

Cagnina v Onondaga County

2010 NY Slip Op 33032(U)

September 27, 2010

Supreme Court, Onondaga County

Docket Number: 09-7938

Judge: John C. Cherundolo

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

CHRISTINA G. CAGNINA,

vs.

Plaintiff,

Index No. 09-7938
RJI No. 33-10-0191

ONONDAGA COUNTY, THE ASSIGNED COUNSEL PROGRAM, INC., the HON. ANN PFAU in her capacity as Chief Administrative Judge of the New York State Unified Court System, the HON. JAMES TORMEY in his capacity as Administrative Judge of the Fifth Judicial District and the ONONDAGA COUNTY BAR ASSOCIATION,

DECISION AND ORDER

Defendants.

The plaintiff, Christina Cagnina, commenced this action by and through her attorney, Jeffrey Parry, by filing a summons with notice with the Office of the County Clerk for Onondaga County on November 30, 2009. The defendants, Onondaga County ("County"), the Assigned Counsel Program, Inc. ("ACP"), and the Onondaga County Bar Association ("OCBA") appeared and demanded service of a complaint on or about December 9, 2009. On December 29, 2009, the plaintiff served her complaint. The County, ACP, and OCBA joined issue on January 19, 2010.

The plaintiff, an attorney who formerly was, pursuant to contract, a member of the panel of attorneys who are assigned through the ACP to represent indigent clients. The plaintiff chose not to renew her contract with the ACP and, therefore, is no longer a member of the ACP panel.

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Plaintiff brings this action alleging five causes of action: breach of contract; equitable estoppel; declaratory judgment; fraud and breach of fiduciary duty; and conversion.

The defendants County, ACP and OCBA brings the instant motion to dismiss pursuant to CPLR §3212, asking the Court to dismiss (a) all causes of action as against the OCBA; and (b) the plaintiff's second, third and fourth causes of action against all moving defendants.

It is typically at this point in a decision where a court might recite the relevant facts giving rise to the matter at bar. However, here the Court finds it relevant, if not absolutely necessary, to recount the facts and procedural history of another matter pending before it: Parry v. County of Onondaga et al., Index Nos.: 2007-5138 and 2007-8002.

Like Ms. Cagnina, the plaintiff herein, Mr. Parry (attorney for Ms. Cagnina and *pro se* plaintiff in Parry v. County of Onondaga, supra) was also a panel attorney pursuant to contract with the ACP. He too was assigned through the ACP to represent indigent clients; that is, until he chose not to renew his contract with the ACP and essentially removed himself from the panel.

Mr. Parry filed an Article 78 petition, Parry v. County of Onondaga, et al., ("Parry Art. 78"), wherein he sought to compel courts to assign counsel to indigent persons and to pay assigned counsel without reference to the assigned counsel plan instituted by the County and the OCBA. This petition was transferred directly to the Appellate Division, Fourth Department, for consideration. The first of two actions Parry v. County of Onondaga, et al., Index No.: 2007-5138 ("Parry I"). Parry I, filed on or about September

12, 2007, stated three causes of action against the County, ACP and OCBA, among other defendants: breach of contract, breach of fiduciary duty and for a declaratory judgment. Notably, the declaratory judgment Mr. Parry demanded of this Court was that the rules and regulations of the ACP are “*ultra vires*, illegal, and a nullity.”

On or about November 27, 2007, Mr. Parry commenced a second action, Parry v. County of Onondaga, et al., Index No.: 2007-8002 (“Parry II”). Parry II states seven causes of action against the County, the ACP and OCBA, among others, sounding in negligence and/or gross negligence; fraud; economic duress; interference with legal remedies; conversion; interference with contractual relations; and injurious falsehood.

Upon motion by the defendants, and after review of papers submitted by both the plaintiff and the defendants, and after oral argument was heard from both sides, this Court issued a decision from the bench on February 14, 2008, and, for reasons stated therein, dismissed all of Mr. Parry’s causes of action in Parry I as against many of the named defendants, including, and in particular, the OCBA. An Order in keeping with that decision was signed on March 4, 2008, and filed on March 5, 2008. A copy of said Decision and Order are attached hereto and incorporated herein by reference and marked as Exhibit “A”.

On May 2, 2008, the Appellate Division, Fourth Department, issued its decision on Mr. Parry’s Article 78 petition, Parry v. County of Onondaga, 51 AD3d 1385. The court held that Mr. Parry had failed to establish a “clear legal right” to the relief sought and dismissed the petition. The Appellate Division found that the County, through its contract with the ACP, had met its obligation to place in operation a plan for the provision of assigned counsel to persons charged with crimes or who otherwise are

entitled to assigned counsel and who are financially unable to obtain counsel. Id. at 1386. Further, the court concluded that because the ACP's assigned counsel plan had been approved by the Chief Administrative Judge of New York, that the respondents, in establishing and operating the ACP, were not violating County Law §722 or otherwise infringing upon the court's inherent authority to provide assigned counsel in criminal cases, as alleged by Mr. Parry. Id. at 1387. Finally, the court pointed out that to the extent that Mr. Parry's petition sought a declaration that the rules and regulations of the ACP violated constitutional or statutory requirements and are therefore a nullity, Mr. Parry must seek such a declaration via a declaratory judgment action (which was already pending in this Court). Id. A copy of said Decision is attached hereto and incorporated herein by reference and marked as Exhibit "B".

Thereafter, upon motion by the defendants and after the Court reviewed all papers submitted by and heard oral arguments from both Mr. Parry and defendants, this Court issued a decision, again from the bench, on June 26, 2008, and for reasons stated therein, dismissed all of Mr. Parry's causes of action in Parry II as against many of the named defendants, including in particular, the OCBA. Further, the Court dismissed Mr. Parry's first, second, third, sixth and seventh causes of action against all the defendants; granted Mr. Parry's cross-motion to consolidate Parry I and Parry II; and issued a discovery schedule, among other things. An Order in keeping with this decision was signed on July 8, 2008 and filed on July 10, 2008. A copy of said Decision and Order are attached hereto and incorporated herein by reference and marked as Exhibit "C".

On November 12, 2008, Mr. Parry moved this Court for summary judgment on his third cause of action in the complaint for Index No.: 2007-5138, for a declaratory

judgment. Mr. Parry demanded the court to issue a declaratory judgment stating that the rules and regulations of the ACP were *ultra vires*, illegal and a nullity. The remaining defendants - the County, ACP and OCBA, filed a cross-motion for summary judgment. After extensively reviewing all of the papers submitted by both Mr. Parry and the defendants, and after listening to and considering the arguments of both sides, this Court issued an exhaustive decision which denied Mr. Parry's motion for summary judgment and granted, in part, the defendants' cross-motion for summary judgment. The Court clearly, concisely and unequivocally set forth the Court's reasoning and the legal basis for dismissing Mr. Parry's declaratory judgment action:

The Assigned Counsel plan is designed to facilitate and implement the court's exercise of its inherent power to deal with and monitor assigned counsel, inasmuch as such plan served to provide a constant, ready source of available counsel, to define the amount and source of compensation and the manner of payment...Thus, like the Appellate Division before this Court, the Court concludes in establishing and operating the ACP, respondents are not in violation of any state or county laws, and the documents, as written, do not infringe upon the court's inherent authority to provide assigned counsel in criminal cases. *See Decision, Index Nos.: 2007-5138, 2007-8002, dated November 25, 2009.*

This decision left no unanswered questions with regard to Mr. Parry's entitlement to the declaration sought nor whether this Court would issue the declaration sought.

"This Court finds no question of fact, and absolutely no reason to issue the declaration that [Mr. Parry] in this Declaratory Judgment Action seeks. Consequently, this Court declines to issue such a declaration." *See Decision, Index Nos.: 2007-5138, 2007-8002, dated November 25, 2009.*

Subsequent to the issuance of the November 25, 2009 decision of this Court, a proposed Order was submitted in keeping with said decision. That Order was signed on December 11, 2009, and was filed in the Office of the County Clerk on December 14, 2009. A copy of said Decision and Order are attached hereto and incorporated herein by reference and marked as Exhibit "D".

With the facts and procedural history of Mr. Parry's own personal litigation as against the County, ACP and OCBA in mind, the Court turns once again to the matter at bar, Cagnina v. County of Onondaga.

After oral argument was heard on the instant motion, the Court of Appeals issued its decision in the matter of Hurrell-Harring v. State of New York,¹⁵ NY3d 8. As the Appellate Division, Third Department, decision in the Hurrell-Harring matter was argued in previous motion practice in Mr. Parry's own actions, this Court reviewed the Court of Appeals's decision to determine whether this holding would have any affect whatsoever on the plaintiff's request for declaratory judgment in this matter. It determines that the most recent decision in Hurrell-Harring does not. Here, the plaintiff is not an indigent defendant, but an attorney who previously represented the indigent through the ACP. There is no need for a separate declaratory judgment action brought by Ms. Cagnina to proceed in order to vindicate the constitutional rights of the indigent. As has been addressed by this court and the Appellate Division, Fourth Department, in the various Parry actions, there is simply no valid declaratory judgment claim, and the holding in Hurrell-Harring does not change this.

The moving defendants have moved for an Order pursuant to CPLR §3212 dismissing all of the causes of action against the OCBA, and that the plaintiff's second,

third, and fourth causes of action against all defendants be dismissed. As the allegations in the complaint for the action at bar are identical in sum and substance (albeit with a change of wording here and there) to those set forth in many of the causes of action set forth in Parry I and Parry II, for the reasons set forth in exhaustive detail in this Court's previous decisions in Parry I and Parry II, the defendants' motion is GRANTED in its entirety.

