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Index #: E2023008006

Date: 01/17/2024

Time: 5:12:39 PM

Return To:
RICHARD FRANCO
400 Meridian Centre Blvd.
Suite 200
Rochester, NY 14618

McClare, Susan
McClare, Brian
178 Selborne Chase, LLC

Curts, Christian
Curts Properties, LLC
178 Selborne LLC

Total Fees Paid: \$0.00

Employee:

State of New York

MONROE COUNTY CLERK'S OFFICE
WARNING – THIS SHEET CONSTITUTES THE CLERKS
ENDORSEMENT, REQUIRED BY SECTION 317-a(5) &
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JAMIE ROMEO

MONROE COUNTY CLERK



NEW YORK STATE SUPREME COURT
COUNTY OF MONROESUSAN MCCLARE, BRIAN MCCLARE and
178 SELBORNE CHASE, LLC

Plaintiffs,

-vs-

CHRISTIAN CURTS, CURTS PROPERTIES, LLC
and 178 SELBORNE LLC

Defendant.

**AFFIRMATION IN RESPONSE
TO ORDER TO SHOW CAUSE
AND IN OPPOSITION TO
STAY**

Index No.: E2023008006

Defendants, CHRISTIAN CURTS, CURTS PROPERTIES, LLC and 178 SELBORNE LLC (“Defendants”) and through its attorneys Davidson Fink LLP, provides the following Affirmation in Response to Plaintiff’s Order to Show Cause.

1. I am an attorney duly admitted to practice law in the State of New York.
2. I am counsel of record to Defendants Christian Curts, Curts Properties, LLC and 178 Selborne LLC (hereinafter “Defendants”).
3. As Counsel Defendants, I am fully familiar with the facts and circumstances of this case.
4. On or about November 29, 2023, Plaintiff Brian McClare (hereinafter “McClare”) sent a letter to the Court stating that Mr. Cheney informed him he was no longer willing to represent him in this matter. (Exhibit “A” hereto).
5. Defendants filed a letter in response on November 30, 2023, asking that the Court direct Mr. Cheney to file a motion to discontinue and/or that Mr. Cheney obtain new counsel in light of his letter, in an effort to prevent undue delay, particularly given that this case involves

claims of ownership to a commercial property, costing Defendants money with each day the matter is not resolved.

6. McClare took no action whatsoever to find new counsel and continued to contact Mr. Cheney despite Cheney's repeated advice to find new counsel. (*NYSEF Doc. No. 35*, ¶ 2-8).

7. McClare's letter demonstrates that Mr. Cheney was aware that he would need to withdraw as counsel in November 2023, and that McClare was aware that he would need to find new counsel, as confirmed in the Cheney Affirmation. (*Ex. "A"*; *NYSEF Doc. No. 35*).

8. Given the undue delay caused by McClare and his attorney, Defendants respectfully request that in the event the Order to Show Cause is granted, Plaintiff should be given no more than thirty (30) days to acquire new counsel. (see, CPLR §321(c)).

9. Defendants also ask that the Court calendar their pending Motion for Summary Judgment as soon as possible following the expiration of any stay the Court may be inclined to grant.

PLAINTIFF IS NOT ENTITLED TO A STAY PURSUANT TO CPLR §321(C)

10. In general, CPLR 321(c) requires that there be a thirty (30) day stay of all proceedings after counsel is permitted to withdraw from an action over their client's objection.

11. This rule does not apply in the instant case.

12. The exception to the automatic stay upon death or removal of an attorney was applied in *Art Cap. Bermuda Ltd. v. Bank of N.T. Butterfield & Sons Ltd.*, 213 A.D.3d 596, 597, 185 N.Y.S.3d 35, 37 (2023).

13. In *Art Cap. Bermuda Ltd.*, a plaintiff's attorney withdrew from representing the plaintiffs because the plaintiffs failed to pay their legal bills and were not cooperating with the

attorney. The First Department held that the Supreme properly denied the plaintiff an automatic stay pursuant to CPLR 321(c):

“We also reject plaintiff’s argument that a default judgment was entered against violation become uncooperative with the representations and failed to pay attorneys’ fees, not because counsel had ‘died, become [] physically or mentally incapacitated, or [been] removed, suspended or otherwise bec[ame] disabled’”.

(*Id.* at 597).

14. Similarly, the Appellate Division also affirmed denial of a stay pursuant to CPLR §321(c) in Transasia Commodities Inv. Ltd. v. NewLead JMEG, LLC, 169 A.D.3d 591, 592, 95 N.Y.S.3d 156, 157 (2019), where “their counsel withdrew due to defendants-appellants’ failure to pay accrued counsel’s fees over an extended period of time”. (*Id.* at 592).

15. In this case, just as in Art Cap. Bermuda Ltd. and Transasia Commodities Inv. Ltd. v. NewLead JMEG, LLC, 169 A.D.3d 591, 592, 95 N.Y.S.3d 156, 157 (2019), Cheney’s affirmation in support of the instant Order to Show Cause (“OSC”) testifies that, “it would take thirty (30) days to find the time that Plaintiff demanded that this firm find in a single day”. Moreover, and most importantly, Cheney testifies that Plaintiffs have not paid Cheney for his legal services, and that they have no intention of doing so:

“[T]he cost to draft and file the requested motion in would have been approximately Four Thousand and 00/100 Dollars (\$4,000.00), with little chance for a positive legal outcome. Plaintiff already has a large legal invoice with my firm that, upon information and belief, Plaintiff has no funds to actually pay the invoice and it is becoming increasingly clear that Plaintiff has no intention of actually paying for the legal services provided”.

(*NYSEF Doc. No. 36*).

16. Here, just as in the Appellate cases cited above, because the withdrawal of Plaintiff’s counsel was caused by a “voluntary act of the client, the court has discretion to permit

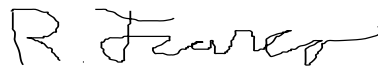
the matter to proceed without such a stay". (*Sarlo-Pinzur v. Pinzur*, 59 A.D.3d 607, 608, 874 N.Y.S.2d 499, 500 (2nd Dept. 2009)).

CONCLUSION

17. As fully set forth above, Plaintiff's own conduct in failing to cooperate with is attorney and failing to pay attorney fees is the reason for Cheney's withdrawal as counsel. As a result, this Court should refuse to stay the action pursuant to CPLR §321(c), and permit Plaintiffs' Motion for Summary Judgment to be heard as soon as possible in order to minimize and mitigate the accrual of lost income resulting from this frivolous action.

WHEREFORE, it is respectfully requested that Defendants' Motion be granted in its entirety, along with such further relief as the Court may deem just and proper.

DATED: January 17, 2024



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