

Walters v City of Saratoga Springs, N.Y.

2007 NY Slip Op 34563(U)

January 5, 2007

Supreme Court, Saratoga County

Docket Number: 2006-0738

Judge: Stephen A. Ferradino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF SARATOGA

JOHN M. WALTERS

Plaintiff,

-against-

DECISION and ORDER

RJI #45-1-2006-1434

Index # 2006-0738

THE CITY OF SARATOGA SPRINGS, NEW YORK;
THE CITY OF SARATOGA SPRINGS POLICE DEPARTMENT;
and OFFICER PAUL VEITCH

Defendants.

APPEARANCES:

Murphy, Burns, Barber & Murphy, LLP
Attorneys for the Defendants
4 Atrium Drive, Executive Woods
Albany, New York 12205

Hamilton Watt, PLLC
Special Counsel to the City of Saratoga Springs
480 Broadway, Suite 250
Saratoga Springs, New York 12866

The Tuttle Law Firm
Attorney for Defendant Paul Veitch
10 Century Hill Drive, Suite 4
Latham, New York 12110

STEPHEN A. FERRADINO, J.

On July 9, 2005 the plaintiff was attending "Countryfest" in the City of Saratoga Springs. Officer Paul Veitch, an Officer on the City of Saratoga Springs Police force arrested the plaintiff on charges of disorderly conduct and took him into custody. The plaintiff filed a notice of claim on July 26, 2005. In his claim the petitioner contends, amongst other things, that he suffered injuries at the hands of Officer Veitch due to the

2007 JAN 16 PM 1:54
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

FILED

use of excessive force.

The defendant, Officer Veitch, has requested an order of this Court directing the defendant City of Saratoga Springs to provide him with separate and independent counsel of his choosing and directing the firm of Murphy, Burns, Barber & Murphy, LLP to execute and deliver to Attorney James B. Tuttle, a consent to change attorney form substituting Attorney Tuttle for Murphy, Burns, Barber & Murphy, LLP. The City of Saratoga Springs has opposed the request.

Officer Veitch takes the position that there is an inherent conflict that should prohibit counsel from representing all of the defendants. Furthermore he cites his personal discomfort at being represented by the same attorney that represents his employer. Officer Veitch alleges he is concerned about allegations of intentional conduct that he believes may be construed to allege conduct outside the scope of his employment thus putting him at odds with his employer. Additionally he raises a concern over exposure to potential punitive damages.

Officer Veitch's current attorney was assigned to him by the insurance carrier providing him coverage under the City's policy of insurance. The current defense attorney argues that there is no evidence that Officer Veitch's actions went beyond the scope of his employment. Furthermore, the Commissioner of Public Safety states, in his affidavit, that the City of Saratoga Springs has determined that Officer Veitch was acting within the scope of his employment and that the City has no intention of raising a defense that Officer Veitch acted outside the scope of his employment. It is the position of the City and the current defense counsel that no conflict of interest exists between the City and Officer Veitch. As a result, the City and its insurance carrier each refuse to

voluntarily provide Officer Veitch with counsel of his choosing to defend him at either of its expense.

Currently based upon the facts of the case there is no indication that defense counsel has taken a position, put forth an argument, or adopted a strategy that has or will benefit the City at Officer Veitch's expense. The defendant, Officer Veitch, maintains that there is an inherent conflict due to the "possibility" of the City to change its current position and mount a defense that he acted outside of the scope of his employment. The record contains evidence that the attorney currently representing the City and Officer Veitch advised Officer Veitch of the potential conflict that could exist between the City and the Officer. Counsel advised Officer Veitch in writing that the City believes the allegations of the plaintiff are false and that the Officer conducted himself appropriately. Defense counsel advised Officer Veitch he did not perceive any conflict in representing both defendants. Furthermore, regarding the Officer's concern over the alleged claim for punitive damages, as long as the City affirmatively contends that the Officer was acting within the scope of his employment and performing a duty required of him, he cannot be the subject of an award of exemplary damages, even if it is demonstrated that his motives are malicious. *Galligan v City of Schenectady*, 116 AD2d 798 (3d Dept. 1986).

The Court acknowledges that in many instances dual representation in a municipal case is inappropriate and compromises the rights of the parties and the attorney's ethical obligations. There is no *per se rule* dictating that disqualification is automatic in scenarios such as the one presented here. See, *Duton v County of Suffolk*, 729 F.2d 903, 908 (2d Cir. 1984). In this case, at this juncture, the Court can not say it

questions the stated ability of counsel to undertake dual representation based upon the expressed unity of interest. Counsel, as a member of the bar, must in the first instance determine whether he is able to represent his client without conflict under the rules. Additionally, as is his duty, counsel has explicitly explained to Officer Veitch the potential for conflict and his lack of concern that such conflict exists and his intent to vigorously defend the Officer and the City as parties united in interest.

The defendant Officer Veitch has been provided what has been bargained for pursuant to the provisions of the collective bargaining agreement, the City has furnished Officer Veitch a defense. Officer Veitch has not been provided the right to elect whether he chooses to accept the defense provided by the City or to choose his own defense at the City's expense either under the terms of the collective bargaining agreement or the City Code. Officer Veitch may retain the services of Attorney Tuttle to represent him in this action but not at the City's expense. Defense counsel is reminded that his client is not the insurance carrier. The individual defendants are the clients and it is their interests that are paramount. Current counsel remains under a continuing duty to represent the best interests of his clients and to withdraw in the event of a conflict of interest.

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to Murphy, Burns, Barber & Murphy, LLP attorneys for the defendants for filing and entry.

Dated: January 5, 2007
Malta, New York


STEPHEN A. FERRADINO, J.S.C.

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

2007 JAN 16 PM 1:54

ENTERED

ENTERED
Kathleen A. Marchione

Saratoga County Clerk

Papers Received and Considered:

Order to Show Cause dated November 20, 2006

Affirmation of James B. Tuttle dated November 2, 2006 with attached Exhibits 1-5

Affidavit of Paul Veitch, sworn to November 1, 2006 with attached Exhibits 1-4

Defendant Paul Veitch's Memorandum of Law dated November 2, 2006

Affidavit of Ronald J. Kim, Esq., sworn to December 18, 2006 with attached Exhibits A-S

Affidavit of Christopher J. Watt, Esq., sworn to December 18, 2006

Affidavit of Thomas K. Murphy, Esq., sworn to December 14, 2006 with attached Exhibits A- F

Memorandum of Law

Reply Affirmation of James B. Tuttle, Esq., dated December 28, 2006 with attached Exhibits A-B