UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 16-21301-CIV-GAYLES

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

ARIEL QUIROS, *et al*,

Defendant.
_____/

DEFENDANT ARIEL QUIROS'S
RESPONSE TO LEON COSGROVE LLC AND MITCHELL, SILBERBERG & KNUPP'S MOTION TO MODIFY ASSET FREEZE

Defendant Ariel Quiros ("Mr. Quiros") files this Response to Leon Cosgrove LLC ("Leon Cosgrove") and Mitchell, Silberberg & Knupp's ("MSK") (together, the "law firms") Motion to Modify Asset Freeze for the Payment of Attorneys' Fees, filed August 4, 2017 [ECF # 384], and states:

The Motion should be denied. This Court lacks jurisdiction to consider the Motion due to the fact that there is a pending appeal by the law firms addressing nearly identical issues. Even if this Court did have jurisdiction, there is no basis in law or fact to support the Motion, pursuant to which the law firms seek enforcement of a contract to which they are not a party and under which they have no rights. The law firms are acting against the interests of their former client and pursuing claims that, as this Court has already observed, are a private claim between a client and his former lawyers and have no place in this action.

RELEVANT BACKGROUND

The law firms represented Mr. Quiros in the instant action until Mr. Quiros terminated them for cause in late March 2017.

The Interim Funding Agreement

Prior to the law firms' termination, Mr. Quiros entered into an Interim Funding Agreement ("IFA") with Ironshore Indemnity, Inc. ("Ironshore"), pursuant to which Ironshore agreed to advance defense costs billed to Mr. Quiros upon satisfaction of certain conditions laid out in the IFA. Mr. Quiros and Ironshore agreed to a confidentiality provision within the IFA pursuant to which the terms of the agreement are confidential, and, therefore, the IFA is not part of the record in this case. However, as Ironshore's counsel states in his Declaration submitted in support of Plaintiff's Response to the Motion (the "Galardi Declaration"), Ironshore and Mr. Quiros agree that the law firms are not a party to the IFA but, instead, were merely approved law firms whose fees could be paid pursuant to the IFA if the fees were approved by Ironshore. No fees were ever paid to any firm under the IFA. Mr. Quiros's current counsel, undersigned counsel, is not an approved firm under the referenced IFA, and, therefore, Mr. Quiros has not sought payment of fees pursuant to the IFA for undersigned counsel.

Mr. Quiros has filed an action against Ironshore in a separate lawsuit, *Quiros v. Ironshore Indemnity, Inc*, Case No. 16-cv-25073-Cooke, in which Mr. Quiros seeks a declaratory judgment regarding coverage under two Directors and Officers Liability Policies issued by Ironshore to Mr. Quiros's business, Q Resorts, Inc., a Defendant in the instant case (the "coverage action"). Importantly, as Ironshore's counsel states in the Galardi Declaration, in the event Ironshore prevails in the coverage action, Mr. Quiros will be obligated to return any defense costs advanced pursuant to the IFA. In other words, if Ironshore were to pay the law firms pursuant to the IFA and against Mr. Quiros's wishes and then to prevail in the coverage action, Mr. Quiros would be obligated to pay Ironshore back for any such

payments. Also importantly, Mr. Quiros has reserved his right to dispute the reasonableness of the fees charged by the law firms.

The Law Firms's Previous Attempts To Intervene In This Action

At the time the law firms were terminated, a prior Motion to Modify Asset Freeze was pending and set for hearing before this Court (E.C.F. No. 288). At issue in the Motion to Modify Asset Freeze was whether the IFA was subject to the Asset Freeze Order in this action. Prior to a hearing on said Motion, Mr. Quiros's new counsel reached an agreement with the SEC and the Receiver regarding payment of defense costs free of the asset freeze. Mr. Quiros withdrew the Motion to Modify Asset Freeze, and this Court entered an Order on said Agreement. (E.C.F. Nos. 301 and 302).

