SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

OLEG ITKIN : Index No. 652570/2017

Plaintiff, : AFFIRMATION IN SUPPORT OF MOTION TO WITHDRAW

- against - :

FYRE MEDIA, INC., FYRE FESTIVAL, LLC and WILLIAM MCFARLAND, :

Defendant. :

MICHAEL LEVINE, an attorney duly admitted to practice law in the Courts of the State of New York, affirms the truth of the following, under the penalty of perjury and pursuant to CPLR Rule 2106:

1. I am counsel to the Defendant William McFarland in the within action and, as such, am fully familiar with all of the facts and circumstances as are hereinafter set forth.

2. This Affirmation is submitted in support of the motion by my firm, Levine & Associates, P.C. ("L&A") for leave to withdraw as counsel for Mr. McFarland in this case.

3. Although Mr. McFarland executed a Retainer Agreement in this case, he never funded the same as required, and he has advised me that there is no reasonable prospect of funding the same in the future.

4. As such, Mr. McFarland has consented to our motion for leave to withdraw, and has further agreed to accept service of the instant Order to Show Cause vie e-mail (which is the primary manner in which I communicate with him).

The Failure to Pay a Retainer Fee Justifies Withdrawal

5. Mr. McFarland's failure to pay legal fees warrants an order from this Court granting L&A's motion to be relieved as counsel. *Police Officers for a Proper Promotional Process v. Port Auth. of New York and New Jersey*, No. 11 Civ. 7478 (LTS)(JCF), 2012 WL 4841849, at *1 (S.D.N.Y. Oct. 10, 2012) (citation omitted) ["it is well-settled … that nonpayment of legal fees is a valid basis for granting a motion to withdraw …"]; *Centrifugal Force, Inc. v. SoftNet Commc'n, Inc.*, No. 08 Civ. 5463(CM)(GWG), 2009 WL 969925, at *2 (S.D.N.Y. Apr. 6, 2009) ["Attorneys are not required to represent clients without remuneration, and the failure to pay invoices over an extended period is widely recognized as grounds for leave to withdraw."]; *Melnick v. Press*, No. 06-cv-6686 (JFB)(ARL), 2009 WL 2824586, at *3 (E.D.N.Y. Aug. 28, 2009) [same]; *Team Obsolete Ltd. V. A.H.R.M.A. Ltd.*, 464 F.Supp.2d 164, 166 (E.D.N.Y. 2006) ["Courts have long recognized that a client's continued refusal to pay legal fees constitutes a 'satisfactory reason' for withdrawal …]; *D.E.A.R. Cinestudi S.P.A. v. Int'l Media Films, Inc.*, No. 03 Civ. 3038 (RMB), 2006 WL 1676485, at *1 (S.D.N.Y. Jun. 16, 2006) ["It is well-settled that nonpayment of fees is a valid basis for the Court to grant counsel's motion to withdraw"] (citation omitted); *Blue Angel Films*, 2011 WL 672245, at *1 (citation omitted) ["[a]lthough there is no clear standard for what may be considered a 'satisfactory reason' for allowing a withdrawal, it seems evident that the non-payment of legal fees constitutes such a reason"]; *Diarama Trading Co. In. v. J. Walter Thompson U.S.A. Inc.*, No 01 Civ. 2950 (DAB), 2005 WL 1963945 at *1 (S.D.N.Y. Aug 15, 2005) ["Satisfactory reasons include failure to pay legal fees"]; *Cower v. Albany Law Sch. Of Union Univ.*, No. 04 Civ. 0643 (DAB), 2005 WL 1606057, at *5 (S.D.N.Y. Jul. 8, 2005) ["It is well settled that nonpayment of fees is a legitimate ground for granting counsel's motion to withdraw"]. Accordingly, "[c]ourts have uniformly granted motions to withdraw when attorneys allege non-payment of fees by their clients." *Itar-Tass Russian News Agency v. Russian Kurier*, Inc., No 95

Civ. 2144 (JGK), 1997 WL 109511, at *2 (S.D.N.Y Mar. 11, 1997), reversed on other grounds by 140 F.3d 442 (2d Cir. 1998). In addition, courts have held that counsel should not be compelled to represent a client *pro bono*. *See, e.g., Cower*, 2005 WL 1606057, at *5 ["The Court cannot force Plaintiff's counsel to proceed *pro bono*."]; *HCC, Inc. v. RH & M Mach. Co.*, No. 96 Civ. 4920 (PKL), 1998 WL 411313, at *1 (S.D.N.Y. Jul. 20, 1998) [granting withdrawal and stating that it would not "impose on counsel an obligation to continue representing [corporate] defendants *pro bono*"].

