmonds Allen] pursuant to the April 2000 escrow agreement. At the risk of sounding like a broken record, it is impossible to make the motion for a default judgment without evidence of the transfer of funds. If we fail to make the motion, it is likely that the court will dismiss the action It appears from the Restated Agreement that the funds had not been rec’d as of Feb 2004 and the parties were restating their intention to transfer funds in the future. This document highlights my concern regarding proof of transfer of funds and raises the related issue of the authenticity of the Feb. 11 Escrow Agreement. Let me know if you have any thoughts. Unfortunately, at the end of the day, I think I have no choice but to make the motion to withdraw.

According to Allen, “[i]n this email, [Judell] acknowledges that Mr. Kanth is meeting regularly with Plaintiff in Judicial Custody in India and hence via Mr. Kanth [Judell] has access to Plaintiff.” Furthermore, Allen maintains that, “[Judell] and the Plaintiff were exchanging instructions solely via Mr. Kanth even when Plaintiff was not in Judicial Custody and not

¹(...continued)

in his “motion,” he seems to have overlooked paragraph (c)(2) of the Rule, requiring that “[a] motion for sanctions [under Rule 11] . . . be made separately from any other motion.” Fed. R. Civ. P. 11(c)(2). Incorporating a Rule 11 motion into the opposition made to another motion does not constitute making a separate Rule 11 motion. Accordingly, inasmuch as Allen seeks sanctions against the plaintiff and his counsel pursuant to Rule 11, via his opposition to Judell’s motion, the Court is unable to provide him that relief.

² The surname of Verma’s Indian counsel is spelled differently and inconsistently, in the writings submitted to the Court by the parties. In their respective writings, when referring to Verma’s Indian counsel, Judell employs both the surnames “Kanthcorp” and “Kanth,” and Allen uses the surname “Kanth.” However, both parties use the same first name, “Gaurang,” when referring to the individual they identify as Verma’s Indian counsel. Since it appears that both parties are referring to the same individual in their writings, but it is unclear which version of the surname is correct, the Court will refer to Verma’s Indian counsel by the surname “Kanth,” which is the version utilized most often by the parties.

directly.” Allen makes this assertion based on a January 24, 2012 letter Judell sent to him, inviting Allen to meet with her and Kanth, while Kanth was visiting New York, to discuss the return of funds Verma allegedly deposited with Allen. The letter is attached as an unlabeled exhibit to Allen’s submission in opposition to Judell’s motion to withdraw as counsel to Verma.

In addition, Allen contends that Judell’s claim that she has not been compensated for her work is without merit. According to Allen, this is so because Judell “works for a very respectable law firm and her contention that the firm was not paid remunerations after accepting the brief is a smoke screen at best as no law firm with such repute would withdraw from a case where such a large sum of money was involved if indeed the evidence existed and the facts were true.”

Judell’s Reply

In her reply affirmation, Judell repeats the assertion she made in her declaration in support of the motion, specifically that she spoke with Allen on October 31, 2012, “and he consented to the withdrawal of SHS. The Motion was served a few weeks later (on October 31st) and Defendant did not file any opposition. However, on the day of the initial pretrial conference (November 21, 2012), Defendant announced to the Court (and to me) that he had withdrawn his consent and had, that morning, filed an opposition to the Motion and also moved for Rule 11 sanctions.” According to Judell, she “can clearly and unequivocally state that [she has] not spoken with Plaintiff since before he was incarcerated in June 2012. [She has] attempted to communicate with him on numerous occasions via email . . . [and has] received only one email response from him in six months.” Judell asserts that Allen’s allegation that she has access to the plaintiff via Kanth is untrue, as she maintains that

Mr. Kanth has withdrawn from representing Verma. Moreover, the fact that Mr. Kanth may have had access to Plaintiff is irrelevant. Mr. Kanth was representing

Plaintiff in various matters in India; he is not counsel in this matter. There is no dispute that Plaintiff has ceased cooperating with me in the prosecution of this action, by among other things, failing to communicate.

Furthermore, Judell avers that Allen “does not and cannot dispute that Plaintiff has failed to pay SHS’s invoices for almost a year.”

Judell avers that, with respect to the e-mail message she sent to Kanth, which is annexed to Allen’s opposition, she was seeking “further explanation from Plaintiff and Mr. Kanth regarding the transfer of funds pursuant to the original Escrow Agreement [Verma alleges he had with Allen]. The communication reflects [her] attempt to highlight this issue, in addition to explaining that [she] was planing to move to withdraw.” Judell asserts that this e-mail message is a privileged communication, but, in any event, “the matters raised in [the] email are irrelevant to the issue of whether SHS’s Motion should be granted.”

DISCUSSION

The Second Circuit Court of Appeals has embraced the view that “[n]on-payment of legal fees, without more, is not usually a sufficient basis to permit an attorney to withdraw from representation.” U.S. v. Parker, 439 F.3d 81, 104 (2d Cir. 2006) (citation omitted); Bennett v. Mukasey, 525 F.3d 222, 224 (2d Cir. 2008). “In most cases, . . . courts have permitted counsel to withdraw for lack of payment only where the client either deliberately disregarded financial obligations or failed to cooperate with counsel.” Parker, 439 F.3d at 104 (internal quotation marks and citation omitted).

Judell contends that “[t]here are five outstanding invoices for services rendered [to Verma] from February 2012 through September 2012 that total almost \$20,000. In addition, Plaintiff has provided no assurances that any past fees or fees incurred in the future will be paid.” Although Judell contends that Verma has failed to pay the above-noted legal fees, in moving to withdraw as his counsel, she was required to provide the Court with facts, sufficient

to support a finding that Verma is either deliberately disregarding his financial obligations to her and SHS or not cooperating with her; the record does not support such a finding. For example, the Court is unable to reconcile Judell's claim, through her declaration submitted in support of her motion, that she has "not been able to communicate with [Verma] since his incarceration in June 2012," with her assertion in her reply affirmation, filed on December 5, 2012, that she has "attempted to communicate with him on numerous occasions via email . . . [and has] received . . . one email response from him in six months." Judell has indicated that her only attempts to communicate with Verma have been via e-mail messages; but owing to Verma's status as a pretrial detainee in an Indian jail, it is unlikely that he is provided the means to access the Internet to send and receive electronic messages. In any event, the record before the Court is barren of facts indicating what effort, if any, Judell has made to: (i) communicate with Verma using the United States postal system; or (ii) visit Verma in India, after his incarceration, so that she might communicate directly with him and ascertain whether, notwithstanding his incarceration, he remains ready, willing and able to cooperate in the prosecution of this action and to satisfy his financial obligations to her and SHS.

"[O]ne can conceive of a situation in which a client's stark refusal to pay [legal fees], coupled with a demonstrated inability to do so, imposes such financial hardship on the attorney that continued representation would be unfair." Rophaiel v. Alken Murray Corp., No. 94 Civ. 9064, 1996 WL 306457, at *1 (S.D.N.Y. June 7, 1996). However, based on the record before it, the Court is unable to conclude that such a situation is present here. As Judell has not demonstrated that Verma has "either deliberately disregarded [his] financial obligations [to her and SHS] or failed to cooperate with counsel," no basis exists for granting her motion to withdraw as Verma's counsel. See Parker, 439 F.3d at 104.

CONCLUSION

For the foregoing reasons, the instant motion, Docket Entry No. 25, is denied.

Dated: New York, New York
June 12, 2013

SO ORDERED:

Copy mailed to:

C. Edmonds Allen



KEVIN NATHANIEL FOX
UNITED STATES MAGISTRATE JUDGE