Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D23758
O/kmg

_____AD3d_____ Submitted - June 5, 2009

WILLIAM F. MASTRO, J.P.
RANDALL T. ENG
ARIEL E. BELEN
L. PRISCILLA HALL, JJ.

2009-03196 DECISION & JUDGMENT

In the Matter of Thomas P. Zugibe,
etc., petitioner, v Catherine M.
Bartlett, etc., et al., respondents.

Thomas P. Zugibe, District Attorney, New City, N.Y. (Carrie A. Ciganek of counsel), petitioner pro se.

Andrew M. Cuomo, Attorney General, New York, N.Y. (Monica A. Connell of counsel), for respondent Catherine M. Bartlett.

David I. Goldstein, Chestnut Ridge, N.Y., for respondent Andrew Dale.

Proceeding pursuant to CPLR article 78 in the nature of prohibition to prohibit Catherine M. Bartlett, an Acting Justice of the Supreme Court, Rockland County, from presiding over a criminal action entitled *People v Zalmar Silber and Andrew Dale*, pending in the Supreme Court, Rockland County, under Indictment No. 2008-382.

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs or disbursements.

The petitioner, Thomas P. Zugibe, the District Attorney of Rockland County, commenced this proceeding to prohibit Catherine M. Bartlett, an Acting Justice of the Supreme Court, from presiding over a criminal proceeding entitled *People v Zalman Silber and Andrew Dale*, pending in the Supreme Court, Rockland County, under Indictment No. 2008-382. After disclosing to the parties an ex parte communication made to her by an acquaintance disparaging one of the codefendants during the pendency of the criminal proceeding, Acting Justice Bartlett considered

recusing herself from the case to avoid the appearance of impropriety. Upon further reflection, however, Acting Justice Bartlett concluded that recusal was unwarranted and that she could serve with complete impartiality.

Contrary to the petitioner's contention, the record does not support a finding that Acting Justice Bartlett actually recused herself after disclosing the ex parte communication, or that she was otherwise disqualified under the terms of 22 NYCRR 100.3(E) and thus required to obtain the consent of all parties to participate in the proceeding pursuant to 22 NYCRR 100.3(F). Absent a legal disqualification under Judiciary Law § 14, recusal is a matter solely within the discretion and personal conscience of the court (*see People v Moreno*, 70 NY2d 403, 405-406; *Matter of Borrell v Hanophy*, 246 AD2d 647, 648; *Matter of Johnson v Hornblass*, 93 AD2d 732, 733). Thus, the petitioner has failed to establish a clear right to the remedy of prohibition (*see Matter of Borrell v Hanophy*, 246 AD2d 647; *Matter of Johnson v Hornblass*, 93 AD2d 732).

MASTRO, J.P., ENG, BELEN and HALL, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court