In reviewing the papers before the Court in this action, as well as the pleadings, transcripts of oral argument, and decisions and Orders of this Court in Parry I and Parry II, as well as the decision of the Appellate Division, Fourth Department, in the Parry Art. 78 proceeding, a disturbing picture has developed. It appears that plaintiff's counsel, Mr. Parry, has taken no heed of any court decision that has been issued from any of the various actions he has filed with regard to his crusade to have the ACP rules and regulations declared unconstitutional, *ultra vires*, illegal and a nullity.

The appellate court expressly stated that the County, through its contract with the ACP, had met its obligation to place in operation a plan for the provision of assigned counsel to persons who are entitled to assigned counsel. Further, the court unequivocally stated that because the ACP's plan had been approved by the Chief Administrative Judge, that the County and the ACP were not violating County Law §722 or otherwise infringing upon the court's inherent authority to provide assigned counsel.

Despite this decision, Mr. Parry proceeded with his actions in Supreme Court, including, in particular, he request for a declaratory judgment that the ACP plan was contrary to law. This Court reviewed all papers submitted and heard and reviewed transcripts of all arguments made before the Court when considering the defendants'

motions to dismiss Mr. Parry's claims. Mr. Parry vehemently objected and opposed the defendants' motions and conceded on not one point, when it was clear under law and fact that his contentions were incorrect. The majority of the causes of action in Parry I and Parry II were dismissed outright as lacking merit. The Court also dismissed all causes of action against many of the defendants as they were clearly not proper parties to the action. The reasoning behind this Court's decisions was spelled out clearly and concisely in the bench decisions issued. Further, with regard to the dismissal of Mr. Parry's declaratory judgment action, this Court, in a very clear and lengthy decision, set forth why Mr. Parry's request for a declaratory judgment could not and would not stand. And it is Mr. Parry's actions upon the issuance of that particular Court decision that the Court finds unconscionable, contumacious, and perhaps sanctionable. To see the extent to which Mr. Parry appears to utterly disregard the decisions of this Court, as well as that of the Appellate Division, one need only look at the time line of the proceedings before this Court and Mr. Parry's actions in conjunction with that time line.

This Court's decision dismissing Mr. Parry's declaratory judgment action was issued on November 25, 2009. It was sent by the Court to counsel that same date. Five days later, on November 30, 2009, Mr. Parry sent out a Summons with Notice in the Cagnina action. An Order in keeping with this Court's November 25, 2009 decision was signed on December 11, 2009, and was filed on December 14, 2009. Fifteen days later, Mr. Parry, signed and served an unverified complaint in the Cagnina action, alleging many of the causes of action that had already been determined to be without merit against various defendants, many of whom had already been determined to be improper parties and against whom no cause of action could stand. What is most distressing is

that Mr. Parry included yet another demand for declaratory judgment in the Cagnina matter - using almost identical words and allegations as set forth in his own previous actions, all of which were found to be without merit.

Further, Mr. Parry appears to give no consideration to the fact that this Court has time and time again dismissed the exact same claims he asserts herein on behalf of Ms. Cagnina as against the OCBA as he asserted against the OCBA in his own previously filed actions. He has been told by this Court that the OCBA is not a proper party to his breach of contract action.

And it does not go unnoticed by this Court that Mr. Parry has pursued the same causes of action against the same defendants in the matter of Roulan v. County of Onondaga, Index No.: 2008-2382, wherein he represents Timothy Roulan, yet another attorney who was formerly on the panel of the ACP but also chose not to renew his contract. Despite the decisions of this Court and of the Appellate Division, Fourth Department, Mr. Parry continues to pursue these claims previously deemed to be without merit against many defendants this Court previously deemed to be improper parties to any such action. This not only shows Mr. Parry's complete disdain for this Court and its rulings, as well as those of the Appellate Division, but also evidences a disturbing pattern of conduct the sole purpose of which appears to be to harass and cause expense to the various defendants.

By continuing to pursue these claims and causes of action, Mr. Parry has wasted valuable Court resources and time, and has caused the defendants to incur expense having to defend against baseless suits time and time again.

A court may, where appropriate and in its discretion, award any party or attorney in any civil action or proceeding costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct. 22 NYCRR 130-1.1(a). In addition to awarding costs, the court, in its discretion, may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. Id. Conduct is frivolous if it is completely without merit in law and cannot be supported by reasonable argument for an extension, modification or reversal of existing law...or if it is to harass or maliciously injure another. 22 NYCRR 130-1.1(c)(1),(3).

An action, not frivolous at the time of filing, may become so during litigation, and failure to discontinue the action is sanctionable. Navin v. Mosquera, 30 AD3d 815. In considering whether specific conduct is frivolous, courts are required to examine "whether or not the conduct was continued when its lack of legal or factual basis was apparent or should have been apparent." Id.

The defendants' motion is GRANTED in its entirety and all causes of action as against the Onondaga County Bar Association are DISMISSED and the plaintiff's second, third and fourth causes of action against all defendants are DISMISSED.

NOW, upon the notice of motion, dated January 25, 2010, in support of the motion for dismissal; the affidavit of Jonathan B. Fellows, sworn to January 25, 2010; the affidavit of Renee S. Captor, sworn to January 20, 2010, in support of the motion; and the affidavit of Jeffrey Parry, sworn to March 4, 2010; and the Court having heard oral argument on the motion, it is hereby

ORDERED, that the motion to dismiss all causes of action against the Onondaga County Bar Association is hereby GRANTED, and it is further

ORDERED, that the second cause of action in the complaint is hereby dismissed as against all defendants; and it is further

ORDERED, that the Court declines to issue the declaratory judgment requested in plaintiff's third cause of action in the complaint and that cause of action is hereby dismissed as against all defendants; and it is further

ORDERED, that the fourth cause of action in the complaint is hereby dismissed as against all defendants; and it is further

ORDERED, that a hearing be held on Thursday, January 13, 2011 at 2:00 p.m., to determine whether costs and reasonable attorneys fees be awarded to the defendants herein and whether sanctions should be issued as against Mr. Parry for the conduct described herein. At that hearing, the Court will take testimony and evidence to establish whether or not counsel's conduct has been frivolous and the Court shall consider, among other issues, the circumstances under which the conduct took place, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

DATED: September 27, 2010.



Hon. John C. Cherundolo, A.J.S.C.

STATE OF NEW YORK
 SUPREME COURT COUNTY OF ONONDAGA

JEFFREY R. PARRY,

Plaintiff,

v.

ORDER

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND, both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE CAPTOR, both Individually and as Director of the Assigned Counsel Program, Inc., J.C. ENGLEBRECHT, both Individually and as President of the Assigned Counsel Program, Inc.; and EACH AND EVERY OFFICER AND MEMBER OF THE ASSIGNED COUNSEL PROGRAM, INC. BOARD OF DIRECTORS,

Index No. 2007-5138

RJI No. 33-07-4009

Hon. John C. Cherundolo

Defendants.

Defendants, Nicholas Pirro, the Onondaga County Legislature, Dale Sweetland, the Onondaga County Bar Association, Renee Captor, J.C. Engelbrecht and Each and Every Officer and Member of the Assigned Counsel Program, Inc. Board of Directors, having moved for an order granting summary judgment dismissing the complaint as against them,

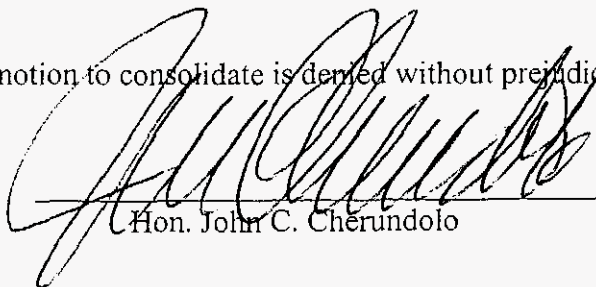
NOW, upon the Notice of Motion of defendants Nicholas Pirro, the Onondaga County Legislature and Dale Sweetland, dated November 12, 2007, and the Affidavit of Jonathan B. Fellows, Esq., sworn to November 12, 2007, the Affidavit of Nicholas Pirro, sworn to November 8, 2007, the Affidavit of Dale Sweetland, sworn to November 9, 2007, the Notice

of Motion of defendants Onondaga County Bar Association, Renee Captor, J.C. Engelbrecht and the Officers and Directors of the Onondaga County Bar Association Assigned Counsel Program, Inc., and the Affidavit of Jonathan B. Fellows, Esq., sworn to November 6, 2007, the Affidavit of David M. Pellow, Esq., sworn to November 1, 2007, the Affidavit of J.C. Engelbrecht, Esq., sworn to November 5, 2007, and the Affidavit of Renee S. Captor, Esq., sworn to November 5, 2007, the Notice of Cross Motion of plaintiff, Jeffrey R. Parry, Esq., dated January 24, 2008, for an order consolidating this action with another action, the Affidavit of Jeffrey Parry, Esq., sworn to January 24, 2008, in opposition to the motions for summary judgment and in support of the cross motion, and the Affidavit of Jonathan B. Fellows, Esq., sworn to December 12, 2007, and the Court having heard oral argument on the motion and cross motion on February 14, 2008, Jonathan B. Fellows, Esq. for the defendants and Jeffrey R. Parry, Esq., pro se, for the plaintiff, and the Court having issued a decision from the bench, a transcript of which is attached hereto as **Exhibit A**, it is

ORDERED that the motions for summary judgment are granted and the action is dismissed with prejudice as against Nicholas Pirro, the Onondaga County Legislature, Dale Sweetland, the Onondaga County Bar Association, Renee Captor, J.C. Engelbrecht, and Each and Every Officer and Member of the Assigned Counsel Program., Inc. Board of Directors, and it is further

ORDERED that the cross motion to consolidate is denied without prejudice.

Dated: MARCH 4, 2008



 Hon. John C. Cherundolo

ENTER.

