

**Elie v O'Quinn**

2017 NY Slip Op 32458(U)

November 27, 2017

Supreme Court, Kings County

Docket Number: 509187/16

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27<sup>th</sup> day of November, 2017.

P R E S E N T:

HON. DEBRA SILBER,  
Justice.  
-----X

SHAKAIRA ELIANE ELIE,  
Plaintiff,  
- against -  
KYLE O'QUINN, DUBLIN 6 AT 115 BROADWAY INC.  
d/b/a TRINITY BAR AND RESTAURANT and DESMA  
WALKER,  
Defendants.  
-----X

DECISION / ORDER

Index No. 509187/16

Mot. Seq. # 4, 5, 7, 9

KYLE O'QUINN and DESMA WALKER,  
Counterclaim Plaintiffs,  
- against -

SHAKAIRA ELIANE ELIE, SHALIMAR MCINTOSH and  
JOHN DOE,  
Counterclaim Defendants.  
-----X

The following papers numbered 1 to 24 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-2</u>	<u>3-4</u>	<u>5-7</u>	<u>8-10</u>
Opposing Affidavits (Affirmations)_____	<u>11</u>	<u>12, 13</u>	<u>14-15</u>	<u>16-21</u>
Reply Affidavits (Affirmations)_____	<u>16</u>	<u>22-23</u>	<u>24</u>	
Affirmation in support_____				<u>11</u>

Upon the foregoing papers in this personal injury action, defendants and counterclaim plaintiffs, Kyle O'Quinn (O'Quinn) and Desma Walker (Walker), move (in motion sequence 4) for an order, pursuant to CPLR 305 (a), 1003 and 3025 (a), granting them leave to file and

serve a Supplemental Summons and Amended Answer with counterclaims joining Shalimar McIntosh, a non-party (McIntosh) and John Doe as additional counterclaim defendants in this action.

O'Quinn and Walker also move (in motion seq. 5) for the court to so-order a subpoena *duces tecum* addressed to the Parkchester Department of Public Safety (PDPS).

Plaintiff, Shakaira Eliane Elie (Elie) moves (in motion seq. 7) for: (1) a protective order, pursuant to CPLR 3103 (a) and (b), striking defendants' Notice to Admit as ambiguous, abusive, prejudicial, irrelevant, interrogatory in nature and invalid under CPLR 3123; or, alternatively, (2) to limit, modify or otherwise strike portions of defendants' Notice to Admit, based on their ambiguous, abusive, prejudicial and irrelevant nature and on the ground that they are an improper attempt to obtain both interrogatories and a deposition by written questions of the plaintiff; and (3) an order, pursuant to 22 NYCRR 130-1.1 (Part 130), imposing sanctions of \$10,000.00 upon the law office of Walden, Macht and Haran, L.L.P. (WMH), attorneys for defendants O'Quinn and Walker.

In addition, Elie cross-moves<sup>1</sup> (in motion seq. 9) for an order: (1) compelling Jim Walden, Esq. and WMH to produce all documents responsive to the subpoena *duces tecum* served upon non-party witnesses A.S.M. Sports (ASM) and MSG Company (MSG), pursuant to CPLR 3101 and 3126, and otherwise, holding them in contempt of court, pursuant to Judiciary Law § 753, for intentionally blocking material evidence if such documents are not immediately produced; (2) disqualifying Jim Walden, Esq. and WMH from representing non-party witnesses Darrell Comer (Comer), ASM and MSG, pursuant to the Disciplinary Rules of the Code of Professional Responsibility, including but not limited to DR 1-102 and DR 7.3; and (3) imposing Part 130 sanctions upon Jim Walden, Esq. and WMH.

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<sup>1</sup> It seems it is a cross motion to a motion already decided.

## ***Background***

### ***The Altercation***

On the evening of May 22, 2016, O'Quinn, a professional basketball player, attended a promotional event at Trinity Place Bar and Restaurant at 115 Broadway in New York (Restaurant) with five friends, including defendant Walker. Elie was also present at the Restaurant.

