

<b>Duffy v County of Nassau</b>
2012 NY Slip Op 30983(U)
April 3, 2012
Supreme Court, Nassau County
Docket Number: 9434/10
Judge: Antonio I. Brandveen
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN  
J. S. C.

RYAN DUFFY,

Plaintiff,

- against -

COUNTY OF NASSAU, BRIAN GUBELLI,  
ANDREW GUBELLI, THOMAS GUBELLI, JOHN  
DOE POLICE OFFICERS 1-10, and JOHN DOE  
POLICE SUPERVISORS 1-5,

Defendants.

TRIAL / IAS PART 29  
NASSAU COUNTY

Index No. 9434/10

Motion Sequence No. 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits .....	<u>1</u>
Answering Affidavits .....	<u>2</u>
Replying Affidavits .....	<u>3</u>
Briefs: Plaintiff's / Petitioner's .....	_____
Defendant's / Respondent's .....	_____

The defendant Andrew Gubelli moves to dismiss the complaint on the ground the plaintiff refused to comply with the September 6, 2011 preliminary conference order, including medical reports, medical authorizations, interrogatory responses and deposition. Gubelli also moves to consolidate for a joint trial of the action with a companion case, *Gubelli v. Reale, et al.*, index number 7210/10 presently assigned to Nassau County Supreme Court Justice Karen V. Murphy. Gubelli further moves to disqualify the plaintiff's counsel because of a conflict of interest.

The Court determines the plaintiff provided Andrew Gubelli with some responses to

the interrogatories and discovery notice. The Court finds the plaintiff's counsel agreed to produce the plaintiff for a February 28, 2012 deposition, and conceded the plaintiff had not received any medical treatments for his injuries which obviated some of the discovery demanded by Andrew Gubelli. However, plaintiff's counsel failed to provide a verification page of the complaint, school record authorizations, employment records authorizations and the responses to interrogatories, specifically the acts Andrew Gubelli allegedly committed which entitle the plaintiff to punitive damages and identifying the person that prepared the responses to the interrogatories. The Court finds the plaintiff's discovery responses are incomplete regarding the defense demands and the September 6, 2011 preliminary conference order.

The underlying personal action and *Gubelli v. Reale, et al.*, index number 7210/10, which was commenced before the instant action arises from the same May 15, 2009 Baldwin, New York incident. "When there are common questions of law or fact, a joint trial is warranted unless the opposing party demonstrates prejudice to a substantial right (*see Glussi v Fortune Brands*, 276 AD2d 586, 587 [2000]; *Ryckman v Schlessinger-Levi-Polatsch-Tydings*, 225 AD2d 603 [1996]; *North Side Sav. Bank v Nyack Waterfront Assoc.*, 203 AD2d 439 [1994])" (*Pierre-Louis v DeLonghi Am., Inc.*, 66 A.D.3d 855, 856, 887 N.Y.S.2d 632 [2d Dept, 2009]). Here, there is no showing of prejudice to the plaintiff or the codefendants with a joint trial of both actions. Moreover, any prejudice would be outweighed by the possibility of inconsistent verdicts if separate trials were held, and the trial Court could mitigate any prejudice by suitable jury instructions

(see *Clark v. Clark*, --- N.Y.S.2d ----, 2012 WL 1021026 [2d Dept, 2012]). The Court determines the instant personal injury action should be paired with *Gubelli v. Reale, et al.*, index number 7210/10 for a joint trial of the action.

“Although ‘[a] party’s entitlement to be represented in ongoing litigation by counsel of his or her own choosing is a valued right which should not be abridged,’ such right will not supersede a clear showing that disqualification is warranted” (*Matter of Marvin Q.*, 45 A.D.3d 852, 853, 846 N.Y.S.2d 356, quoting *Campolongo v. Campolongo*, 2 A.D.3d 476, 476, 768 N.Y.S.2d 498; see *Greene v. Greene*, 47 N.Y.2d 447, 453, 418 N.Y.S.2d 379, 391 N.E.2d 1355; *Matter of Astor Rhinebeck Assoc., LLC v. Town of Rhinebeck*, 85 A.D.3d 1160, 1161, 925 N.Y.S.2d 896; *Horn v. Municipal Info. Servs.*, 282 A.D.2d 712, 724 N.Y.S.2d 320). “[A] party seeking disqualification of its adversary’s lawyer must prove: (1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse” (*Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131, 651 N.Y.S.2d 954, 674 N.E.2d 663; see Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.9[a]; *Falk v. Chittenden*, 11 N.Y.3d 73, 78, 862 N.Y.S.2d 839, 893 N.E.2d 116; *Jamaica Pub. Serv. Co. v. AIU Ins. Co.*, 92 N.Y.2d 631, 636, 684 N.Y.S.2d 459, 707 N.E.2d 414)