1 THE CLERK: Perry versus Onondaga County.

2 THE COURT: Can we have your appearances for
3 the record, please?

4 MR. FELLOWS: Jonathan Fellows, Bond,
5 Schoeneck & King for defendants.

6 MR. PARRY: Jeffrey Parry, pro se, Judge.

7 THE COURT: All right, Mr. Fellows, care to be
8 heard?

9 MR. FELLOWS: Yes, Your Honor. Plaintiff is a
10 panel attorney of the Onondaga County Bar
11 Association and the Assigned Counsel Program, I'm
12 going to call that ACP, Judge.

13 THE COURT: So he didn't get paid, wants to
14 get paid, sued everybody in town.

15 MR. FELLOWS: Your Honor, ACP has a contract
16 with the County, Mr. Parry is one of the panel
17 attorneys of ACP. If he has a dispute about not
18 getting paid, that dispute is either with the
19 County or ACP. There is no need to sue everyone
20 else in town. He doesn't have a claim against any
21 of them.

22 Your Honor, I think the motion papers kind of
23 walk through who these other people are. I will go
24 through it briefly right now.

25 THE COURT: You don't have to. I read it.

1 MR. FELLOWS: Judge, we are not moving on
2 behalf of the County, we are not moving on behalf
3 of ACP. I do believe there are defenses that we'll
4 bring forward later to the claims against those two
5 parties. All I'm asking the Court to do today is
6 to get rid of the people that he has sued that have
7 no contractual or fiduciary relationship with him
8 and proceed with the litigation.

9 THE COURT: Thank you, Mr. Fellows.
10 Mr. Parry?

11 MR. PARRY: Your Honor, frankly, when I
12 drafted these papers, I never thought that it would
13 be construed that there was a contract between
14 myself and Mr. Pirro or Mr. Sweetland or Ms. Captor
15 or Mr. Englebrecht, etcetera. I have no problem
16 with that being ruled out. There is, however, a
17 breach of fiduciary duty which is contained in the
18 same papers. And I'm not willing to consent to
19 that.

20 Also, Your Honor, as to the Onondaga County
21 Legislature, Judge, as a matter of law and as
22 contained in the contract and handbook provisions
23 of Assigned Counsel, they're the contracting party.
24 It's in the statute that they are directed to or
25 given the option to form this organization. It's

1 also in the statute that they can direct
2 Mr. Sweetland to enter into the papers.

3 Frankly, I don't see on a contractual basis
4 how they can be held out. But frankly, Your Honor,
5 all of that is the grand scheme of things. I don't
6 want to say a tempest in a teapot, but it is a
7 relatively small matter.

8 The fact of the matter is that Article 18B
9 places upon the County the duty to pay lawyers.
10 This is not something that's isolated with me, I
11 now have five clients that have the same problem.
12 The tort claims are potentially enormous.

13 Judge, I have to tell you I'm having some
14 trouble. Frankly, Judge, I'm having some trouble
15 talking. As this is being argued, I have one child
16 that got out of the hospital yesterday, I have
17 another child that requires 24-hour-a-day medical
18 care and I can't get paid and we're sitting here
19 nitpicking as to whether or not I have a contract
20 with Ms. Captor. That's ridiculous. Of course I
21 don't. Had I been called, I'd have admitted it.

22 Judge, I have to get to more serious matters
23 than this thing and if I look like a desperate man,
24 it's because I am. And I represent four other
25 desperate men.

1 Judge, I'll rely on your discretion here. I'm
2 admitting that there is no contract with Mr. Pirro,
3 I'm admitting that there is no contract with
4 Mr. Sweetland. The County Legislature not only
5 drafted this thing, they made themselves
6 fiduciaries because they put people on the board,
7 they're in. That's it.

8 I hope I don't sound rude, Judge. But as you
9 know, Judge, from previous cases, this has been
10 several years in the making and I'm pretty
11 frazzled.

12 THE COURT: Anything else, Mr. Fellows?

13 MR. FELLOWS: No, Your Honor.

14 THE COURT: This Court has now listened to
15 oral arguments and this is the decision of the
16 Court. The plaintiff, Jeffrey Parry, is a local
17 attorney appearing pro se. He voluntarily agreed
18 to be placed on the County's assigned counsel list.
19 As such he agreed to be assigned to represent
20 indigent criminal defendants, and the County of
21 Onondaga, via the Onondaga County Bar Association
22 Assigned Counsel Program, Inc., a domestic
23 not-for-profit corporation, pays the plaintiff for
24 his services in this representation.

25 The plaintiff believes that he has not been

1 paid what is due him for representation on various
2 actions to which he has been assigned and is suing
3 the ACP, the Assigned Counsel Program, and the
4 County and various other entities and persons,
5 including the Onondaga County Bar Association, the
6 Onondaga County Legislature and others. The
7 plaintiff ostensibly brings this action in an
8 effort to get paid what he believes he is due. He
9 has not only sued the various associations and
10 corporations involved in or tangentially associated
11 with the Assigned Counsel Program, but has also
12 sued individual officers of the not-for-profit
13 corporations and the individual board members of
14 the Assigned Counsel Program.

15 All of the defendants, but for the County and
16 the Assigned Counsel Program, move to dismiss the
17 complaint against them. The moving defendants
18 state that they did not enter into any agreements
19 with the plaintiff, and despite the plaintiff's
20 allegations, they are not parties to any contract
21 that Mr. Parry may have entered into with either
22 the County or the ACP, and, therefore, they did not
23 owe the plaintiff a fiduciary duty which the
24 plaintiff claims has been breached.

25 This Court agrees with the moving defendants.

1 The only entities Mr. Parry may conceivably have an
2 action against are the County of Onondaga and the
3 Assigned Counsel Program. He entered into an
4 agreement with the Assigned Counsel Program and the
5 Assigned Counsel Program is the creation of the
6 County of Onondaga. In opposition to the
7 defendants' motion to dismiss, the plaintiff has
8 provided no proof, in admissible form, that
9 evidences any type of fiduciary duty the moving
10 defendants may have owed to the plaintiff. The
11 plaintiff's conclusory allegations are, in and of
12 themselves, not enough to raise triable issues of
13 fact regarding the existence of a fiduciary
14 relationship between the plaintiff and any of the
15 individual moving defendants or the other moving
16 defendants in this case.

17 Mr. Parry asked that the Court pierce the
18 corporate veil and allow action against the
19 individual named defendants to continue; however he
20 has not satisfied the heavy burden showing that the
21 corporation was dominated as to the transactions in
22 question and that the dominion was such an
23 instrument of fraud or otherwise resulted in
24 wrongful or inequitable consequences. Citing, TNS
25 Holdings, Inc. V. MKI Securities Corp, 92 NY2d 335.

1 Further, evidence of dominion alone does not
2 suffice to pierce the corporate veil, without an
3 additional showing that the dominion led to
4 inequity, fraud or malfeasance.

5 As such, the motion of the defendants Nicholas
6 Pirro, both individually and as County Executive;
7 the Onondaga County Legislature; Dale Sweetland,
8 both individually and as chairman of the Onondaga
9 County Legislature; Renee Captor, both individually
10 and as Director of the Assigned Counsel Program,
11 Inc.; J.C. Englebrecht, both individually and as
12 President of the Assigned Counsel Program, Inc.;
13 and Each and Every Officer and Member of the
14 Assigned Counsel Program, Inc., Board of Directors
15 to dismiss this case as granted in its entirety and
16 the plaintiff's complaint as against those
17 defendants is dismissed in its entirety.

18 The plaintiff herein also cross moved to
19 consolidate this action, bearing Index Number
20 2007-5138, with an action involving the same
21 plaintiff and many of the same defendants herein
22 named, as well as adding a few additional
23 defendants. This second action bears Index Number
24 2007-8002. The plaintiff alleges both actions
25 involve common issues of law and fact and involve

1 the same witnesses and evidence and are proper for
2 consolidation under CPLR 602.

3 CPLR 602 does allow for consolidation of
4 claims both where claims involve common issues of
5 fact and/or law and where the court consideration
6 of the claims separately would entail unnecessary
7 expense and time and the actions would be
8 duplicitous in nature. While there is no time
9 stated in which to make a motion for consolidation
10 of claims, a motion for this relief may not be made
11 until issue has been joined, as it is unknown until
12 the time what actions present common issues in
13 various cases to be consolidated. Citing, Siegel
14 New York Practice, 4th Edition, Section 127 at page
15 221.

16 The plaintiff makes no showing that issue has
17 been joined on the second action bearing Index
18 Number 2007-8002, and therefore, cannot be
19 consolidated or considered for consolidation at
20 this time as it is unknown what the issues are as
21 framed by the pleadings and the answers and whether
22 the actions do indeed involve common issues of law
23 and fact.

24 As such, plaintiff's motion for consolidation
25 is at this time denied, without prejudice. I would

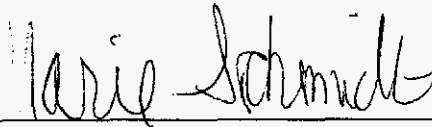
1 hope that if, in fact, those issues are framed by
2 an answer or a responsive pleading that the parties
3 might be able to at least discuss whether there are
4 common issues of fact and law and might agree on
5 whether or not consolidation is appropriate under
6 the circumstances or whether the actions should
7 proceed jointly.

8 As a result, the defendants' motion to dismiss
9 the plaintiff's complaint as against the moving
10 defendants is granted in its entirety and the
11 plaintiff's cross-motion is denied, without
12 prejudice, to renew at a later date. The
13 defendant's counsel is directed to submit a
14 proposed order to this Court, on notice to opposing
15 counsel, in keeping with this, attaching a copy of
16 the arguments heard before this Court and this
17 decision attached to the order. Thank you,
18 gentlemen.

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C E R T I F I C A T I O N

I, Marie E. Schmidt, an Official Reporter in the Fifth Judicial District, State of New York, do hereby certify that the foregoing is a true and complete transcript of my stenographic notes taken in the above-entitled matter, held at the time and place first above mentioned.



