UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THE CITY OF NEW YORK, : 06-CV-2233

Plaintiff, :

v. : United States Courthouse
Brooklyn, New York

ADVENTURE OUTDOORS, INC., :
: June 2, 2008

Defendant. 10:00 o'clock a.m.
:

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TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES SENIOR JUDGE.

APPEARANCES:

For the Plaintiff: NEW YORK CITY LAW DEPARTMENT
Office of the Corporation Counsel
BY: ERIC PROSHANSKY, ESQ.
RICHARD J. COSTA, ESQ.
Assistant Corporation Counsel

-AND-

PILLSBURY WINTHROP SHAW PITTMAN
BY: KENNETH TABER, ESQ.
MARIA T. GALENO, ESQ.

For the Defendant: RENZULLI LAW FIRM
BY: JOHN F. RENZULLI, ESQ.
CHRISTOPHER RENZULLI, ESQ.

Court Reporter: Anthony M. Mancuso
225 Cadman Plaza East
Brooklyn, New York 11201
(718) 613-2419

(Case called; both sides ready.)

THE COURT: Appearances, please.

MR. TABER: Kenneth Taber of Pillsbury Winthrop Shaw Pittman for plaintiff City of New York.

MS. GALENO: Maria Galeno, also with Pillsbury Winthrop for the City of New York.

MR. PROSHANSKY: Eric Proshansky, Corporation Counsel for the City of New York.

MR. COSTA: Richard Costa, Corporation Counsel.

MR. J. RENZULLI: John Renzulli on behalf of Adventure Outdoors.

MR. C. RENZULLI: Christopher Renzulli on behalf of Adventure Outdoors.

THE COURT: Does the defendant has a motion?

MR. J. RENZULLI: I do, your Honor.

The defendant's motion is to withdraw as counsel for Adventure Outdoors at this time for the reasons that have been so stated in the motion.

These decisions -- this decision -- were very hard to make. I come here with a heavy heart and a disappointment not to be able to go forward. After analyzing the situation here with my client, my client is taking the position that from a financial standpoint, from a likely appeal, from the possibility of a retrial, the fact that a jury was taken away from us six days from when we were supposed to select a jury,

we ask this court to permit our law firm to withdraw from this case.

THE COURT: The City.

MR. TABER: Your Honor, we do not oppose the motion to withdraw, provided that it is indeed accompanied by the entry of a default judgment together with the kind of extensive findings of fact that we believe are appropriate at this stage of the litigation, based both on the fruits of discovery as well as the allegations of the amended complaint, which will now, under controlling authority, be taken as true.

We were advised of the motion only moments ago and haven't, frankly, had an opportunity to fully consult with our client about that. I'm making the statement I'm making based upon the position that the City took previously when confronted by a similar motion with respect to the Mickalis Pawn defendant.

Mr. Proshanksy will correct me if I stated anything inconsistent with the City's view. I think it accurately articulates it.

MR. PROSHANSKY: My only caveat is that we have not had time to consult with our clients either.

I believe that Mr. Taber has correctly articulated our position but I would like an opportunity to return to the court after I've consulted with my client.

MR. TABER: I might also add, your Honor, so that

there's no confusion on the record, we vigorously dispute a number of the statements that are made in the motion to withdraw with respect to the nature of these proceedings and the characterization of these proceedings as a bench trial.

We think your Honor's prior rulings make it abundantly clear that that is not what was to take place here. Indeed, as the court is familiar, we are in the midst of jury selection and came here today intending to pursue that process towards a selection of a jury.

Nonetheless, unless otherwise instructed by our client, Mr. Proshanksy says it will be the City's position that we do not oppose the motion.

THE COURT: You want to respondF?

MR. J. RENZULLI: Well, your Honor, I did respond. We had oral argument on the issue of the advisory jury. It is in the record. We have made our statement clear to the court and the reasons for which we thought that we were entitled to a constitutional jury. That's the first issue.

The second issue is that there are disputed facts in this record today that I don't believe the court can take notice of in writing an opinion, should the court go down that road.

We're here on the amended complaint and that is what is in focus and target relative to the default should the City take the position that they will default.

I also want to say, your Honor, that you know as well as everyone sitting at this table that there were discussions in earnest up to Sunday, late afternoon, in this case.

THE COURT: Are you suggesting that I participated?

MR. J. RENZULLI: I'm not. You can't, your Honor. And you know you can't because you're the trier of the fact.

THE COURT: I told you that, did I not?

MR. J. RENZULLI: You did and you made that clear and I agree with your Honor on that point. You can't. And that's the problem. And that's when I said to your Honor if you give us a constitutional jury we would be fine with you mediating this case.

