

Substitution of Counsel

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IN *SWEET V. SWEET* [1](#) the Family Court considered sanctioning the father's attorney for her failure to attend a scheduled court appearance. The mother's counsel and the law guardian were present, but the father's attorney, who had notice of the appearance, did not show up. Although the father advised the court that he had discharged his attorney, no consent to change attorney was filed with the court, nor was a motion made by her for permission to withdraw.

The court declined to sanction the attorney but admonished her in a written opinion for her failure to follow the proper procedure. This opinion highlights the inconvenience, to the court and to counsel, as well as the serious consequences that flow from a failure to properly substitute counsel. This can adversely affect *either* party.

Provisions for Change

Civil Practice Law and Rules provides that unless the party in a pending action is an infant, an incompetent person or an adult incapable of adequately prosecuting or defending his rights, the attorney of record may be changed by filing with the court clerk a consent to change attorney, signed by the retiring attorney and signed and acknowledged by the party.[2](#) A substitution that does not contain the consent of the retiring attorney fails to comply with the statute and is not effective.[3](#)

Notice of the change of attorney must be given to the attorneys for all parties to the action or, if a party appears without an attorney, to the party.[4](#) The only other method

by which an attorney of record may withdraw or be changed is by an 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.⁵ No court order or consent is necessary when the attorney who is discharged has not filed a notice of appearance.⁶ However, where an attorney has appeared in an action, the representation by that attorney continues until a consent is filed or an order changing attorneys is made. An assertion by a party that he or she is proceeding pro se is insufficient.⁷ If a new action or proceeding is brought, no order or stipulation of substitution is necessary to employ a different attorney.⁸

The authority of an attorney ceases upon the entry of judgment.⁹ Until an attorney of record is discharged in the manner prescribed by law, the attorney is authorized to act for all purposes incidental to the entry and enforcement of the judgment. As to the adverse parties, his authority continues unabated.¹⁰ It has been held that "incidental to the entry and enforcement of the judgment" means that he may issue execution, take the necessary steps to collect it and issue a satisfaction.

After entry of judgment, a client is free to retain another attorney without the necessity of formal substitution.¹¹ The general rule is that the power of an attorney ceases upon entry of final judgment,¹² and it has been held that a different attorney may be employed after entry of judgment without an order of substitution,¹³ to move to open a default or for the purpose of prosecuting an appeal from the judgment.

CPLR §321 (a) provides that a party may prosecute or defend a civil action in person or by attorney. If a party appears by attorney he or she may not act in person in the action, except by consent of the court. Thus, if a client's new attorney is not properly substituted, his acts as an attorney in the case are ineffective.¹⁴ In the absence of a proper substitution, the opposite party is not bound to recognize the attorney claiming to be substituted.¹⁵ He is required to recognize the former attorney as still employed, and service of notices and papers upon the former attorney is proper.¹⁶ Until the attorney of record is discharged in the manner provided by law, the attorney represents the party.¹⁷

CPLR §2103 provides that except where otherwise prescribed by law or an order of the court, papers to be served upon a party in a pending action shall be served upon that party's attorney. If a party has not appeared by an attorney or the party's attorney cannot be served, service must be upon the party. Thus, service of papers upon the attorney of record, rather than the new attorney, constitutes service upon the party.

Although defendant's counsel was aware that plaintiffs' attorney of record had been informally discharged and that present counsel was representing them, the Appellate Division held that it was proper to serve a motion to dismiss upon the attorney of record and not upon present counsel. However, since defendant's present attorneys were never substituted as attorneys of record, they lacked standing to make the motion to dismiss.¹⁸ The court pointed out that a party may not be represented by more than one attorney in an action,¹⁹ and the acts of an attorney who has not been substituted in accordance with CPLR §321(b) should be disregarded.

Pro Se Litigant

The validity of actions taken by or against a pro se litigant where his attorney of record has not followed the proper procedure to be relieved or replaced is unresolved. In *Moustakas v. Bouloukos*,²⁰ the Second Department held that a stipulation of settlement, which was negotiated by the client with the other attorney after he attempted to discharge his attorney by letter, was void because plaintiff's attorney of record in the actions had not been discharged in the manner prescribed by CPLR §321 [b], and was neither present nor consulted during the negotiation and execution of the agreement that purported to settle those actions.

The court held that an attorney of record in an action may only withdraw or be changed or discharged in the manner prescribed by CPLR §321[b]. It was also mindful of Code of Professional Responsibility, DR 7-104(A)(1), which generally prohibits an attorney, in the course of his representation of a client, from communicating on the subject of that representation with a party whom he knows to be represented by an attorney in that matter, and found that such conduct was improper.

The mere delivery of the letter from the client to the attorney did not effectively discharge the latter, who was then attorney of record in the three pending actions,

because no duly executed consent to the change had been filed and served pursuant to CPLR §321[b][1], and no court order granting such change had been made pursuant to CPLR §321 [b][2]. Plaintiff Moustakas had appeared in the pending actions by an attorney and had not thereafter discharged that attorney in the manner prescribed by law; therefore, he could not personally act in person in those actions by settling them without the consent of the court. The Second Department was of the view that CPLR §321 not only protects adverse parties, but has the further salutary purpose of protecting the parties from attorneys who represent other parties in the action.