MARIE E. SCHMIDT

Dated: February 19, 2008

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

593

OP 07-02247

PRESENT: SMITH, J.P., LUNN, FAHEY, PINE, AND GORSKI, JJ.

IN THE MATTER OF JEFFREY R. PARRY, PETITIONER,

V

MEMORANDUM AND ORDER

COUNTY OF ONONDAGA, ASSIGNED COUNSEL PROGRAM,
 INC., ONONDAGA COUNTY BAR ASSOCIATION AND
 JAMES C. TORMEY, III, AS DISTRICT ADMINISTRATIVE
 JUDGE FOR THE FIFTH JUDICIAL DISTRICT,
 RESPONDENTS.

JEFFREY R. PARRY, PETITIONER PRO SE.

BOND, SCHOENECK & KING, PLLC, SYRACUSE (JONATHAN B. FELLOWS OF
 COUNSEL), FOR RESPONDENTS COUNTY OF ONONDAGA, ASSIGNED COUNSEL
 PROGRAM, INC., AND ONONDAGA COUNTY BAR ASSOCIATION.

RESPONDENT JAMES C. TORMEY, III, AS DISTRICT ADMINISTRATIVE JUDGE FOR
 THE FIFTH JUDICIAL DISTRICT, HAVING ELECTED NOT TO APPEAR.

Proceeding pursuant to CPLR article 78 (initiated in the
 Appellate Division of the Supreme Court in the Fourth Judicial
 Department pursuant to CPLR 506 [b] [1]) seeking, among other things,
 to compel respondents to comply with article 18-b of the County Law.

It is hereby ORDERED that said petition is unanimously dismissed
 without costs.

Memorandum: Petitioner commenced this original proceeding
 pursuant to CPLR article 78 in the nature of prohibition and mandamus
 seeking, in effect, to compel the courts of respondent County of
 Onondaga (County) to assign counsel to indigent persons and to compel
 the County to pay assigned counsel without reference to the assigned
 counsel plan implemented by the County and administered by respondent
 Onondaga County Bar Association Assigned Counsel Program, Inc. (ACP),
 incorrectly sued as Assigned Counsel Program, Inc. The ACP is a not-
 for-profit corporation affiliated with respondent Onondaga County Bar
 Association (Bar Association). With respect both to prohibition and
 mandamus, there must be, inter alia, "a clear legal right" to the
 relief sought (*Matter of Holtzman v Goldman*, 71 NY2d 564, 569; see
Matter of Legal Aid Socy. of Sullivan County v Scheinman, 53 NY2d 12,
 16), and that is not the case here. Thus, the petition must be
 dismissed. The record establishes that the County, through its
 contract with the ACP, has met its obligation to place in operation a
 plan for the provision of assigned counsel to persons charged with
 crimes or who otherwise are entitled to assigned counsel and who are

financially unable to obtain counsel (see County Law § 722). The ACP sponsored by the Bar Association, "whereby the services of private counsel are rotated and coordinated by an administrator," is statutorily authorized (see § 722 [3]). Such assigned counsel plans are "designed to facilitate and implement the court's exercise of its inherent power [to assign counsel, inasmuch as such plans] serve to provide a constant, ready source of available counsel[,] to define the amount and source of [assigned counsels'] compensation, and the manner of payment" (*Matter of Stream v Beisheim*, 34 AD2d 329, 334). Furthermore, the ACP's assigned counsel plan has in fact been approved by the Chief Administrative Judge of New York (see § 722 [3]). Thus, we conclude that, in establishing and operating the ACP, respondents are not violating County Law § 722 or otherwise infringing upon the court's inherent authority to provide assigned counsel in criminal cases, and that petitioner has not established "a clear legal right to the relief sought" (*Matter of Platten v Dadd*, 38 AD3d 1216, 1217, lv denied 9 NY3d 802; cf. *Matter of Legal Aid Socy. of Orange County v Patsalos*, 185 AD2d 926).

Finally, the petition also must be dismissed to the extent that it seeks a declaration from this Court that the contract between the County and the ACP violates constitutional or statutory requirements and is therefore a nullity. Such relief must be sought in a declaratory judgment action (see e.g. *Levenson v Lippman*, 4 NY3d 280; *Matter of Hinman v Mark*, 291 AD2d 870) and, indeed, it appears that such an action has been commenced by petitioner and is now pending in Supreme Court.

Supreme Court
 APPELLATE DIVISION,
 Fourth Judicial Department,
 Clerk's Office, Rochester, N.Y.

*I, JOANN M. WAHL, Clerk of the Appellate Division of the Supreme Court in the Fourth
 Judicial Department, do hereby certify that this is a true copy of the original order, now
 on file in this office.*



IN WITNESS WHEREOF, *I have hereunto set my
 hand and affixed the seal of said Court in the City
 of Rochester, New York, this* **MAY 02 2008**

Joann M. Wahl

Clerk.

STATE OF NEW YORK
 SUPREME COURT COUNTY OF ONONDAGA

JEFFREY R. PARRY,

Plaintiff,

v.

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND, both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE CAPTOR, both Individually and as Director of the Assigned Counsel Program, Inc., J.C. ENGLEBRECHT, both Individually and as President of the Assigned Counsel Program, Inc.; and EACH AND EVERY OFFICER AND MEMBER OF THE ASSIGNED COUNSEL PROGRAM, INC. BOARD OF DIRECTORS,

Defendants.

ORDER

Index Nos. 2007-5138
 2007-8002

RJI No. 33-07-4009

JEFFREY R. PARRY,

Plaintiff,

v.

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE' CAPTOR, both Individually and as Director of the Assigned Counsel Program, Inc., J.C. ENGLEBRECHT, both individually as President of the Assigned Counsel

Index No. 2007-8002

RJI No. 33-08-1893

Hon. John C. Cherundolo

Program, Inc.; ANTHONY RIVIZZIGNO, both individually and as County Attorney, GEORGE RAUS, DONALD D'AMICO, CRAIG SCHLANGER, RICHARD HANLON, JERALD HARRELL, and EACH AND EVERY OFFICER AND MEMBER OF THE ASSIGNED COUNSEL PROGRAM, INC. BOARD OF DIRECTORS,

Defendants.

Defendants having moved for summary judgment dismissing certain Defendants and certain causes of action in Index No. 2007-8002 and for an order compelling Plaintiff to respond to certain discovery requests in Index No. 2007-5138, and plaintiff having moved for an order compelling defendant, the Onondaga County Bar Association Assigned Counsel Program, Inc. ("ACP") to disclose the names and residence addresses of its officers and directors,

NOW, upon the notice of motion dated May 13, 2008, in support of the motion for dismissal, the affidavit of Jonathan B. Fellows sworn to May 13, 2008, in support of the motion, and the notice of motion dated May 21, 2008, in support of the motion to compel, and the affidavit of Jonathan B. Fellows sworn to May 21, 2008, in support of the motion, and the notice of motion of Plaintiff dated June 19, 2008, and the affidavit of Jeffrey Parry sworn to June 19, 2008, and the reply affidavit of Jonathan B. Fellows sworn to on June 23, 2008, and the Court having heard oral argument on the motions and issued a decision from the bench, a copy of which is attached hereto as Exhibit A, it is hereby

ORDERED that the actions are hereby consolidated pursuant to CPLR 602(a), and it is further

ORDERED that the motion to dismiss all causes of action against Nicholas Pirro, the Onondaga County Legislature, Dale Sweetland, the Onondaga County Bar Association,

Renee Captor, J. C. Englebrecht, Anthony Rivizzigno, George Raus, Donald D'Amico, Craig Schlanger, Richard Hanlon, Jerald Harrell, and each and every officer and member of the Assigned Counsel Program, Inc. Board of Directors is hereby granted, and it is further

ORDERED that the first cause of action in the Complaint in Index No. 2007-8002 for negligence is hereby dismissed as against all defendants, and it is further

ORDERED that the second cause of action in the Complaint in Index No. 2007-8002 for fraud is hereby dismissed as against all defendants, and it is further

ORDERED that the third cause of action in the Complaint in Index No. 2007-8002 for economic duress is hereby dismissed as against all defendants, and it is further

ORDERED that the sixth cause of action in the Complaint in Index No. 2007-8002 for interference with contractual relations is hereby dismissed as against all defendants, and it is further

ORDERED that the seventh cause of action in the Complaint in Index No. 2007-8002 for injurious falsehood is hereby dismissed as against all defendants, and it is further

ORDERED that the motion to dismiss is denied with respect to the fourth cause of action for interference with legal remedies in the complaint in Index No. 2007-8002 and the fifth cause of action in the complaint in Index No. 2007-8002 for conversion and denied without prejudice to renew as against defendants Onondaga County and ACP, and it is further

ORDERED that Plaintiff's motion to compel the production of names and residential addresses of officers and directors of ACP is hereby denied, and it is further

ORDERED that the motion to compel is hereby granted and the complaints shall be dismissed in both actions in their entirety unless Plaintiff responds to Defendants' outstanding

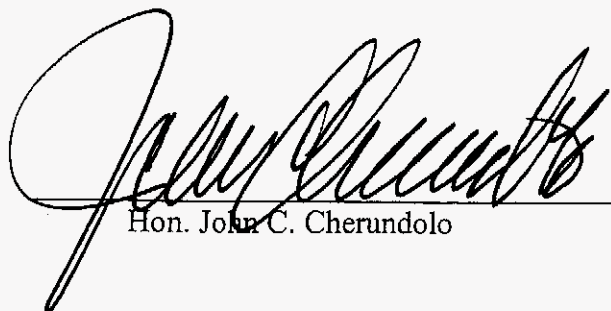
discovery demands within thirty days of the date of service of this Order with notice of entry,
and it is further

ORDERED that all paper discovery in these actions shall be completed by July
31, 2008, and all depositions and other discovery shall be completed by September 1, 2008, and
it is further

ORDERED that Plaintiff shall file a note of issue on or before September 10,
2008.