We're down the road now and we're too far down the road. We've made efforts. We've had discussion into the late evening of Friday and I don't think Mr. Proshanksy would dispute that. We went back and forth over the weekend. No resolution could be found.

My client has a decision. He either loses his business that he grew for thirty years or he continues in the appellate process. He has no other alternative.

Your Honor recognized that this case could cost millions of dollars and still be uncertain and be in appeals courts and possibly the supreme court.

We've examined your Honor's comment. We agree with

you wholeheartedly. That's exactly what is going to occur here. We do not have unlimited resources like the City. We don't have a bank of taxpayer money to defend ourselves. We're in a very untenable position.

THE COURT: Is that your statement?

MR. J. RENZULLI: Yes, your Honor.

THE COURT: Thank you.

The motion of the Renzulli Law Firm, LLP to withdraw as counsel is denied pursuant to Rule 1.4 of the local rules of the United States District Court for the Southern and Eastern Districts of New York and in accordance with the rules of legal ethics in the practice of law.

At this stage, while the case is actually in trial, jurors have been called and have filled out extensive questionnaires, pretrial proceedings have been completed and the court has ruled on myriad motions in order to prepare for the case, it's too late under Rule 1.4 to withdraw.

The financial relationship between the Renzulli Law Firm, LLP and Adventure Outdoors, Inc., is for the two parties to decide upon. A lawyer may not abandon his client -- and I use the word "abandon" only as a technical word, not in its invidious sense -- in the midst of a litigation at this stage.

The question of the nature of the jury trial was thoroughly discussed and an extensive opinion was prepared in the NAACP case, which used exactly the same form of trial. It

is historic. It goes back to equity precedents of medieval times.

In addition, it is controlled by the Federal Rules of Civil Procedure. See Rule 39 of the Rules of Civil Procedure.

It was the exact form of trial that was used in the NAACP case, where the court issued extensive findings of fact and law in accordance with the rules and dismissed the case.

The motion states that the defendant's decision is motivated "By the fact that it will not receive a fair trial. The City selected the district judge in a desire to hear this case in violation of defendant's right to due process."

A motion to recuse was made and thoroughly considered. An oral opinion was issued. There is no basis whatsoever under the federal rules or the rules of this court for that motion at this stage.

The defendant, of course, may, if it wishes, refuse to go forward with the case. This will constitute a default. If there is a default, pursuant to Rule 55 of the practice with respect to defaults and use of Magistrate Judges, the court will refer the case to the Magistrate Judge for findings of fact and law proposed and to propose an adequate remedy. See Rule 55(2) (procedure on claims that are not for a sum certain).

The rule calls for the entry of default judgment by

the clerk of the court only where the claim is for a sum certain.. in cases of a default of this nature, it is the practice to refer the matter to the Magistrate Judge.

The court prefers to direct the Renzulli Law Firm to appear, unless other counsel, of course, is selected, before the Magistrate Judge with respect to these proceedings so that the Magistrate Judge will be afforded the assistance of counsel.

It would make that direction pursuant to its authority to control counsel who are admitted to the bar of this court. The court retains full confidence that the Renzulli Law Firm, whatever the economic detriment it may suffer, will take adequate steps to protect its client in such proceedings and any proceedings which may follow.

Do the parties have any comment?

These are my tentative rulings, subject to hearing from counsel. I will, of course, issue an opinion in which I will describe ethical, constitutional and other considerations. Constitutional, statutory and rule authorities require, in my opinion, subject to hearing from counsel, this resolution.

I'll hear first from defense counsel.

MR. J. RENZULLI: This is another example of the court holding my client and now my law firm in this courtroom. I will look at your Honor's order and I will reply to it.

I would ask you now to let that issue go up to the Second Circuit, under a 1292(b), once you issue your order. You're keeping me now captive in a case that my client can't afford and you're telling me, as a practitioner, who has children and a family, that I have to participate in this case. That's what you just told me. I find that to be repugnant. I will fight that and I will fight it hard and I will not give up.

THE COURT: I take it you refuse to appear for your client before the Magistrate Judge in assisting the Magistrate Judge to determine a fair judgment in view of the default.

MR. J. RENZULLI: Your Honor, the Magistrate Judge has a complaint in this case. This is no different than when any other defendant in a case defaults. The Magistrate Judge does not need the assistance of the Renzulli Law Firm to come to conclusions on this default. So my position is why would we have to do that? Why is it necessary to put me through that effort?

The court, the City, can file for their default judgment and the court proceeds under Rule 55. To have me sitting there before the Magistrate Judge to contest facts is basically making me try this case, now not under an advisory jury but under a situation where you are asking me to participate in the default of my client.

I have not read the cases, your Honor, and I'm sure

you have. I would like to see those cases. I would like to reply to your order before I make any decision for my firm.

I think you can understand.

THE COURT: I understand.

Is your present posture that you do not wish to appear for your client on a referral by this court to the Magistrate Judge to determine the terms of a decree that will follow a default?

MR. J. RENZULLI: Your Honor, do I want to? No. My motion is to be relieved as counsel in this case. And that would mean all proceedings. But I'm not a fool. I would like to see what law the judge is going to present to me so that I can make a balanced decision and the right decision.

THE COURT: All right.

MR. J. RENZULLI: And if I have any appeal rights, I want to look at those also.

THE COURT: All right.

Your motion to withdraw is denied at this stage.

Now, we're scheduled to go forward this morning with the selection of a jury. Do you on behalf of your client, and with your client's direction, refuse to go forward with the selection and further proceedings in this case?

MR. J. RENZULLI: Your Honor, it's our position that going through a jury selection would be a mockery of the process. My client cannot defend himself in this case. There

are no more lines of credit. We don't have the resources. There's nothing left.

THE COURT: You haven't answered my question. I think it called for a yes or no answer.

MR. J. RENZULLI: Your Honor, we do not want to proceed with jury selection.

THE COURT: Will you proceed with jury selection, which is scheduled to go forward now and with the rest of the trial? Yes or no.

MR. J. RENZULLI: We do not want to proceed with jury selection or the rest of the trial.

THE COURT: I prefer a yes or no.

MR. J. RENZULLI: Your Honor, are you ordering me to do it? Are you ordering me to go forward?

THE COURT: I am ordering you to tell me whether you are going forward this morning with the selection.

MR. J. RENZULLI: We are not going forward, your Honor.

THE COURT: What is the view of the City?

MR. TABER: Your Honor, I believe that the next step, in light of what Mr. Renzulli has just said as to his unwillingness to proceed with jury selection this morning, is for the assent by Mr. Renzulli on behalf of his still client Adventure Outdoors to the entry of a default judgment.

THE COURT: I don't believe that he has to assent to

that. What's your view?

MR. J. RENZULLI: I do not have to assent to a default judgment.

THE COURT: That's correct. He has already defaulted by refusing to go forward.

MR. TABER: Your Honor, I want to be clear in my terms because I may be confusing terms. My understanding from our prior proceedings, vis-a-vis Mickalis Pawn, that there is a two-step process. The first step of the process is the entry of a default. Perhaps, what Mr. Renzulli has said is that they are not consenting to the entry of a default. That would be step one.

Step two, as I understand it, is the entry of specific findings of fact and the imposition of specific relief as part of the default judgment. As I understand your Honor's prior statement, it is that second stage which your Honor is directing take place before the Magistrate Judge, which perfectly fine with us.

THE COURT: You're being asked now, since the defendant has defaulted, to state whether you are moving for a default judgment. I believe that's the proper procedure.

Do you agree?

MR. J. RENZULLI: I agree.

MR. TABER: We are, your Honor.

THE COURT: Are you moving for a default?

MR. TABER: Correct.

THE COURT: The motion is granted conditionally on argument.

Now, do the parties want to brief the issues that I raised?

MR. J. RENZULLI: We would like to have the opportunity, with the court's thoughts and direction.

THE COURT: I would prefer that you proceed in the normal course, which is that the attorneys brief it and then the court decides.

Do you want an opportunity to brief the issue of where we proceed from here with respect to your attempt to withdraw?

MR. J. RENZULLI: Absolutely.

THE COURT: How much time?

MR. J. RENZULLI: Until Friday, your Honor.

THE COURT: You can have more than that, if you want to.

MR. J. RENZULLI: I don't know, judge. How much time would you give me?

THE COURT: I'll give you whatever you want.

MR. J. RENZULLI: A couple of weeks.

THE COURT: Sure, whatever you think you need.

MR. J. RENZULLI: Two weeks is fine.

THE COURT: Two weeks. What's the date?

THE CLERK: That would be the 16th for the motion to be heard?

THE COURT: No. June 16 for a brief on whatever issues the defense counsel wish to brief. What's a date a week from that?

THE CLERK: The 23rd, your Honor.

THE COURT: June 23 for the City's papers. Give me a week from that.

THE CLERK: June 30.

THE COURT: June 30 for motions on the issue of withdrawal and related matters of default.