6. Here, there has been no payment made to L&A and Mr. McFarland have declined to execute a retainer agreement or make any such payments. In fact, the client, while appreciative of L&A's efforts to obtain a time-extension, has indicated that he is not in a position to pay L&A in the underlying action under the terms of L&A's standard retainer agreement.

Relieving counsel at this stage of the litigation would not unduly disrupt the existing case schedule.

7. Where discovery has not yet closed and a case is not "on the verge of trial readiness," withdrawal of counsel is unlikely to cause either prejudice to the client or such substantial disruption to the proceedings as to warrant a denial of leave to withdraw. *Winkfield v. Kirschenbaum & Phillips, P.C.*, No. 12 Civ. 7424 (JMF), 2013 WL 371673, at *1 (S.D.N.Y. Jan. 29, 2013) (quoting *Blue Angel Films*, 2011 WL 672245, at *2); *accord Karimian v. Time Equities, Inc.*, No. 10 Civ. 3773 (AKH) (JCF), 2011 WL 1900092, at *3 (S.D.N.Y. May 11, 2011). Indeed, courts frequently grant motions to withdraw as counsel at equivalent, or even later, stages of litigation. *See, e.g., D.E.A.R. Cinestudi*, 2006 WL 1676485, at *1-2 [granting counsel's motion to withdraw due to lack of payment of fees where discovery was complete and trial was months away]; *Spadola v. New York City Trans. Auth.*, No. 00 CIV 3262, 2002 WL 18, at *1 (S.D.N.Y. Jan. 16, 2002) [allowing counsel to withdraw where discovery had been completed and client had

not paid outstanding legal fees because client "would not be unduly prejudiced by his counsel's withdrawal at this stage of litigation"]; *Promotica of America, Inc. v. Johnson Grossfield, Inc.*, No. 98 CIV. 7414, 2000 WL 424184, at *1-2 (S.D.N.Y. Apr. 18, 2000) [granting motion to withdraw where discovery was closed and case was ready for trial]; *Cf. Furlow v. City of New York*, No. 90 Civ. 3956 (PKL), 1993 WL 88260, at *2 (S.D.N.Y. Mar. 22, 1993) [where document discovery was complete but depositions had not been taken, withdrawal permissible because "this action is not trial ready and resolution of this matter will not be delayed substantially by counsel's withdrawal at this juncture"].

8. Here, the matter is only at the pleading stage and relieving counsel at this stage will have no effect whatsoever on the time schedule for this case.

Defendant McFarland is prepared to represent himself in this matter.

9. At the present time, Defendant McFarland does not have substitute counsel. Defendant McFarland intends to represent himself during the remainder of the pretrial stage of this case, with hopes of securing counsel for the trial. As courts have recognized, "[a] litigant's unrepresented status is often 'not the product of choice,' but 'the result of necessity and economic reality'." Cynthia Gray, *Judicial Ethics and Self Represented Litigants*, American Judicature Society (2005), at p. 11 (quoting *Jacobsen v. Filler*, 790 F.2d. 1362, 1367-68 (9th Cir. 1985) (Reinhardt, dissenting)). The right of self-representation is as old as the Judiciary Act of 1789, is codified in the United States Code at 28 U.S.C. § 1654, and has been affirmed by the Supreme Court in *Faretta v. California*, 422 U.S. 806, 812-13 (1975). For Defendant McFarland, it is not only a right but a necessity to act *pro se*.

action and nonetheless does not wish to retain L&A to represent the corporate Defendant.

WHEREFORE, for all the foregoing reasons, L&A respectfully requests that the Court enter an order relieving L&A as counsel for Defendant McFarland, permitting Defendant McFarland to proceed *pro se*, directing that Defendant McFarland enter an appearance pro se (or hire replacement counsel) within thirty days of the date of the Order relieving L&A, and awarding to L&A such other further and different relief as to the Court may seem just and equitable.

LEVINE & ASSOCIATES, P.C.

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