#### ***A. Elie's Account Of The Altercation***

Allegedly, O'Quinn "made eye contact" with Elie, a patron at the Restaurant, after which Walker "brushed against" Elie in an effort to "provoke her" (amended complaint at ¶¶ 15 and 17). According to Elie, at approximately 8:45 p.m., she exited the Restaurant, after which O'Quinn and Walker "without justification or provocation, brutally, recklessly, wantonly and negligently attacked, assaulted, harassed and battered" her (*id.* at ¶¶ 21-22). O'Quinn allegedly attacked Elie "by grabbing her around the neck with both hands, throwing her to the ground and kicking her in the ribs while she was on the ground" (*id.* at ¶ 22). O'Quinn allegedly attacked Elie again when she tried to confront Walker (*id.* at ¶¶ 25-26). Elie allegedly sustained serious personal injuries as a result of the assault (*id.* at ¶¶ 27-28).

#### ***B. O'Quinn And Walker's Account Of The Altercation***

O'Quinn claims he attended an event at the Restaurant with five friends (O'Quinn/Walker answer to amended complaint at ¶ 58). O'Quinn allegedly exited the Restaurant to leave with four of his friends, while his fifth friend stayed behind (*id.* at ¶ 59). O'Quinn and Walker allege, upon information and belief, that Elie followed O'Quinn out of the Restaurant and "decided to target [him] because of his status as a professional basketball player . . ." (*id.* at ¶¶ 60-61). Allegedly, Elie assaulted O'Quinn outside the Restaurant by grabbing his private parts without consent and asked Walker whether she was O'Quinn's

girlfriend (*id.* at ¶¶ 63 and 64). O'Quinn allegedly told his friends to ignore Elie (*id.* at ¶ 65).

O'Quinn and his friends allegedly walked away, crossed the street and entered Zuccotti Park (*id.* at ¶ 67). Then, Elie and her two friends (McIntosh and an unidentified man) followed O'Quinn and his friends and "conspired to confront and assault Walker and other members of O'Quinn's group" (*id.* at ¶ 68). Elie, McIntosh and the unidentified man allegedly ran after O'Quinn and his friends along the perimeter of Zuccotti Park (*id.* at ¶ 69). Elie allegedly knocked Walker to the ground and repeatedly struck her in the face and upper body and McIntosh allegedly punched Christopher Fontaine, one of O'Quinn's friends (*id.* at ¶ 70). Elie's male friend allegedly approached O'Quinn and his friends with a partially open backpack held to his chest with his hand inside, as if he had a weapon in the bag (*id.* at ¶ 71). Elie's male friend allegedly stole Walker's purse, which was recovered by O'Quinn's friends (*id.* at ¶ 72). O'Quinn and his friends subsequently "left the scene to avoid any further confrontation" (*id.* at ¶ 73).

### ***The Instant Action***

On June 1, 2016, Elie commenced this personal injury action against O'Quinn, the Restaurant and Jane Doe (later substituted with Walker) by filing a summons and a verified complaint. The complaint asserted a cause of action for assault and battery against O'Quinn and Jane Doe (first cause of action) and three causes of action against the Restaurant for negligence and negligent hiring (the second through fourth causes of action).

O'Quinn answered the complaint, asserted factual allegations regarding his account of the altercation, asserted an affirmative defense for contributory negligence and asserted a counterclaim against Elie for battery.

On March 21, 2017, Elie filed an amended summons and complaint, substituting Walker in place of Jane Doe and correcting the name of the Restaurant in the caption.

O'Quinn and Walker collectively answered the amended complaint, asserted factual allegations regarding their account of the altercation, asserted affirmative defenses and asserted three counterclaims against Elie for: (1) battery for assaulting O'Quinn; (2) battery for attacking Walker; and (3) conspiracy to commit assault and battery. O'Quinn and Walker also asserted a cross claim against the Restaurant for contribution.

### *The Instant Motions*

#### ***A. O'Quinn And Walker's Motion For Leave To Amend Their Answer To Assert Counterclaims Against Non-Parties McIntosh And John Doe***

O'Quinn and Walker move, pursuant to CPLR 305 (a), 1003 and 3025 (a), for leave to file and serve a Supplemental Summons and Amended Answer to the Amended Complaint, joining McIntosh and John Doe as additional counterclaim defendants. O'Quinn and Walker contend that Elie, McIntosh and John Doe "are jointly and severally [liable] as co-conspirators, for the assault committed upon Ms. Walker[,]"<sup>2</sup> and are thus "proper Counterclaim Defendants under CPLR 3019 (a) . . ."<sup>3</sup> O'Quinn and Walker further contend that the amendment would not prejudice Elie since the lawsuit is in its infancy and there has been limited discovery thus far.

McIntosh, in opposition, submitted her attorney's affirmation arguing that defense counsel fabricated conspiracy allegations against McIntosh in retaliation because she "refus[ed] to cooperate with defense [c]ounsel."<sup>4</sup> McIntosh also asserts that O'Quinn and

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<sup>2</sup> See ¶ 8 of the April 20, 2017 affirmation of Jim Walden, Esq., submitted in support of O'Quinn and Walker's motion for leave to amend (Walden Amendment Affirmation).

<sup>3</sup> Walden Amendment Affirmation at ¶ 9.

<sup>4</sup> See ¶ 2 of the June 22, 2017 affirmation of David Storobin, Esq., submitted in opposition to O'Quinn and Walker's motion for leave to amend (Storobin Opposition Affirmation).

Walker were required to commence a third-party action against her and that the “[f]ailure to pay an index number fee . . . makes an action jurisdictionally defective.”<sup>5</sup>

***B. O’Quinn And Walker’s Motion For A So-Ordered Subpoena Addressed To The PDPS***

O’Quinn and Walker also move, pursuant to CPLR 2307, for the court to so-order a subpoena duces tecum addressed to PDPS for documents regarding the unrelated arrest of McIntosh and someone named Jashane Montague for creating a public disturbance on July 1, 2015.

Defense counsel believes that Jashane Montague is the same “John Doe” who was allegedly involved in the May 22, 2016 altercation with O’Quinn and Walker based on a “tentative” identification by witnesses from a “grainy” picture obtained from social media.<sup>6</sup>

Defense counsel contends that the July 1, 2015 arrest records are discoverable because they “unquestionably will lead to disclosure of usable information, in at least three respects.”<sup>7</sup> First, defense counsel claims that the information regarding McIntosh “is directly relevant to her impeachment upon cross-examination, whether as a witness or a Counterclaim Defendant.”<sup>8</sup> Second, defense counsel contends that “to the extent that McIntosh is joined as a Counterclaim Defendant . . . the records sought may lead to discovery of information that falls within one of the grounds for admissibility of prior ‘bad act’ evidence as part of Ms.

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<sup>5</sup> Storobin Opposition Affirmation at ¶ 16.

<sup>6</sup> See ¶ 6 of the April 25, 2017 affirmation of Jim Walden, Esq., submitted in support of O’Quinn and Walker’s motion for a so-ordered subpoena (Walden Subpoena Affirmation).

<sup>7</sup> Walden Subpoena Affirmation at ¶ 13.

<sup>8</sup> *Id.* at ¶ 14.