Dated: July 8, 2008

ENTER.



Hon. John C. Cherundolo

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SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF ONONDAGA: CIVIL TERM

JEFFREY R. PARRY,

Plaintiff,

INDEX NO.
2007-8002

-vs-

DECISION

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND, both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE CAPTOR, both individually and as Director of the Assigned Counsel Program, Inc.; J.C. ENGLEBRECHT, both individually and as President of the Assigned Counsel Program, Inc.; ANTHONY RIVIZZIGNO, both individually and as County Attorney; GEORGE RAUS, DONALD D'AMICO, CRAIG SCHLANGER, RICHARD HANLON, JERALD HARRELL, and EACH AND EVERY OFFICER AND MEMBER OF THE ASSIGNED COUNSEL PROGRAM, INC. BOARD OF DIRECTORS,

Defendants.

Onondaga County Courthouse
401 Montgomery Street
Syracuse, New York 13202
June 26, 2008

B e f o r e:

HONORABLE JOHN C. CHERUNDOLO,

Justice, without a jury.

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A p p e a r a n c e s :

JEFFREY R. PARRY, ESQ.
Appearing pro se
120 East Washington Street - Suite 800
Syracuse, NY 13202

BOND, SCHOENECK & KING, PLLC
BY: SUZANNE O. GALBATO, ESQ.
Appearing on behalf of the Defendants
One Lincoln Center
Syracuse, NY 13202

1 PARRY v. THE COUNTY OF ONONDAGA, et al.

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2 THE COURT: No.

3 All right. First of all, I'm going to
4 consolidate this action with the matter of Jeffrey
5 Parry vs. County of Onondaga, Index Number 2007-5138
6 pursuant to CPLR 602 (A), as it is clear that these
7 actions arise out of the same set of circumstances,
8 same set of facts, and involves the same parties.

9 Secondly, Plaintiff is hereby ordered and
10 directed to produce the discovery demanded by the
11 Defendants within thirty days and in proper form and
12 in keeping with the requirements of the CPLR or the
13 complaint will be dismissed. When I say in
14 compliance with the CPLR, in other words, if a
15 document is produced, he shall specify what that
16 document is responding to, what request that document
17 is responding to.

18 The claims asserted against Nicholas Pirro, both
19 individually and as County Executive; the Onondaga
20 County Legislature; Dale Sweetland, both individually
21 and as Chairman of the Onondaga County Legislature;
22 Renee Captor, both individually and as Director of
23 the Assigned Counsel Program, Inc.; J.C. Engelbrecht,
24 both individually and as President of the Assigned
25 Counsel Program, Inc.; and Each and Every Officer and

1 PARRY v. THE COUNTY OF ONONDAGA, et al. 4

2 Member of the Assigned Counsel Program, Inc., Board
3 of Directors, as well as the claims asserted against
4 Anthony Rivizzigno, both individually and as County
5 Attorney, are hereby dismissed in their entirety.
6 Refer to the Court's decision in Parry vs. County of
7 Onondaga, Index Number 2007-5138, and this Court's
8 decision dated February 14th, 2008.

9 Plaintiff's Causes of Action based on gross
10 negligence, fraud, and injurious falsehood are hereby
11 dismissed as against all Defendants for Plaintiff's
12 failure to plead with the particularity required by
13 CPLR 3016. See also Cunningham vs. Hagedorn, 72
14 A.D.2d 702; Lesesne vs. Lesesne, 292 A.D.2d 507; Rall
15 vs. Hellman, 284 A.D.2d 113; and Gavrilov vs. Slinim,
16 5 Misc.3d 1021 (A).

17 With regard to the Plaintiff's claim for
18 economic duress, it is clear under New York law that
19 economic duress can occur as a Cause of Action and
20 can only be asserted against an opposing party to a
21 contract where: and I quote, "The theory on which
22 the Plaintiff seeks recovery permits a complaining
23 party to void a contract and recover damages when it
24 establishes that it was compelled to agree to the
25 contract terms because of a wrongful threat by the

1 PARRY v. THE COUNTY OF ONONDAGA, et al.

5

2 other party which precluded the exercise of its free
3 will. The existence of economic duress is
4 demonstrated by proof that one party to a contract
5 has threatened to breach the agreement by withholding
6 performance unless the other party agrees to do some
7 further demand." And I cite, 805 Third Avenue Co.
8 vs. M.W. Realty Associates, 58 N.Y.2d 447.

9 And in the papers submitted to this Court, which
10 this Court has reviewed in its entirety, Plaintiff
11 has made no such showing. As a result, that Cause
12 of Action is hereby dismissed.

13 With regard to the Plaintiff's claim of simple
14 negligence, again it is clear from the Plaintiff's
15 complaint and subsequent papers that he's pled in
16 this case, that this is again no more than a breach
17 of contract action dressed in tort clothing, despite
18 the contentions made at oral argument. New York
19 Courts have long held that a Plaintiff may not
20 convert a breach of contract action into a tort
21 action. Again, citing Massena Town Center Associates
22 vs. Sear Brown Group, Inc., 255 A.D.2d 893; also
23 Scott vs. Keycorp, 247 A.D.2d 722. New York Courts
24 do not recognize a Cause of Action for negligent
25 breach of contract. Citing 22A N.Y.Jur.2d,

1 PARRY v. THE COUNTY OF ONONDAGA, et al.

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2 Contracts, Section 428. Therefore, Plaintiff's Cause
3 of Action for negligence is hereby dismissed.

4 Plaintiff's Cause of Action for interference
5 with contractual relations is an attempt, yet again,
6 to restate a Cause of Action for breach of contract,
7 the claim which this Court has already -- and is a
8 claim which this Court has already determined cannot
9 lie as against the individual Defendants named. The
10 Plaintiff's complaint fails to state a Cause of
11 Action for tortious interference with contractual
12 relations with regard to the remaining Defendants,
13 the County of Onondaga and the Assigned Counsel
14 Program, Inc., citing CPLR 3211 (a) (7); therefore,
15 the Plaintiff's Cause of Action for tortious
16 interference with contractual relations is hereby
17 dismissed as against all Defendants.

18 The Defendants' motion to dismiss the
19 Plaintiff's remaining Causes of Action for conversion
20 and interference with legal remedies is hereby denied
21 without prejudice to renew, and shall proceed as
22 against the Defendants Onondaga County and the
23 Assigned Counsel Program only, as it is premature in
24 this Court's mind to determine the validity of these
25 claims without the benefit of discovery having been

1 PARRY v. THE COUNTY OF ONONDAGA, et al. 7

2 had.

3 The Plaintiff's cross-motion asking this Court
4 to compel the Defendants to provide the names and
5 residential addresses of officers and directors of
6 the Assigned Counsel Program, Inc. is hereby denied.
7 Plaintiff has made no showing that he has made a
8 proper demand for such information pursuant to the
9 CPLR, and based under the Court's decision and this
10 case, such information is not relevant to the action.

11 Having said all that, this Court is intending to
12 fast-track this case. Mr. Parry's claims against
13 the Assigned Counsel Program, if indeed true, need to
14 be addressed and need to be addressed forthwith. We
15 intend to do exactly that.

16 As a result, I'm ordering that all paper
17 discovery in both actions be complete by July 31st,
18 2008. All depositions and other discovery will be
19 complete by September 1st, 2008. This case will be
20 trial-ready by September 15th, 2008.

21 Plaintiff shall file a Note of Issue in this
22 action on or before September 10th, 2008.

23 A trial date will be set as soon as possible
24 following September 15th, so we can get this action
25 reached by all parties and get this matter resolved

1 PARRY v. THE COUNTY OF ONONDAGA, et al.

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2 once and for all, such that if Mr. Parry is indeed
3 owed money, it will get paid and paid promptly.

4 So I'm going to ask Defense Counsel to prepare
5 the appropriate order, submit it to the Court on
6 notice to Mr. Parry, so we can get this done and get
7 to proceeding with discovery and get the case
8 resolved forthwith.

9 MS. GALBATO: Yes. Thank you, Judge.

10 MR. PARRY: Thank you, Judge.

11 THE LAW CLERK: Attach a copy of the transcript?

12 THE COURT: Yeah, attach a copy of the
13 transcript to it as well.

14 MS. GALBATO: Thank you, Judge.

15 THE COURT: Thank you.

16 (Conclusion of proceedings.)

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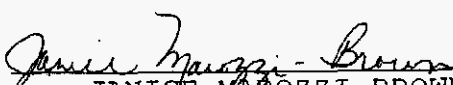
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C E R T I F I C A T E

STATE OF NEW YORK)
COUNTY OF ONONDAGA)
CITY OF SYRACUSE)

I, JANICE MAROZZI-BROWN, CSR-RPR, Senior Court Reporter,
in and for the Fifth Judicial District, State of New York, do
hereby certify that I attended the foregoing proceeding and
took a stenotype report of the same and the foregoing is a true
and accurate transcript of the same and of the whole thereof,
to the best of my ability.

DATED: 4-27-08



JANICE MAROZZI-BROWN, CSR-RPR
Senior Court Reporter

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JEFFREY R. PARRY,

Plaintiff,

v.

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND, both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE CAPTOR, both Individually and as Director of the Assigned Counsel Program, Inc., J.C. ENGLEBRECHT, both Individually and as President of the Assigned Counsel Program, Inc.; and EACH AND EVERY OFFICER AND MEMBER OF THE ASSIGNED COUNSEL PROGRAM, INC. BOARD OF DIRECTORS,

Defendants.

ORDER

Index Nos. 2007-5138

RJI No. 33-07-4009

JEFFREY R. PARRY,

Plaintiff,

v.