Notwithstanding the withdrawal of the Motion to Modify the Asset Freeze and this Court's Order, the law firms filed a Response to the Notice of Withdrawal of the Motion in addition to a Motion to Intervene in this action to address the use of insurance proceeds. Undersigned counsel for Mr. Quiros, counsel for the SEC, and counsel for the Receiver, therefore, prepared and submitted Responses and opposed that motion. (E.C.F. Nos. 306 – 308). This Court denied the law firms' Motion to Intervene and rejected the law firms' efforts to interject their claims for attorney's fees from Mr. Quiros in this action. (ECF No. 310).

The law firms next filed a Motion for Reconsideration of said Order, which this Court considered and also denied. (E.C.F. No. 311 and 312). Notably, in the Motion for Reconsideration, the law firms revealed an attorney-client communication from Mr. Quiros, although the privilege has not been waived by Mr Quiros. In its Order denying the Motion for Reconsideration, this Court stated that the law firms were attempting "to assert a position on behalf of Quiros which may conflict with Quiros's position and

ability to negotiate with the insurance company in the insurance coverage action" and noted that Mr. Quiros actually objected to the law firms' Motion. (E.C.F. No. 312).[1]

The law firms then filed a Notice of Appeal of this Court's Orders on May 8, 2017 (E.C.F. No. 324). The appeal ia pending. A review of the law firms' Initial Brief reflects that, on appeal, the law firms raise nearly identical claims to those raised in their Motion now before this Court.

The law firms continue to pursue their own interests without regard to the interests of their former client and, as well, continue to cause Mr. Quiros's current counsel, counsel for the Receiver and for the SEC, and the Court to waste time and resources dealing with frivolous and improper litigation tactics. The law firms' tactics fly in the face of this Court's Orders and are impeding Mr. Quiros's ability to freely negotiate with the SEC, the Receiver, and Ironshore.

MEMORANDUM OF LAW

1. This Court Does Not Have Jurisdiction To Consider the Motion

In the Motion now before this Court, the law firms seek a modification of the asset freeze in an effort to have their fees paid from insurance proceeds free of the asset freeze. That is exactly the relief they previously sought in this Court, and it is the subject of the Orders appealed from in the appeal pending before the Eleventh Circuit.

It is well established that "[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *United States v. Tovar-Rico*, 61 F.3d

[1] This Court's Orders and warnings notwithstanding, one of the law firms, Leon Cosgrove, also attempted to interject itself into the coverage action by serving discovery requests on Mr. Quiros (interrogatories and requests for production) in that action despite the fact that they are not a party in that action either. The Court in the coverage action granted Mr. Quiros's Motion for Protective Order. *See* Coverage Action at ECF No. 32.

1529, 1532 (11th Cir. 1995) (*quoting Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982) (per curiam)). "This serves to avoid the confusion and waste of time that would result from dual jurisdiction." *Id*. (citing *Shewchun v. United States*, 797 F.2d 941, 943 (11th Cir. 1986)).

As stated above, the issues raised in the instant motion are the same issues raised in the law firms' pending appeal. Therefore, this Court does not have jurisdiction to rule on the Motion and, for that reason, the Motion should be denied to avoid the confusion and waste of time that would result from dual jurisdiction.

2. The Law Firms Offer No Valid Basis For A Reconsideration Of This Court's Prior Rulings.

Even if this Court did have jurisdiction to consider the Motion, the Motion should be denied as an improper and inadequate motion for reconsideration of this Court's prior Orders. As set forth above, this Court has already considered the issues raised in the Motion now before the Court – that is, whether the law firms are entitled to payment of attorneys' fees free of the asset freeze. Thus, the present Motion, although not titled as such, is a motion for reconsideration of this Court's prior rulings on the very issues in the Motion now before the Court. The law firms have not met the standard for a motion for reconsideration (or even tried).

The applicable standard for a motion for reconsideration is that the moving party "must demonstrate why the court should reconsider its prior decision and set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. A motion for reconsideration should raise new issues, not merely address issues litigated previously." *Socialist Workers Party v. Leahy*, 957 F.Supp. 1262, 1263 (S.D.Fla.1997) (internal quotation and citations omitted). "Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." *Instituto de Prevision Militar v. Lehman Bros.*, 485 F. Supp. 2d 1340, 1343 (S.D. Fla. 2007) (quoting *Cover v. Wal–Mart Stores*,

Inc., 148 F.R.D. 294, 295 (M.D.Fla.1993)). The law firms have not offered nor shown that they satisfy any of the grounds justifying reconsideration, and for that reason, the Motion should be denied.

3. The Law Firms Are Not Parties To The IFA And Are Not Entitled To Payment Thereunder.

Mr. Quiros agrees that payment of defense costs under an insurance policy may be made free of the asset freeze, both generally and in the instant case. However, the law firms are not entitled to any payment under Ironshore's contract with Mr. Quiros, and, therefore, the issue of whether any such payments are subject to the asset freeze should not even be before the Court.[2]

The law firms are not parties to the IFA, which is solely an agreement between Mr. Quiros and Ironshore. As such, they have no right to enforcement of the terms of the IFA. Moreover, even if they were parties to the IFA, they do not have a right to payment under the terms of the IFA.

The IFA covered only defense costs between December 2016 and the date of the law firms' termination in late March 2017. Pursuant to the IFA, the law firms are required to submit their fees for approval, and Ironshore must determine that the fees are reasonable before paying them. The law firms have not alleged that they have submitted those fees and that those fees have been approved by Ironshore for payment (and, in fact, Ironshore represents that is not the case).[3] Moreover, Mr. Quiros disputes the reasonableness of the law firms' request for a million dollars in fees for less than four months' work on his behalf.

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[2] Indeed, by continuing to file motions, like the instant Motion, without Mr. Quiros's consent, the law firms are asserting positions and inviting rulings contrary to Mr. Quiros's interests, and, as a result, hampering Mr. Quiros's ability to defend himself in the instant case and causing Mr. Quiros to incur additional expenses.

[3] Although the terms of the IFA are confidential, this information is already in the record in this case and in the coverage action, and Mr. Quiros does not intend to waive nor violate the terms of the confidentiality provision of the IFA.

The law firms' claim that Mr. Quiros has no standing to object to their request for payment under the IFA is absurd. Putting aside the fact that Mr. Quiros is a party to the IFA, unlike the law firms, Mr. Quiros is bound to repay any amounts paid under the IFA in the event Ironshore prevails in the coverage action and there is a determination of no coverage under the policy. As such, Mr. Quiros should certainly be entitled to approve or oppose the requested fees before they would be paid due to the fact that they may ultimately be coming out of his pocket.

The law firms have no rights under the IFA other than to claim that they have been approved for payment should Mr. Quiros seek payment of their fees under the agreement. He has not, and, therefore, they are entitled to nothing from Ironshore under that IFA.

4. Any Remedy Available To The Law Firms Does Not Belong In This Court.

To the extent the law firms seek payment from Mr. Quiros for services provided to him prior to their termination, the appropriate course of action is to proceed with an action against Mr. Quiros seeking payment for the reasonable value of their services on the basis of quantum meruit. *See, e.g., Rosenberg v. Levin*, 409 So. 2d 1016, 1017 (Fla. 1982). The Florida Supreme Court laid out the guidelines for courts determining quantum meruit fees for discharged attorneys in *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 652 So. 2d 366 (Fla. 1995). The quantum meruit action is an independent action governed by State law and, again, not related to the subject matter of this action and not appropriate in this Court.

The law firms' requests for payment of additional fees in this case have been denied multiple times. Their claims of changed circumstances are irrelevant because they have no right to be before this Court on this issue in the first place.

CONCLUSION

For all of the above reasons, the law firms' Motion to Modify Asset Freeze for the Payment of Attorneys' Fees should be denied outright without further waste of the parties' or the Court's time or resources.

WHEREFORE, Defendant Ariel Quiros respectfully requests that this Court DENY Leon Cosgrove and Mitchell, Silberberg & Knupp's Motion to Modify Asset Freeze for the Payment of Attorneys' Fees and grant such other relief as this Court deems appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail via CM/ECF, on this 31st day of August, 2017, to all counsel of record.

/s/ Melissa D. Visconti
Melissa Damian Visconti