Walker's case in chief, such as motive, intent, lack of inadvertence, or *modus operandi*."<sup>9</sup>

Third, defense counsel argues that "the evidence sought is relevant to the identification of John Doe [because] the arrest photographs would aid in confirming that John Doe is Montague . . ."<sup>10</sup>

Elie, in opposition, argues that O'Quinn and Walker seek "irrelevant and possibly embarrassing information . . ." about non-party witness McIntosh "as punishment for her refusal to acquiesce to the demands of defense attorney . . ."<sup>11</sup> Elie contends that defendants' subpoena seeks McIntosh's arrest records, which are not discoverable because "the mere arrest of an individual, without any other disposition in Criminal Court, is not subject matter for relevant inquiry."<sup>12</sup> Elie argues that CPLR 4513 "allows for impeachment of a witness based solely on a prior conviction for a crime, and not for an arrest or a non-disposition."<sup>13</sup> Elie also argues that the motion should be denied because it is based entirely on hearsay testimony by defense counsel.

McIntosh also submits an attorney's affirmation opposing defendants' motion on the ground that "merely getting arrested without a conviction is not subject matter for an inquiry in an unrelated case."<sup>14</sup>

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<sup>9</sup> *Id.* at ¶ 16 (italics in original).

<sup>10</sup> *Id.* at ¶ 17.

<sup>11</sup> See ¶ 3 of the June 2, 2017 affirmation of Ezra B. Glazer, Esq., submitted in opposition to O'Quinn and Walker's motion for a so-ordered subpoena (Glazer Subpoena Opposition Affirmation).

<sup>12</sup> Glazer Subpoena Opposition Affirmation at ¶ 21.

<sup>13</sup> *Id.* at ¶ 24.

<sup>14</sup> See ¶ 3 of the June 19, 2017 affirmation of David Storobin, Esq., submitted in opposition to O'Quinn and Walker's motion for a so-ordered subpoena (Storobin Subpoena Opposition Affirmation).

**C. *Elie's Motion For A Protective Order And To Strike O'Quinn And Walker's Requests For Admissions***

Elie moves for a protective order, pursuant to CPLR 3103 (a), seeking to strike O'Quinn and Walker's April 18, 2017 Notice to Admit or to limit, modify or strike portions of the 131-item Notice to Admit on the grounds that the requests are "ambiguous, abusive, prejudicial and irrelevant" and "a poorly veiled attempt to obtain both written interrogatories and the deposition by written questions of the Plaintiff."<sup>15</sup> Elie also contends that the majority of the requests seek factual information that is in dispute.

O'Quinn and Walker, in opposition, argue that "[t]he admissions sought concern[ ] [p]laintiff's own behavior, matters she observed, information she received, or information that she can readily ascertain" and that they "do not believe these matters are contested because they are established by documents or third-party testimony."<sup>16</sup> They further argue that many of their requests for admissions "directly mirror requests previously propounded by [p]laintiff, to which Mr. O'Quinn fully responded."<sup>17</sup>

**D. *Elie's Cross Motion To Compel Discovery And To Disqualify Defense Counsel***

Elie also cross-moves for an order: (1) compelling the production of documents responsive to the subpoena duces tecum she served upon non-party witnesses ASM, O'Quinn's business agent, and MSG, O'Quinn's employer; (2) disqualifying defense counsel Jim Walden, Esq. and WMH from representing non-party witnesses Comer, ASM and MSG;

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<sup>15</sup> See ¶ 2 of the May 8, 2017 affirmation of Ezra B. Glazer, Esq., submitted in support of Elie's motion for a protective order (Glazer Protective Order Affirmation).

<sup>16</sup> See O'Quinn and Walker's June 22, 2017 memorandum of law in opposition to Elie's motion for a protective order (Protective Order Opposition Memorandum) at 14.

<sup>17</sup> Protective Order Opposition Memorandum at 14.

and (3) imposing Part 130 sanctions upon Jim Walden, Esq. and WMH for soliciting the non-party witnesses.

Elie submitted an attorney's affirmation arguing that defense counsel is appearing for non-party witnesses ASM, its representative, Comer, and MSG "to prevent important discoverable information from being brought to light."<sup>18</sup> After Elie served subpoenas upon these non-party witnesses, Jim Walden, Esq. and WMH appeared as counsel for them and objected to the document demands based on attorney-client privilege and relevance. MSG subsequently produced a number of documents, as well as a privilege log identifying 24 documents that were withheld and 2 documents that were redacted. Essentially, Elie contends that defense counsel has surreptitiously solicited non-party witnesses as clients for the purpose of impeding the discovery of relevant evidence. For this reason, Elie seeks an order disqualifying Jim Walden, Esq. and WMH from representing Comer, ASM and MSG while simultaneously representing O'Quinn and Walker, and an order imposing Part 130 sanctions upon defense counsel.

O'Quinn and Walker, in opposition, contend that "[p]laintiff has no standing to make the motion" and "none of these individuals or entities has any actual or potential conflicts of interest . . ."<sup>19</sup> O'Quinn and Walker submitted affidavits from J.R. Hensley and Comer of ASM, O'Quinn, Christopher Fontaine and Marc Schoenfeld, Deputy General Counsel for MSG, all attesting that they gave informed consent to waive any potential conflict of interest arising from WMH's multiple representations. In addition, defense counsel denies that the non-party witnesses were solicited by WMH. Comer and J.R. Hensley attest that O'Quinn

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<sup>18</sup> See ¶ 9 of the June 21, 2017 affirmation of Ezra B. Glazer, Esq., submitted in support of Elie's cross motion (Glazer Cross-Moving Affirmation).

<sup>19</sup> See O'Quinn and Walker's June 28, 2017 memorandum of law in opposition to Elie's cross motion (Cross Motion Opposition Memorandum) at 2.

arranged for WMH to represent ASM and Comer and Marc Schoenfeld attests that MSG decided to retain WMH to respond to the subpoena served upon it.

Regarding the cross motion to compel the production of documents responsive to the subpoena served upon ASM, J.R. Hensley and Comer attest that ASM possesses no responsive documents regarding an investigation of the altercation involving O'Quinn. Defense counsel contends that MSG, on the other hand, sufficiently produced a privilege log identifying the documents withheld on the basis of attorney-client and work-product privilege and approximately 40 pages of non-privileged documents that were responsive to the subpoena. Defense counsel contends that the sole basis for the cross motion – that the subpoenas were issued to non-parties – is irrelevant.

### *Discussion*

#### *(1)*

#### *Quinn And Walker's Motion For Leave To Amend Their Answer To Assert A Counterclaim Against Elie And Non-Parties*

CPLR 3019 (a) provides, in relevant part, that “[a] counterclaim may be any cause of action in favor of one or more defendants . . . against . . . a plaintiff and other persons alleged to be liable.” Regarding a counterclaim asserted against a plaintiff and a non-party, CPLR 3019 (d) provides that:

“[w]here a person not a party is alleged to be liable, a summons and answer containing the counterclaim . . . shall be filed, whereupon he or she shall become a defendant. Service upon such a defendant shall be by serving a summons and answer containing the counterclaim . . . Such defendant shall serve a reply or answer as if he or she were originally a party.”

In contrast, a third-party complaint is warranted, pursuant to CPLR 1007, where the third-party claim arises from or is conditioned upon the liability asserted against the defendant and third-party plaintiff in the main action (*See Lucci v Lucci*, 150 AD2d 649, 650 [1989])

[upholding dismissal of third-party complaint and holding that proper procedural vehicle is a counterclaim joining non-parties where third-party defendants' liability did not arise from and was not conditioned upon liability of defendant in main action]).

Here, joinder pursuant to CPLR 3019 is the proper procedure because the alleged liability of McIntosh and John Doe for participating in an alleged conspiracy with Elie to commit assault and battery does not arise from, and is not conditioned upon, the liability of O'Quinn and Walker.

“A motion for leave to amend a pleading should be freely granted in the absence of prejudice or surprise resulting directly from the delay, unless the amendment would be palpably insufficient or patently devoid of merit” (*HSBC Bank USA v Philistin*, 99 AD3d 667, 667 [2012]). “The determination to permit or deny leave to amend a pleading is committed to the sound discretion of the trial court” (*Darby Grp. Companies, Inc. v Wulforst Acquisition, LLC*, 130 AD3d 866, 867 [2015]).