THE COUNTY OF ONONDAGA; NICHOLAS PIRRO, both individually and as County Executive; THE ONONDAGA COUNTY LEGISLATURE; DALE SWEETLAND both individually and as Chairman of the Onondaga County Legislature; THE ONONDAGA COUNTY BAR ASSOCIATION, THE ASSIGNED COUNSEL PROGRAM, INC.; RENEE' CAPTOR, both Individually and as Director of the Assigned Counsel Program, Inc., J.C. ENGLEBRECHT, both individually as President of the Assigned Counsel Program, Inc.; ANTHONY RIVIZZIGNO, both individually and as County Attorney, GEORGE RAUS, DONALD D'AMICO, CRAIG SCHLANGER, RICHARD HANLON, JERALD HARRELL, and EACH AND EVERY OFFICER

Index No. 2007-8002

RJI No. 33-08-1893

AND MEMBER OF THE ASSIGNED COUNSEL
PROGRAM, INC. BOARD OF DIRECTORS,

Defendants.

Plaintiff having moved for an order granting summary judgment on the third cause of action in the complaint in Index Number 2007-5138, for a declaratory judgment, and defendants having cross-moved for an order dismissing the declaratory judgment cause of action,

NOW, upon the Notice of Motion of the plaintiff, dated November 12, 2008, and the Affidavit of Jeffrey R. Parry, sworn to November 11, 2008, in support of the motion, and the Notice of Cross-Motion of defendants, dated December 3, 2008, the Affidavit of Jonathan B. Fellows, sworn to December 3, 2008, and the Affidavit of Jeffrey R. Parry, sworn to December 16, 2008, and the Court having issued a written decision on the motions, a copy of which is attached as Exhibit A, it is

ORDERED that plaintiff's motion is denied, and it is further

ORDERED that defendants' cross-motion is granted in part, and the third cause of action in the complaint in Index Number 2007-5138, seeking a declaratory judgment, is hereby dismissed, and defendants' motion is otherwise denied.

Dated: December 11, 2009
Syracuse, New York



Hon. John C. Cherundolo

ENTER.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

JEFFREY R. PARRY,

Plaintiff,

vs.

Index No. 07-5138
RJI No. 33-07-4009

THE COUNTY OF ONONDAGA; THE ONONDAGA
COUNTY BAR ASSOCIATION, THE ASSIGNED
COUNSEL PROGRAM, INC.,

Defendants.

DECISION

JEFFREY R. PARRY,

Plaintiff,

vs.

Index No. 07-8002
RJI No. 33-08-1893

THE COUNTY OF ONONDAGA; THE ONONDAGA
COUNTY BAR ASSOCIATION, THE ASSIGNED
COUNSEL PROGRAM, INC.,

Defendants.

MEMORANDUM DECISION

This is a motion for summary judgment brought by plaintiff - a practicing criminal defense attorney - Jeffrey R. Parry ("plaintiff" or "Mr. Parry"). Plaintiff's motion deals with Mr. Parry's original third cause of action, seeking a declaratory judgment action seeking to establish that the handbook of rules and procedures ("the Handbook"), for the Onondaga County Bar Association Assigned Counsel Program, Inc. ("ACP" or "defendant"), is "*ultra vires*, illegal, and a nullity", and that it is unconstitutional. The motion presently before this Court comes near the end of what has been an arduous motion practice to incrementally parse through plaintiff's original

causes of action against a myriad of individuals and entities in plaintiff's efforts to procure payment for work performed under the ACP and for which he claims he was never compensated. The remaining defendants to this action, the ACP and the County of Onondaga ("County" or "defendant"), oppose this motion and cross-move for summary judgment and dismissal of plaintiff's claim.

For the following reasons, plaintiff's motion for summary judgment is DENIED, and defendants' cross-motion for summary judgment is GRANTED.

BACKGROUND

The County of Onondaga has implemented and funds an Assigned Counsel Program, which differs from a Public Defender system in several important ways. A Public Defender system is the counterpart to a district attorney's office in that criminal defense attorneys work for the Public Defender full-time and become specialized in certain areas of criminal law. Under the Assigned Counsel Program, ACP panel attorneys are essentially independent contractors and are reimbursed for representing the indigent clients to whom they are assigned. The Assigned Counsel Program may not be an attorney's sole source of income as attorneys commonly take on assigned cases in order to supplement the income they earn practicing in other areas of law. In fact, some ACP attorneys lack expertise in the areas of criminal defense to which they are assigned; however, the assigned attorneys provide an invaluable service while upholding the Sixth Amendment right to counsel for those who could not otherwise afford to defend themselves. The ACP panel attorneys earn far below market-value for their services and

make the assistance offered by the ACP a reality, at the same time providing a tremendous benefit to their community.

Under the ACP, attorneys are reimbursed through a voucher system. As of January 1, 2004, assigned attorneys are to be compensated at a rate of \$60.00 (sixty dollars) per hour for misdemeanor cases, and \$75.00 (seventy-five dollars) per hour for felony cases. This compensation rate is governed by statute, and is capped. Vouchers claiming an amount which exceeds the statutory cap are taken under special review. Furthermore, it is required that each voucher be submitted with certain other documentation provided by the assigned attorney in order to explain or support the attorney's billing practices. Plaintiff contends that there are numerous problems under the current system, including allegations of wrongdoing and purposeful non-payment. Plaintiff, here, claims that he has monies due and owing to him under the ACP.

Concerning to this Court are the contentions made by the plaintiff of purposeful wrongdoing, favoritism and claims of willful, gross negligent and/or purposeful actions by ACP that have a direct effect on the right to counsel for indigent defendants in criminal actions. Although the motion before this Court does concern plaintiff's causes of action for non-payment, several universal facts bear mentioning. First, Mr. Parry was allegedly removed from the ACP panel during the course of his representation of several indigent clients; yet plaintiff continued to provide his services while refusing to reconcile with the panel insofar as renewing his contract. The basis for his refusal to renew his contract gives rise to the cause of action underlying the instant motion. Plaintiff avers that he could not, in good conscious, sign a contract he deemed to be illegal. The

question presented to this Court is whether the contract and handbook themselves are “illegal, ultra vires, and/or a nullity” and whether, as written, they must be deemed to be unconstitutional. Plaintiff asks that this Court consecrate his declaration; a request that this Court cannot agree.

THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment is a drastic remedy which shall be granted only when the movant has established that there are no triable issues of fact. *Andre v. Pomeroy*, 35 NY2d 361. Once the movant has established a prima facie entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof, in evidentiary form, establishing the existence of triable issues of fact or must demonstrate an acceptable excuse for its failure to do so. *Zuckerman v. City of New York*, 49 NY2d 557; *Davenport v. County of Nassau*, 279 AD2d 497; and *Bras v. Atlas Construction Corp.*, 166 AD2d 401.

The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. *Matter of Suffolk County Dep't of Social Services v. James M.*, 83 NY2d 178; and *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395. A motion for summary judgment should be denied if the court has any doubt as to the existence of a triable issue of fact. *Freese v. Schwartz*, 203 AD2d 513; and *Miceli v. Purex Corp.*, 84 AD2d 562.

When deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party and must give the non-moving party the benefit of all reasonable inferences which can be drawn from the

evidence. Negri v. Stop & Shop, Inc., 65 NY2d 625; and Louniakov v. M.R.O.D. Realty Corp., 282 AD2d 657. However, mere conclusions of law or fact are insufficient to defeat a motion for summary judgment. Banco Popular North America v. Victory Tax Management, Inc., 1 NY3d 381.

Here, the plaintiff asks this Court to make a declaration by way of declaratory judgment, that the contract and handbook (as well as policies) are illegal, ultra vires and/or a nullity, and that they are, as written, unconstitutional.

**STANDARD FOR DECLARATORY JUDGMENT
AND JUDICIAL REVIEW(CPLR §3001)**

CPLR §3001 provides the statutory basis in New York for Declaratory Judgment Actions. That section authorizes the Court to enter a declaratory judgment, in addition to any other relief that may be available, declaring the rights and obligations of the parties to a justiciable controversy. This means that the controversy must be real and actual, not feigned. A declaratory judgment action cannot and should not be a request for an advisory opinion, but, rather, the issues to be resolved must be real, not of an academic interest and not based on some potential or conjectural events that may occur in the future. Weinstein, Korn & Miller, New York Civil Practice CPLR, Second Edition, Section 3001.00.

It has been said that the primary purpose of a Declaratory Judgment Action is to adjudicate the party's rights before a "wrong" actually occurs, and hope that later litigation will be unnecessary. Klostermann v. Cuomo, 61 N.Y.2d 525. The primary purpose of making the requested declaration or declarations is to stabilize the legal

relations and eliminate uncertainty as to the scope and content of present or prospective obligations, as long as such prospective obligations are real and can be determined.

Goodman v. Reisch, 220 A.D.2d 383.

A Declaratory Judgment may not be had when an “actual controversy” is lacking. Barry v. Ready Reference Publishing Co., 25 A.D.2d 827. As a result, the words “justiciable controversy” were added to CPLR §3001 to reflect such past pronouncements of New York courts, and that statute otherwise codifies the statements made by the New York State Court of Appeals that there is a Constitutional requirement of an actual controversy between the adverse parties. MVAIC v. National Grange Mutual Insurance Co., 19 N.Y.2d 115. The language of the statute also reflects that the courts are not empowered to render advisory opinions, or determine abstract, moot, hypothetical, remote, academic or conjectural questions. Hearst Corporation v. Klein, 50 N.Y.2d 707; Zimmerman v. Abrams, 101 A.D.2d 691; Cutro v. Sheehan Agency, Inc., 96 A.D.2d 669; Concord Realty Co. v. New York, 30 N.Y.2d 308; Square Parking Systems v. Metropolitan Transportation Authority, 92 A.D.2d 782; New York State Association of Insurance Agents, Inc. v. Schenck, 44 A.D.2d 757.

