

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

D30357
C/kmb

_____AD3d_____

Argued - January 6, 2011

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
L. PRISCILLA HALL
PLUMMER E. LOTT, JJ.

2009-09903

DECISION & ORDER

Michael Spinner, appellant, v County of Nassau,
et al., respondents, et al., defendants.

(Index No. 680/09)

Sullivan Papain Block McGrath & Cannavo P.C., New York, N.Y. (Robert G. Sullivan and Stephen C. Glasser of counsel), for appellant.

John Ciampoli, County Attorney, Mineola, N.Y. (Dennis J. Saffran and Daniel K. Valentino of counsel), for respondents.

In an action, inter alia, to recover damages for false arrest and malicious prosecution, the plaintiff appeals, as limited by his notice of appeal and brief, from so much of an order of the Supreme Court, Nassau County (Spinola, J.), dated September 17, 2009, as granted that branch of the cross motion of the defendants County of Nassau, Steven Schwartz, and Susan Lutinger which was to disqualify the plaintiff's attorney.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and that branch of the cross motion of the defendants County of Nassau, Steven Schwartz, and Susan Lutinger which to disqualify the plaintiff's attorney is denied as premature.

The plaintiff's attorney in this action, Robert G. Sullivan, also served as the plaintiff's criminal defense lawyer in a prior criminal prosecution that resulted in an acquittal. At one point, during the course of that prosecution, Sullivan met with two prosecutors from the Nassau County District Attorney's Office, Steven Schwartz and Susan Lutinger, who are now named as defendants in this case, for the purpose of explaining to them the quantity of exculpatory evidence that existed

March 8, 2011

SPINNER v COUNTY OF NASSAU

Page 1.

with respect to the criminal prosecution. The defendants County of Nassau, Schwartz, and Lutinger (hereinafter collectively the defendants) cross-moved, inter alia, to disqualify Sullivan as the plaintiff's attorney in the present action. The Supreme Court, among other things, granted that branch of the motion which was to disqualify Sullivan.

Under the circumstances of this case, the Supreme Court's disqualification of Sullivan under the advocate-witness rule was premature (*see Meccariello v Di Pasquale*, 35 AD3d 678, 680; *Phoenix Assur. Co. of N.Y. v Shea & Co.*, 237 AD2d 157). While Sullivan is in a position to offer first-hand testimony concerning what he told the prosecutors (i.e., Schwartz and Lutinger) during the subject meeting, the defendants did not adequately show that Sullivan's testimony would violate the advocate-witness rule (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.7). At this early "stage of the proceedings, where discovery has not yet been had, disqualification . . . is premature" (*Kirshon, Shron, Cornell & Teitelbaum v Savarese*, 182 AD2d 911, 912).

COVELLO, J.P., DICKERSON, HALL and LOTT, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court