Given the absence of any conceivable prejudice or surprise, O'Quinn and Walker are entitled to amend their answer to the amended complaint to assert a counterclaim for conspiracy against Elie, McIntosh and John Doe.

(2)

***O'Quinn And Walker's Motion For A  
So-Ordered Subpoena Addressed To The PDPS***

O'Quinn and Walker's motion requesting that the court so-order their subpoena addressed to the PDPS compelling the production of documents relating to McIntosh's *unrelated* July 1, 2015 arrest for which she was never convicted is denied.

Defense counsel's contention that the so-ordered subpoena is necessary to impeach McIntosh when she takes the stand is unavailing because the Appellate Division, Second

Department has held that “[i]mpeachment based on an arrest or indictment alone is improper . . . since they involve mere accusations of guilt” (*Dance v Town of Southampton*, 95 AD2d 442, 453 [1983]).

With regard to the arrest photos, they are not available in response to a subpoena if the file was closed without a conviction, as the file is sealed pursuant to CPLR § 160.50(1) and Subsection 160.50(1)(a) requires the photos to be destroyed when the file is sealed.<sup>20</sup> Additionally, PDPS is a private security force comprised of peace officers, for Parkchester, a large condominium housing development in the Bronx. It is not a court and would not have a file as anticipated by movants. If any arrests were processed and photos taken, the PDPS would have transferred the arrestees to the NYPD. See *People v Covington*, 42 Misc3d 1232(A) [Sup Ct Bx 2014]).

(3)

***Elie’s Motion For A Protective Order And To Strike  
O’Quinn And Walker’s Requests For Admissions***

“[A] court may issue a protective order ‘‘denying, limiting, conditioning or regulating the use of any disclosure device’ to ‘prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts’’ (*Nimkoff v Cent. Park Plaza Assocs., LLC*, 123 AD3d 679, 680-681 [2014] [quoting CPLR 3101 (a)]). Furthermore, ‘‘a protective order may be utilized to test the legitimacy of a notice to admit pursuant to CPLR 3123 (a)’’ (*Constantino v Newman*, 47 AD2d 626 [1975]).

“Requests to admit are intended to eliminate from the litigation factual matters which will not be in dispute at trial, not to obtain information in lieu of other disclosure devices’’ (*Berg v Flower Fifth Ave. Hosp.*, 102 AD2d 760, 760 [1984]). ‘‘As a disclosure device, their

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<sup>20</sup> McIntosh’s file (2015 BX 030615) is indeed sealed, according to the Court’s computer, and there is no file for anyone named Jashane Montague.

purpose is to eliminate from contention factual matters which are easily provable and about which there can be no controversy. Their use serves to expedite the trial by eliminating as issues that as to which there should be no dispute” (*id.*). “To allow the notice to admit to become perverted into a further form of deposition in the nature of written interrogatories would defeat and detract from their intended purpose” (*id.* at 760-761). Furthermore, notices to admit “should not be used to call for legal conclusions, or seek admissions as to material issues in the case” (*Vasquez v Vengroff*, 295 AD2d 421, 422 [2002]).

The Appellate Division, Second Department, has repeatedly upheld orders striking notices to admit where the demands improperly seek admissions as to material and ultimate issues and/or are improperly used as a substitute for other discovery devices (*see Rozz v Law Offices of Saul Kobrick, P.C.*, 134 AD3d 922, 922 [2015]; *Singh v G & A Mounting & Die Cutting, Inc.*, 292 AD2d 516 [2002]; *Jonas by Jonas v Liberty Lines Transit, Inc.*, 142 AD2d 554 [1988]; *Batchie v Travelers Ins. Co.*, 110 AD2d 864, 865 [1985]).

Here, defendants O’Quinn and Walker have made no attempt to limit their requests for admissions to factual matters which they reasonably believe are not in dispute. Instead, defendants’ requests for admissions seek information from Elie regarding a wide range of information, including, but not limited to a third individual’s involvement in the altercation (Requests 3 through 10), Elie’s knowledge that O’Quinn was a professional athlete (Requests 10 through 15), the conduct of Elie and a non-party at the Restaurant (Requests 17 through 32), assault allegations (Requests 37, 51 through 53), Elie’s medical treatment, diagnoses and personal injuries allegedly sustained (Requests 63 through 93) and Elie’s conversations with law enforcement (Requests 94 through 116), all of which involve issues that are in dispute and are, thus, clearly beyond the scope of a notice to admit as a disclosure device.

Essentially, O'Quinn and Walker's Notice to Admit amounts to a deposition on written questions or interrogatories on written questions, improperly denominated a Notice to Admit.

While a few of the 131 items in defendants' requests for admissions may be proper, courts have held that it is "unwise and unnecessary for the court to prune the requests to construct for counsel and the parties a proper notice to admit . . ." (*Berg*, 102 AD2d at 761; *see also Kimmel v Paul, Weiss, Rifkind, Wharton & Garrison*, 214 AD2d 453, 453-54 [1995] [holding that "while a few proper requests may be interspersed in the Notice to Admit and amongst the largely redundant interrogatories, it is not the court's obligation to prune those pre-litigation devices"]). Accordingly, O'Quinn and Walker's Notice to Admit is stricken in its entirety.

(4)

***Elie's Cross Motion To Compel And To Disqualify Counsel***

"A party's right to be represented 'by counsel of its choosing is a valued right which should not be abridged absent a clear showing that disqualification is warranted'" (*Mediaceja v Davidov*, 119 AD3d 911, 911 [2014] [quoting *Zutler v Drivershield Corp.*, 15 AD3d 397 (2005)]). "[T]he disqualification of an attorney is a matter which rests within the sound discretion of the trial court" (*Zutler*, 15 AD3d at 397).

Elie contends that WMH should be disqualified from representing Comer, ASM and MSG because WMH violated the Code of Professional Responsibility by improperly soliciting them as clients (*see* DR 2-103 [A][1]). However, affidavits submitted by these non-party witnesses reflect that they retained WMH of their own volition, and there is no evidence that WMH solicited these non-party witnesses in violation of the Code of Professional Responsibility. Furthermore, the non-party witnesses have each attested that they waive any potential conflict of interest arising from the firm's joint representation.

Accordingly, Elie has failed to establish any basis upon which to disqualify WMH from representing Comer, ASM and MSG.

In addition, ASM and MSG assert that they have fully complied with the subpoenas served upon them by serving responses and objections to the subpoenas, producing any documents responsive to the subpoenas and a privilege log specifying the documents that have been withheld on the basis of privilege. Elie has failed to establish that ASM and MSG have failed to produce responsive documents that are not protected from disclosure by privilege, and thus, Elie's cross motion seeking an order compelling ASM and MSG to comply with the subpoenas is denied.

Accordingly, it is

**ORDERED** that Quinn and Walker's motion (in motion seq. 4) for leave to amend their answer to the amended complaint to assert a counterclaim against McIntosh and John Doe is granted. They shall serve and file a Supplemental Summons and Amended Answer in the form annexed to the motion on McIntosh and John Doe by personal service within 60 days and upon the other parties by e-filing; and it is further

**ORDERED** that Quinn and Walker's motion (in motion seq. 5) for the court to so-order a subpoena duces tecum addressed to PDPS is denied; and it is further

**ORDERED** that Elie's motion (in motion seq. 7) is granted to the extent that Elie is entitled to a protective order and thus O'Quinn and Walker's April 18, 2017 Notice to Admit is stricken; and it is further

**ORDERED** that Elie's cross motion (in motion seq. 9) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



**Hon. Debra Silber, J.S.C.**

**Hon. Debra Silber  
Justice Supreme Court**