It is impossible for any court to harmonize all of the New York cases on the subject of “justiciability” since the courts, by virtue of the variegated situations brought before them in declaratory judgment actions, are forced into *ad hoc* determinations much of the time. The only pervasive characteristic is an insistence that the general purpose of the Declaratory Judgment Action be satisfied. Weinstein, Korn & Miller, New York Civil Practice CPLR, Second Edition, Section 3001.03.

In a Declaratory Judgment Action, the plaintiff must show that there is a valid interest in securing a declaration and present, in an adversary context, a controversy with the defendant concerning that interest. Krieger v. Krieger, 25 N.Y.2d 364; Dicanio v. Incorporated Village of Nissequogue, 180 A.D.2d 223. Indeed, there must be some actual, genuine, live controversy, the decision of which can definitely effect existing legal relations. If the issue is not yet ripe for determination, or if no actual potential conflict can be established, or if all of the factors of a potential conflict are not yet in place, or if those facts may change by alteration and circumstances or otherwise, such issues cannot be determined by declaratory judgment. Hearst Corporation v. Clyne, *supra*; Wisholek v. Douglas, 97 N.Y.2d 740. Borchard, **Declaratory Judgments**, 34-36, 2nd Edition, 1941.

To meet the test of justiciability, it is necessary to present the court with a controversy touching the legal relations of the parties that may affect an adverse interest from which harm is presently flowing or could flow in the future in absence of a Court determination of the party's rights. Town of Saranac v. Town of Plattsburg, 218 A.D.2d 866; Rice v. Cayuga Onondaga Health Care Plan, 190 A.D.2d 330. The controversy, to be ripe for declaratory judgment, must be capable of definitive and complete disposition and presented in an adversary context with a set of concrete facts. Town of Saranac v. Town of Plattsburg, *supra*; Dicanio v. Incorporated Village of Nissequogue, *supra*; Rosenzweig v. New York Surrogate's Court, 44 Misc.2d 1013. *See also* Weinstein, Korn & Miller, *New York Civil Practice CPLR*, 2nd Edition, Section 3001.05.

Chief Justice Hughes in Aetna Life Insurance Co. v. Hayworth, 300 U.S. 227, best described the elements of justiciable controversy as follows:

A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot...the controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interest...it must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what law would be upon a hypothetical state of facts...where there is such a concrete case admitting of a immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Aetna Life Insurance Co. v. Hayworth,
300 U.S. at pp. 240-241.

Whether an “actual controversy” is presented is a question, that by its very nature, must be decided on an *ad hoc* basis. Engel v. Engel, 275 A.D. 14. Whether a case is a proper subject for Declaratory Judgment is determined by circumstances that exist when the issues are presented to the court, not when the action was instituted and not upon any hypothetical or conjectural circumstances that may exist in the future. Phelan v. City of Buffalo, 54 A.D.2d 262; Golden v. Zwickler, 394 U.S. 103.

By stating that the Supreme Court “may render a declaratory judgment”, the drafters of CPLR §3001 emphasized the discretionary nature of the remedy of Declaratory Judgment. Morgenthau v. Erlbaum, 59 N.Y.2d 143; Solomon Brothers v. West Virginia State Board of Investors, 152 Misc.2d 289. If the issuance of a declaration of rights in a particular case will serve the interests of convenience of the parties or the

public, if there is a public interest involved, or if the court is satisfied that a grant of a declaratory judgment will serve some useful function, then the court should exercise its discretion and render declarations that detail and define interests and rights.

Sometimes the exercise of discretion will invoke a detailed appraisal of the case, and other times such a detailed appraisal may not be necessary in light of other factors dealing with the case, including factors dealing with Collateral Estoppel, Res Judicata, Prior Actions Pending or other interests dealing with justiciable controversies that may not yet be ripe.

Where the action involves a question involving a public interest or an issue having wide-spread repercussions, or where questions of policy may become involved, such considerations may, in the right circumstances, lead a court to decline to hear actions seeking declarations and would obviate the need for such a declaration of interests or rights. Johnson v. Dunbar, 282 A.D. 720; Spat v. Feinberg, 18 Misc.2d 925; Glendon v. Glendon, 45 Misc.2d 855. In such cases, the case law is clear that the court's discretion, while exceedingly broad in determining whether to grant or refuse to grant declaratory relief, cannot be exercised in a totally arbitrary or capricious manner. Westchester Mortgage Co. v. Grand Rapids and Iona Railroad Company, 246 N.Y. 194. The exercise of judicial discretion under CPLR §3001 should be accomplished in a reasoned manner, and if the court decides to refuse jurisdiction, the court should state its grounds and articulate its reasoning behind such refusal. CPLR §3001. For example, courts need not respond to a request for declaratory judgment if there is another action pending between the parties or if the issue has already been decided in another forum. Gardner v. Evans, 60 N.Y.2d 781; Ithaca Textiles, Inc. v. Waverly Lingerie Sales Co., 24

A.D.2d 133; Berkule v. Feldman, 39 Misc.2d 250. *See also*, Note, *Availability of a Declaratory Judgment When Another Suit Is Pending*, 51 Yale Law Journal 511 (1942).

The court may also refuse to entertain a Declaratory Judgment Action when the issue will become effective only upon the occurrence of a future event that may or may not come to pass. Prashker v. United States Guarantee Co., 1 N.Y.2d 584; United Water New Rochelle, Inc. v. City of New York, 275 A.D.2d 464; Park Ave. Clinical Hospital v. Cramer, 26 A.D.2d 613. Declaratory relief may be denied when the result would not terminate the dispute, or might increase the number of cases brought to determine similar issues, or perhaps result in a piecemeal determination of the litigation. The basic idea of a Declaratory Judgment Action must serve some utilitarian function to stabilize or clarify relationships between the parties before a court will hear and act upon it. Great American Insurance Co. v. Cochrane, 16 A.D.2d 151; Smith v. Western Telephone Company, 276 A.D.2d 210 *See also* Weinstein, Korn & Miller, *New York Civil Practice CPLR*, 2nd Edition, Section 3001.09(d).

In order for the court to consider a request for Declaratory Judgment, CPLR §3017(b) requires that the demand specify the rights and legal relations on which a declaration is requested, whether further relief is or could be claimed, and the nature of any further relief that is requested. The court is required to look to the pleadings submitted in the action to determine what the specific right or rights promote the requests in a Declaratory Judgment Action. Such requests will come in the Complaint that commences the Declaratory Judgment Action, any affirmative pleading throughout the case, and in any counterclaim, cross-claim, or third-party complaint. Spadanuta v.

Incorporated Village of Rockville Center, 20 A.D.2d 799. The complaint must present facts in a definite, intelligible and concise manner so as to enable the court to determine if there is a justiciable controversy and, if so, to determine the universe of facts that make up the controversy. Bloom v. Mayor of New York, 35 A.D.2d 92; Lakeland Water District v. Onondaga County Water Authority, 24 N.Y.2d 400; New York State Association of Insurance Agents, Inc. v. Schenck, 44 A.D.2d 757.

Once the court assumes jurisdiction of a declaratory judgment action via a motion or otherwise, it has the power to grant any relief, whether such relief was prayed for or not. Levy v. Blue Cross and Blue Shield, 124 A.D.2d 900; Reiner v. Prudential Insurance Company, 48 N.Y.S.2d 880. If the plaintiff is not entitled to relief, the court should retain jurisdiction and proceed to issue a declaration in favor of the party entitled thereto rather than dismiss the action outright, where the determination will effect the legal relations of the private parties. St. Lawrence University v. Trustees of Theological School of St. Lawrence University, 20 N.Y.2d 317; East Brooklyn Savings Bank v. Leibner, 256 N.Y. 596. The law has been clear that generally the court should make specific declarations of legal interests, but dismissal of such a request in a particular case can be, and often is, justified as an exercise of discretion. Sweeney v. Cannon, 23 A.D.2d 1; Bernkrant v. Temporary State Housing Rental Commission, 36 Misc.2d 507.

Further, CPLR §3017(a) authorizes the court to grant any relief appropriate to the proof, whether demanded or not. New York Association of Counties v. Axelrod, 191 A.D.2d 932.

So the question before the Court is whether the ACP contract and handbook themselves are illegal and ultra vires, and should be declared a nullity, and/or whether the way those documents are interpreted and acted upon by ACP are illegal and ultra vires. In either case, given appropriate findings, this Court can issue such declarations as may be necessary, or under appropriate circumstances, decline to give any declarations. This Court, at this stage of the proceeding, declines to make any declarations from the request of plaintiff. Based on the applicable case law of the Court of Appeals and Appellate Divisions, which this Court is constrained to follow.

Defendants set forth, *inter alia*, that the information requested by the ACP, in addition to the voucher form, does not require that the assigned attorney reveal information protected by the attorney-client privilege. Furthermore, defendants set forth that there is no provision or law which requires that all admitted attorneys must be considered qualified to serve as defense counsel in criminal cases and that the ACP has the authority to decide as such. Defendants further aver that the administrative scheme, published in the Handbook, and under which the vouchers are reviewed, is lawful and has been approved by the Administrative Law Judge. This approval, they contend, makes plaintiff's request meritless (*citing, Levenson v. Lippman*, 4 NY3d 280). The defense also contends that the prior decision by the Appellate Division in plaintiff's Article 78 claim, forecloses such a claim.

PLAINTIFF'S MOTION

As the plaintiff is the moving party in this motion for summary judgment, this Court must afford the defendants every reasonable inference that can be made from the

evidence before it. This being the case, the defendants seek to raise several issues of fact and law as to the legality of the Handbook of ACP procedures, which they contend preclude the grant of plaintiff's motion, and justify judgment on their behalf dismissing the third cause of action in its entirety.

DISCUSSION

The defense claims that plaintiff's request for declaratory judgment, and thus its motion and the entire claim contained in the Third Cause of Action, are foreclosed by the opinion in the Appellate Division, Fourth Department, which emanated from plaintiff's Article 78 proceeding. Defense also contends that because the contract and handbook were approved by the administrative judge specifically, that the claim and request for declaratory judgment must fail.

