

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

D36715
C/hu

_____AD3d_____

Submitted - November 9, 2012

WILLIAM F. MASTRO, J.P.
DANIEL D. ANGIOLILLO
SANDRA L. SGROI
ROBERT J. MILLER, JJ.

2012-01133

DECISION & ORDER

Edith McElduff, plaintiff-appellant, v Edward
McElduff, respondent; Nancy M. Eraca, nonparty-
appellant.
(Action No. 1)

Edward McElduff, respondent, v Edith Marie McElduff,
defendant-appellant; Nancy M. Eraca, nonparty-
appellant.
(Action No. 2)

(Index Nos. 10569/10, 13096/10)

Edith McElduff, Elmira, N.Y., named in Action No. 2 as Edith Marie McElduff,
plaintiff-appellant pro se in Action No. 1 and defendant-appellant pro se in Action
No. 2.

Nancy M. Eraca, Elmira, N.Y., nonparty-appellant pro se.

Larkin, Axelrod, Ingrassia & Tetenbaum, LLP, Newburgh, N.Y. (William J. Larkin
III of counsel), for respondent.

In two related actions for a divorce and ancillary relief, the wife appeals, and nonparty
Nancy M. Eraca separately appeals, as limited by their respective briefs, from so much of an order
of the Supreme Court, Orange County (Ecker, J.), dated December 22, 2011, as granted that branch
of the husband's cross motion which was to disqualify Nancy M. Eraca as the wife's attorney in both
actions pursuant to the advocate-witness rule.

December 12, 2012

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ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The nonparty-appellant's contention, in effect, that the husband waived the right to seek disqualification, is without merit under the circumstances of this case (*see M.A.C. Duff, Inc. v ASMAC, LLC*, 61 AD3d 828; *cf. Matter of Aaron W. v Shannon W.*, 96 AD3d 960; *Matter of Lovitch v Lovitch*, 64 AD3d 710).

"The disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court" (*Trimarco v Data Treasury Corp.*, 91 AD3d 756, 756; *see Nationscredit Fin. Servs. Corp. v Turcios*, 41 AD3d 802). In order to disqualify counsel pursuant to the advocate-witness rule, the moving party must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party (*see S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 446; *Trimarco v Data Treasury Corp.*, 91 AD3d at 757; *Daniel Gale Assoc., Inc. v George*, 8 AD3d 608, 609). Here, the husband demonstrated that disqualification of Nancy M. Eraca as the wife's attorney was warranted. Accordingly, the Supreme Court properly granted that branch of the husband's cross motion which was for disqualification.

MASTRO, J.P., ANGIOLILLO, SGROI and MILLER, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court