This result has been rejected by the Third Department and adopted by the Fourth Department. In *Imor v. Imor*,²¹ the defendant husband moved to vacate a judgment of divorce and the settlement agreement incorporated in it, which he entered into after he discharged his attorney of record. The Supreme Court denied his motion.

The Third Department affirmed, holding that his failure to comply with the requirements for changing the attorney of record did not preclude him from entering into a stipulation of settlement. Pursuant to the stipulation of settlement, defendant withdrew his answer in the divorce action and authorized plaintiff "to proceed as if by default, without further notice to him."

Plaintiff thereafter obtained the judgment of divorce by default. Defendant argued that since he was represented by counsel, who served a notice of appearance and an answer in the divorce action, CPLR §321(a) prohibited him from acting personally in the action without court approval, and he was not authorized to enter into the stipulation of settlement. The Third Department found an estoppel, relying upon defendant's acknowledgement in the stipulation that he had discharged his attorneys of record and elected to proceed on his own behalf.

Having terminated the attorney-client relationship, he was estopped from claiming he was represented by counsel and could act only through that counsel. Defendant maintained that in the absence of a formal consent to change attorney signed by his former counsel, as is required by CPLR §321(b)(1) when changing an attorney of record without court approval, the prohibition against acting in his own behalf remained in effect despite his discharge of counsel. The Third Department disagreed, holding that while as a consequence of the failure to comply with the formal requirements of CPLR §321(b)(1) a party cannot deny the

authority of his former attorney of record to act on his behalf, that party could not deny that he had the authority to act on his own behalf after discharging his attorney. To the extent that *Moustakas v. Bouloukos*²² holds to the contrary, the court declined to follow it.

Rights to Fee

In another case the Third Department held that a law firm that was discharged without a signed substitution lacked standing to seek to set aside a stipulation of discontinuance of an action, in an effort to protect its rights to a disputed attorneys' fee. The court rejected the firm's assertion that a failure to follow the procedural requirements attendant to its substitution rendered null and void the subsequent activity by the parties in the action.²³

The Fourth Department adopted the Second Department rule in *Rejewski v. Rejewski*.²⁴ It held that the Supreme Court abused its discretion in denying defendant's motion, based on CPLR §321 (b) (1), to vacate a judgment entered upon a matrimonial Referee's report. After defendant's attorney purportedly withdrew as counsel, and in defendant's absence, plaintiff testified extensively before the Referee, who then issued his findings. Plaintiff contended that defendant consented to his attorney's withdrawal. As the record was devoid of any evidence that defendant executed a consent for his attorney to withdraw, the court granted defendant's motion and vacated all parts of the judgment on appeal except the part divorcing the parties.

Notes

- (1) 177 Misc2d 454 (Fam.Ct,1998).
- (2) CPLR §321 (b) (1).
- (3) *McNally v. Youngs* (1932) 237 AD 787, 262 NYS 828.
- (4) CPLR §21(b)(1).
- (5) CPLR §21(b)(2).
- (6) *In re Estate of Theirich* (1958) 13 Misc2d 155.
- (7) *Candeloro v. Candeloro* (1987, 2d Dept) 133 AD2d 731.
- (8) *In re Mandelkorn's Estate* (1917) 99 Misc 168, 165 NYS 404.
- (9) *Cruikshank v. Goodwin*, 49 NY St. Rep 603, 20 NYS 757.
- (10) *Hendry v. Hilton* (1953) 283 AD 168.
- (11) *Gradl v. Saulpaugh*, 268 App. Div. 787.
- (12) *Davis v. Solomon* (1899) 25 Misc 695, 56 NYS 80, However, see FCA §1120(b), which provides that a law guardian's representation continues when an appeal is taken.

- (13) *Hendry v. Hilton*, supra; *Gradl v. Saulpaugh*, supra.
 - (14) *Palmer v. Palmer* (1969) 62 Misc2d 73.
 - (15) *Felt v. Nichols* (1897) 21 Misc 404, 47 NYS 951.
 - (16) *In re White* (1900) 52 AD 225, 65 NYS 168.
 - (17) *Hess v. Tyszko* (1974, 3d Dept.) 46 AD2d 980.
 - (18) *Dobbins v. County of Erie*, 58 AD2d 733 (4th Dept., 1977).
 - (19) *Kitsch v. Riker Oil Co.*, 23 AD2d 502.
 - (20) 112 AD2d 981 (2d Dept., 1985).
 - (21) 119 AD2d 913 (3d Dept. 1986).
 - (22) Id.
 - (23) *Pemberton v. Dolphin Dev. Corp.* (1987, 3d Dept. 134 AD2d 23.
 - (24) 214 AD2d 954 (4th Dept. 1995).
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