Looking at defendants' first claim with regard to the Article 78 proceeding, clearly, in that case, the court found that the petition must be dismissed. The court further found that:

...the record establishes that the County, through its contract with the ACP, has met its obligation to place in operation a plan for the provision of assigned counsel to the persons charged with crimes or who otherwise are entitled to assigned counsel and who are financially unable to obtain counsel (see County Law, Section 722). The ACP sponsored by the Bar Association ... is statutorily authorized (see Section 722(3)). Such assigned counsel plans are "designed to facilitate and implement the court's exercise of its inherent power (to assigned counsel, inasmuch as such plans) serve to provide a constant, ready source of available counsel, to define the amount and source of (assigned counsel's) compensation and the manner of payment, citing Matter of Stream v. Beisheim, 34 AD2d 324.

The Appellate Division, Fourth Department went on to confirm that the ACP's assigned counsel plan has, in fact, been approved by the Chief Administrative Judge of the State of New York, pursuant to Section 722(2). The court thus concluded:

...we conclude that, in establishing and operating the ACP, respondents are not violating County Law Section 722 or otherwise infringing upon the court's inherent authority to provide assigned counsel in criminal cases, and that the petitioner has not established "a clear right to the relief sought."

Based on the language of the Appellate Division, the defense contends that the Appellate Division decision clearly precludes the type of relief requested by the plaintiff in this action, and otherwise precludes a decision that would invalidate the very ACP program which the Appellate Division upheld.

The defense further contends that this Court lacks jurisdiction to set aside the determination of the Chief Administrative Judge. By letter dated April 6, 2006, Chief Administrative Judge Lippman stated, in pertinent part, as follows:

I have received the proposed revised Onondaga County Bar Association Assigned Counsel Program, Inc., handbook of policies, rules and procedures (effective February 1, 2006) pursuant to Section 22 of the County Law...I hereby approve the proposed handbook of policies, rules and procedures for the Onondaga County Bar Association Assigned Counsel Program, Inc. (effective February 1, 2006).

(See Captor Affidavit, Exhibit "A").

The plaintiff, however, contends that the defendants are using the handbook, and otherwise adopting policies, rules and procedures that are inequitable to those clients to

which the plaintiff and others similarly situated are assigned. In short, it is almost as though the plaintiff is not criticizing so much the handbook, rules and regulations, but the actual way in which the rules, regulations, policies and procedures are used by the responsible ACP administrators. In fact, most of the other claims that the plaintiff makes in each of the actions before this court deal with actions by ACP, which he alleges to show purposeful wrongdoing, negligence, and reckless indifference to the constitutional rights of indigent people alleged to be criminals.

Based on the law before this Court, this Court finds that it cannot condone or agree to issue a declaratory judgment that the ACP handbook, rules, policies and regulations, as written and as approved by the Chief Administrative Judge, are illegal, ultra vires and should be declared a nullity. As a result, this Court declines to make such a declaration.

Indeed, the plaintiff in this matter has not established “a clear right to the relief sought”, and has not otherwise shown to this Court’s satisfaction, that the rules, as approved, lead to constitutional deprivation of individual defendants.

In making this decision, this Court relies heavily upon Levenson v. Lippman, 4 NY3d 280, and makes the determination that the allocation of financial resources for the payment of assigned counsel is a concern for court administrators, and that Chief Administrator validly adopted the ACP plan pursuant to the authority delegated to him under 22 N.Y.C.R.R. 80.1. This Court finds that the Assigned Counsel plan is designed to facilitate and implement the court’s exercise of its inherent power to deal with and monitor assigned counsel, inasmuch as such plan served to provide a constant, ready

source of available counsel, to define the amount and source of compensation and the manner or payment. Matter of Stream v. Beisheim, 34 AD2d 324. Thus, like the Appellate Division before this Court, this Court concludes that in establishing and operating the ACP, respondents are not in violation of any state or county laws, and the documents, as written, do not infringe upon the court's inherent authority to provide assigned counsel in criminal cases.

Left to be determined in this case, is whether the activities of ACP, themselves, used the handbook, rules, regulations, policies and procedures in an ultra vires, illegal, and/or unconstitutional way. Plaintiff makes a myriad of claims alleging that the wrongful activities of ACP contributed to a host of Sixth Amendment violations to indigent defendants. While this Court has grave concern about whether or not such claims are, in fact, accurate, this Court, as a result of *stare decisis* based on previous case law, chooses to uphold the validity of the original documents approved by the Chief Administrative Judge, and look to the way that ACP actually carries out the mandates of County Law Section 722.

As a result, this Court finds no question of fact, and absolutely no reason to issue the declaration that plaintiff in this Declaratory Judgment Action seeks. Consequently, this Court declines to issue such a declaration.

DEFENDANTS' MOTION

The defendants are the moving party in this cross-motion for summary judgment seeking to dismiss plaintiff's claim; therefore, this Court must afford the plaintiff every reasonable inference that can be made from the evidence before it. This being the case,

plaintiff seeks to raise several issues of fact and law as to the constitutionality of the procedures set forth in the ACP Handbook which preclude the grant of defendants' motion. A careful reading of the documents at issue, and a review of the adoptive language by the Chief Administrative Judge, leads this Court to an altogether different conclusion.

In light of the above, this Court readily adopts defendants' assertion that this Court lacks jurisdiction over plaintiff's Declaratory Judgment Action. The issues of constitutionality raised by the plaintiff go to the actions of the ACP administrators, not to the adopted handbook, policies, procedures and written regulations. It is there where the facts at issue involving strictly statutory provisions end and issues of constitutionality begin. It is there where the constitutional issues arise, that makes this action lie within the jurisdiction of this Court.

Plaintiff has set forth, *inter alia*, that the actions of ACP have reached beyond its authorized powers and impermissibly treads on the administrative and supervisory functions reserved to the courts by County Law Art. 18-b and N.Y. Const. art. VI, § 28 when it categorizes attorneys as to the assignments they might receive; mandates and conducts Continuing Legal Education programs; and demands that assigned counsel produce confidential information in relationship to their indigent clients, particularly minors. Furthermore, plaintiff has set forth that the County and ACP violate, *inter alia*, contract law by denying compensation to assigned attorneys who have performed work under the ACP.

This Court finds that the plaintiff's gravamen here, and primary complaint, stands not with the handbook, and other written documents upon which ACP makes its determinations, but the way in which ACP operates, and whether such operations are ultra vires, illegal and otherwise unconstitutional. It is of great concern that such constitutional claims are made to this Court, and, obviously going forward, that will be a significant inquiry of future discovery and at trial.

CONCLUSION

Plaintiff is not, at this stage, without remedy for his causes of action seeking payment for the work he completed on behalf of indigent clients as an assigned attorney. Neither is he without recourse to pursue his allegations directed at the legality of the way in which the ACP Handbook is used by ACP Administrators.

This Court is acutely aware of the Third Department's decision in Kimberly Hurrell-Harring, et al v. State of New York, et al, 66 AD3d 84, decided July 16, 2009. This Court is aware that the Hurrell-Harring matter has been appealed to the Court of Appeals, and the State recently has filed its brief and that matter is ready to be argued.

That case, much like this, seeks to overhaul of the Public Defense System. There, like here, constitutional issues surrounding the Sixth Amendment were prominent. The majority in that Court felt that such a "massive overhaul" of the Public Defense System must be done by the Legislature. In order to overturn decisions made by Chief Administrative Judge on Assigned Counsel Programs, this Court is in complete accord.

However, given the significant constitutional issues presented by the plaintiff (even if only anecdotedly in his papers), the actions of ACP must go on for further

evaluation in this matter. At this point in the litigation, this trial jurist is compelled to agree with the majority in Hurrell-Harring and adopts that majority view in the decision in this case, recognizing that to be a 3-2 decision. The plaintiff cannot, and must not, be deprived of his day in court against ACP with regard to the actions they have taken that might be outside the intent of both the law and the Administrative Judge's acquiescence to the documents from which they operate. Give the constitutional issues alleged to be present in the record before this Court, such claims as to the activities of ACP outside of the written documents from which they base, must be tried before a jury of their peers.

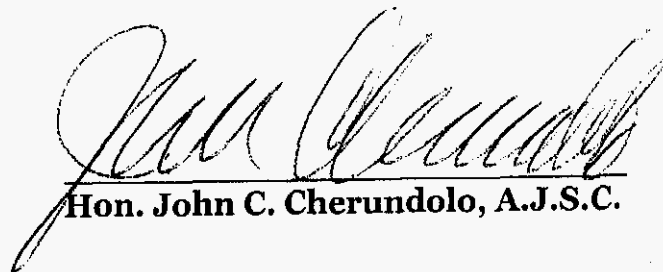
In conclusion, the plaintiff's motion for summary judgment seeking a declaratory judgment is DENIED, and the Court declines to issue such a declaration. Instead, the Court grants judgment dismissing plaintiff's cause of action seeking Declaratory Judgment.

The defendants' cross-motion for summary judgment, to the extent that it goes beyond the third cause of action and the declaration requested, is DENIED, pursuant to the law of Declaratory Judgments.

To the extent that all discovery is not yet complete, the parties are hereby directed to complete all discovery on all claims by February 1, 2010. It is important that all the discovery be totally and fully complete by February 1, 2010. There will be no other reasons or excuses to defer discovery in this matter. Plaintiff is to file a Note of Issue on or before February 1, 2010, or his actions will be dismissed. This matter will be set for trial once all discovery is complete and a Note of Issue has been filed by the plaintiff.

Counsel for the defendants is hereby directed to submit a proposed Order in keeping with the Decision, upon notice to the plaintiff, and attaching a copy of this decision thereto.

DATED: November 25, 2009.



Hon. John C. Cherundolo, A.J.S.C.