

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MALKA REIZY MOSKOVITZ, SARAH :

FEUERWERGER, BERL FRANKEL, MOSHE :

ECKSTEIN, YISRUEL GOLDSTEIN, ISRAEL:

FRIED, JACOB MOSKOVITZ and VICTOR :

FRANKEL, :

:

Plaintiffs, :

:

vs. :

:

LA SUISSE, SOCIÉTÉ D'ASSURANCES SUR :

LA VIE now known by Merger as :

SCHWEIZERISCHE :

LEBENSVERSICHERUNGS-UND :

RENTENANSTALT, :

:

Defendant and Third-Party :

Plaintiff, :

:

vs. :

:

MOSES KRAUS and CARUSO AG :

:

Third-Party Defendants. :

:

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Case No 2006 Civ. 4404

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO WITHDRAW AS COUNSEL OF RECORD AND FOR FIXING
OF COMMON LAW RETAINING LIEN**

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PRELIMINARY STATEMENT

Herrick, Feinstein LLP (“Herrick”) respectfully submits this memorandum of law in support of its motion, pursuant to Local Civil Rule 1.4, to withdraw as counsel of record for third-party defendant Moses Kraus (“Kraus”).

Herrick is the attorney of record for Kraus in the above-captioned action.¹ Kraus, however, has failed to pay Herrick for legal services rendered and has informed Herrick that he will not pay Herrick’s requested retainer or hourly rates to continue legal representation on a going-forward basis. As of April 24, 2012, the outstanding amount due and owing from Kraus is \$33,743.52. Additionally, Herrick has had difficulty communicating with Kraus and Herrick and Kraus have significant differences of opinion on how to proceed in this action.

Kraus will not be prejudiced by Herrick’s withdrawal as counsel and the case will not be delayed if the Court grants Herrick’s application. There are currently no motions pending before the Court that relate to Kraus and a trial date has not yet been scheduled.

STATEMENT OF FACTS

The facts relevant to this motion are set forth in the supporting declaration of M. Darren Traub, Esq. filed contemporaneously herewith.

¹ Former Herrick partner, Jule Rousseau, is listed as attorney of record. Since filing his appearance, Mr. Rousseau has changed firms to Arent Fox LLP. Therefore, both Herrick and Mr. Rousseau seek leave to withdraw as counsel for Mr. Kraus.

ARGUMENT

Local Civil Rule 1.4 provides:

An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien. All applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties.

It is well-settled law that non-payment of legal fees constitutes a “satisfactory reason” for granting a motion for withdrawal pursuant to Local Rule 1.4. See *Clower v. Shiva Realty of Mulberry*, No. 10 CV 1702 (RPP), 2011 U.S. Dist. LEXIS 112309, at *6 (S.D.N.Y. Sept. 30, 2011) (granting counsel’s motion to withdraw for non-payment) (citing *HCC, Inc. v. R H & M Mach. Co.*, No. 96-cv-4920, 1998 U.S. Dist. LEXIS 10977, 1998 WL 411313, at *1 (S.D.N.Y. July 20, 1998); *Kolacek v. Gemexco Trading, Inc.*, No. 90-cv-5760, 1992 U.S. Dist. LEXIS 571, 1992 WL 14991, at *1 (S.D.N.Y. Jan 22, 1992)). “It is well-settled as a general matter that a client’s inability or refusal to pay can constitute a valid ground for withdrawal from representation.” *Team Obsolete, Ltd. v. A.H.R.M.A. Ltd.*, 464 F. Supp. 2d 164, 165 (E.D.N.Y. 2006).

Here, not only has Kraus not paid his outstanding legal fees of approximately \$33,743.52, but he has informed Herrick that he is not willing to pay Herrick for future legal representation on a going-forward basis for this matter.

“[I]n addition to considering reasons for withdrawal, district courts typically also consider whether ‘the prosecution of the suit is [likely to be] disrupted by the withdrawal of counsel.’” *Blue Angel Films, Ltd. v. First Look Studios, Inc.*, No. 08 Civ. 6469 (DAB)(JCF), 2011 U.S. Dist. LEXIS 16674, at *5 (S.D.N.Y. Feb. 17, 2011) (citing *Whiting v. Lacara*, 187 F.3d 317, 320-21 (2d Cir. 1999)). Here, there are currently no motions pending before the Court that relate to Kraus and a trial date has not been scheduled. Therefore, Kraus will not be prejudiced and the case will not be delayed if the Court grants Herrick’s motion for withdrawal as counsel of record in this action.

Under New York common law, withdrawing counsel may retain his or her former client’s cases, papers, and documents pending receipt of payment for professional services rendered. *See Allstate Ins. Co. v. Nandi*, 258 F. Supp. 2d 309, 311 (S.D.N.Y. 2003) (citing *Rivkin v. A.J. Hollander & Company, Inc.*, 95 Civ. 9314 (DAB)(AJP), 1996 U.S. Dist. LEXIS 16202, at *2 (S.D.N.Y. Nov. 1, 1996)). Accordingly, Herrick is entitled to a common law retaining lien in the amount of \$33,743.52.

CONCLUSION

For all of the foregoing reasons, Herrick respectfully requests that the Court grant the relief requested herein and enter an Order that:

(a) Herrick and Jule Rousseau is relieved as counsel of record for Third-Party Defendants;

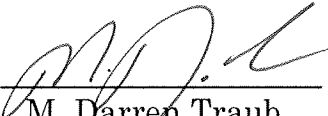
(b) The amount of Herrick's common law retaining lien is fixed in the amount of \$33,743.52;

(c) Herrick may retain Third-Party Defendants' files and papers in accordance with its retaining lien, and is required to release such files only upon satisfaction of the lien amount in accordance with such terms as the Court may require; and

(d) Further proceedings in this matter are stayed for thirty (30) days to afford the Third-Party Defendants a reasonable opportunity to retain new counsel, proceed *pro se*, or default.

Dated: New York, New York
May 4, 2012

HERRICK, FEINSTEIN LLP

By: 

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