Is that satisfactory?

MR. J. RENZULLI: Yes.

Just so that we can frame the issues, the first issue is whether the court has the power and jurisdiction, in light of the fact that we are no longer counsel for Adventure Outdoors, to participate with the Magistrate Judge in her evaluation --

THE COURT: That's not an issue.

MR. J. RENZULLI: I thought that was the issue.

THE COURT: No.

MR. J. RENZULLI: Can you tell me what the issue is?

THE COURT: The issue is whether when the matter is sent to the Magistrate Judge, as I believe the procedure is -- although you can brief that --

MR. J. RENZULLI: You say that's under local Rule 1.4, your Honor.

THE COURT: Excuse me.

When the matter is sent to the Magistrate Judge, as I believe the appropriate procedure is -- but you can brief that -- for the formulation of a decree in light of the default, can the court order defense counsel to continue to represent the defendant to insure that under the rules of equity, and to assist the court in formulating a fair and appropriate decree, counsel can be ordered to continue to appear and represent Adventure Outdoors, Inc.

I think that states it.

MR. J. RENZULLI: Now, I understand.

THE COURT: Do you understand it now?

MR. J. RENZULLI: I understand what you are saying. I've never heard of it, but I understand you.

THE COURT: What's the City's view?

MR. TABER: Your Honor has articulated the issue.

I think there is a further issue, your Honor, that may also bear briefing by the parties and I'm not sure that it needs to be briefed now but it will need to be briefed at some point with respect to the assertion by Mr. Renzulli that upon such a default he continues to enjoy appellate rights.

THE COURT: I don't want to get involved in that. That's not for this court.

MR. J. RENZULLI: Why don't you ask him to take my license?

THE COURT: Excuse me. That was uncalled for.

MR. J. RENZULLI: I know, judge.

THE COURT: It's uncalled for. I don't want to hear anything further.

MR. J. RENZULLI: I stop.

THE COURT: As you know, this court has no appellate jurisdiction. The only quasi-appelate jurisdiction it has is in reviewing the Magistrate Judge's order and recommendation. In order to get a fair presentation before the Magistrate Judge, and to assist the Magistrate Judge in a difficult matter, should there be then a necessity of this court ruling on the matter, either by appeal or because a final judgment must be entered by the court, the court, in general, prefers to have both sides represented by counsel. It is an interesting problem and you'll brief it.

MR. J. RENZULLI: I think, just so that I can give you an idea of where I'm going, when I look at Rule 55, and the defaults, the issue is did this court have personal jurisdiction, is there a cognizable cause of action in which the court can find liability on the defendant when looking at the default situation.

I find it highly unusual that the court would order the other side, who has said we default and we're not

participating, to actually participate in the process so that an R and R can be done by the Magistrate Judge which then can be looked at by the judge here, you, and then the appeal process I would imagine would start.

I find it highly unlikely that you would have the defaulting party enter into those proceedings. That's what we're researching. I'm more than happy to do that. I'm not aware of that occurring. I don't have the wisdom that you, do, your Honor. I realize that.

THE COURT: I wouldn't denigrate myself if I were in your position.

MR. J. RENZULLI: I mean that wholeheartedly. I don't mean that in any way than respect for your legal acumen.

THE COURT: I appreciate it. I never denigrated myself in that way as a lawyer.

MR. J. RENZULLI: We're all different, judge.

THE COURT: Correct.

Bear in mind that this is an equitable cause of action and the court sits as a court of equity, that changes somewhat the considerations from a slip-and-fall case, for example, where the only issue is money damages. The practice may be different.

Are there any other problems the parties wish to bring to the court's attention?

MS. GALENO: No, your Honor.

MR. J. RENZULLI: No, your Honor.

THE COURT: I take it I have a consent of both parties to dismiss all the jurors that were due to come in tomorrow.

MS. GALENO: Under the circumstances, yes, your Honor.

MR. J. RENZULLI: Yes, your Honor.

THE COURT: All right. The clerk will order all jurors dismissed.

Do you want me to withhold direction to the clerk of the court to enter a default judgment or do you want a default judgment entered immediately?

MR. J. RENZULLI: That's not my decision, your Honor.

MR. TABER: We would like it immediately, your Honor.

THE COURT: All right. So ordered, conditional on argument.

Thank you very much.

MR. J. RENZULLI: Thank you, judge.

THE COURT: Counsel, as always, I appreciate the efforts of all the distinguished counsel before me.

MR. TABER: Thank you, your Honor.

MR. J. RENZULLI: Thank you, your Honor.

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