*Scopin v. Goolsby*, 88 A.D.3d 782, 784, 930 N.Y.S.2d 639 [2d Dept, 2011].

While the right to choose one’s counsel is not absolute, disqualification of legal counsel during litigation implicates not only the ethics of the profession but also the parties’ substantive rights, thus requiring any restrictions to be carefully scrutinized (see *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437, 443, 515 N.Y.S.2d 735, 508 N.E.2d 647). The party seeking to disqualify a law firm or an attorney bears the burden to show sufficient proof to warrant such a determination (see *Aryeh v. Aryeh, supra*; *Petrossian v. Grossman*, 219 A.D.2d 587, 588, 631 N.Y.S.2d 187). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court (see *Olmoz v. Town of Fishkill*, 258 A.D.2d 447, 684 N.Y.S.2d 611)

*Gulino v. Gulino*, 35 A.D.3d 812, 826 N.Y.S.2d 903 [2d Dept, 2006].

Here, the plaintiff’s counsel here does not dispute he represents four different individuals with potentially conflicting interests in the instant action and *Gubelli v. Reale, et al.*, index

number 7210/10. Rather, the plaintiff's counsel here states, in a January 23, 2012 affirmation, any potential conflicts he may have were fully disclosed to his clients, and the clients agreed to proceed with his representation. The Court notes Andrew Gubelli's counsel represents two plaintiffs, the alleged assault victim and police officer in *Gubelli v. Reale, et al.*, index number 7210/10, and the codefendants in the instant action. Here, Andrew Gubelli fails to sustain his burden showing disqualification the plaintiff's counsel here is warranted. Andrew Gubelli has not shown the clients' interests of the plaintiff's counsel here are materially adverse.

It is well settled that an attorney may not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a member of his firm ought to be called as a witness (*see*, Code of Professional Responsibility DR 5-101 [B]; *Brill v Friends World Coll.*, 133 AD2d 729; *Solomon v New York Prop. Ins. Underwriting Assn.*, 118 AD2d 695), and, "once representation is undertaken, the lawyer must withdraw as advocate if it appears that he must testify on behalf of his own client, or if it appears that he will be called as a witness to testify for the adverse party, where his testimony may be prejudicial to the client he is representing" (*People v Paperno*, 54 NY2d 294, 300)

*Matter of Bartoli*, 143 A.D.2d 830, 831, 533 N.Y.S.2d 324 [2d Dept, 1988].

The plaintiff's counsel here was a criminal attorney for some of the same parties in a related criminal proceeding to this instant civil action. The attorney for Andrew Gubelli indicates the issue of the plaintiff counsel's representation in the criminal proceeding may be material here in the civil litigation, and the plaintiff's counsel cannot be a witness and an attorney in the same proceeding. However, the attorney for Andrew Gubelli provides an insufficient showing that the plaintiff's counsel will testify on behalf of his own client, or he will be called as a witness to testify for an adverse party. Accordingly, that portion of the motion to

disqualify counsel for the plaintiff is denied.

The plaintiff is, however, directed to fully comply with the September 6, 2011 preliminary conference order, including school record authorizations, employment records authorizations and the responses to interrogatories, specifically the acts Andrew Gubelli allegedly committed which entitle the plaintiff to punitive damages and identifying the person that prepared the responses to the interrogatories within 30 days after service of a copy of this order with notice of entry, otherwise the verified complaint is dismissed.

A joint trial is ordered for *Gubelli v. Reale, et al.*, index number 7210/10 and the instant action in the interest of judicial economy. Each action shall maintain its separate index number and separate caption So ordered.

Dated: April 3, 2012

ENTER:



J. S.C.

NON FINAL DISPOSITION

**ENTERED**  
APR 09 2012  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE