

Cepeda v City of New York

2020 NY Slip Op 34273(U)

June 26, 2020

Supreme Court, New York County

Docket Number: 401990/2001

Judge: Lisa A. Sokoloff

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 21

----- X
Dimas Cepeda and Olga Cepeda,

-against-

Plaintiffs,

Index # 401990/2001

Mot. Seq. 2

City of New York and
New York City Transit Authority,

DECISION AND ORDER

Defendants.

----- X
Document 1 [a paper file] and the following e-filed documents, listed by NYSCEF document number
(Motion 2) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 were read on this motion to disqualify
----- X

Gary Merinstein,

Index # 155319/2016

-against-

Plaintiff,

Mot. Seq. 2

New York City Transit Authority and
Metropolitan Transportation Authority

DECISION AND ORDER

Defendants.

----- X
The following e-filed documents, listed by NYSCEF document number (Motion 2) 26, 27, 28, 29, 30, 31,
32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71,
72, 73, 74, 75, 76, 79 were read on this motion to disqualify counsel.
----- X

Morang,

Index 157780/2012

-against-

Plaintiff,

Mot. Seq. 3

New York City Transit Authority,

DECISION AND ORDER

Defendants.

----- X
The following e-filed documents, listed by NYSCEF document number (Motion 3) 50, 51, 52, 53, 54, 55,
56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95,
96, 97, 98, 99, 102 were read on this motion to disqualify counsel.
----- X

Pollack,

Index # 155263/2016

-against-

Plaintiff,

Mot. Seq. 1

New York City Transit Authority,
Metropolitan Transportation Authority

DECISION AND ORDER

Defendants.

----- X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 66 were read on this motion to disqualify counsel.

-----X

McLennan-Weir,

Index # 152098/2016

Plaintiff,

-against-

Mot. Seq. 1

New York City Transit Authority,

DECISION AND ORDER

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72 were read on this motion to disqualify counsel.

LISA A. SOKOLOFF, J.

The defendants, New York City Transit Authority and the Metropolitan Transportation Authority [TA or Transit], move to disqualify David A. Roth and Roth and Roth, LLP [Roth Firm] as counsel for Plaintiffs in the above cases, or in the alternative preclude plaintiffs from using at trial the statements of former Transit President, Andy Byford, at the 8/21/2018 Town Hall, or enjoin the Roth Firm and their employees from asking questions of Transit officials at any public hearing or appearance without first submitting the proposed question(s) to defense counsel 24 hours in advance of the public hearing as well as disclose their identity at the hearing. The plaintiffs cross-move pursuant to 22 NYCRR § 130-1.1 for costs and sanctions.

On August 21, 2018, Transit hosted a "Town Hall" regarding its "Fast Forward Program," at York College, in Jamaica, New York, where then TA President Andy Byford took questions from the public on the Authority's plans for modernizing and improving subway service in the City of New York. During the course of the Town Hall, Roth and Byford engaged in the following exchange¹:

[Redacted]

Four of the cases in which defendants seek disqualification of the Roth Firm as counsel for plaintiffs [*Cepeda*, *Merinstein*, *Morang* and *Pollack*] are what are commonly referred to as *gap cases*. In those cases, the plaintiff claims to have been injured by falling into the gap between the subway car and the platform while entering or exiting the car. In each of those cases, the plaintiffs have alleged in a pleading that "Defendants were negligent in its design of the subject station, and negligent for "failing to install safety mechanisms, including devices and warnings so as to prevent passengers from tripping / falling or otherwise getting injured in the gap between platform and the subway car floor."

The fifth case, *McLennon-Wier*, is factually closer to the concerns Roth expressed to Byford as the plaintiff [a blind woman] fell off the platform at a station and was injured by an

¹ The exchange may not be reproduced as part of this decision except for purposes of appeal.

oncoming train. In that matter, plaintiff alleges that the TA was negligent in their design of the subject station for failing to include adequate platform edge warning systems.

Defendants contend that all five cases are factually similar to the situation Roth described to Byford. Since Byford's statements can bind Transit, defendants contend Roth's question was an attempt to obtain discovery from Transit and Mr. Byford, in particular, without counsel being present. Transit argues that Roth violated rules of professional conduct by improperly questioning then TA President Andy Byford outside the presence of counsel in violation of New York Rule of Professional Conduct ("RPC") 4.2, which states "[i]n representing a client, a lawyer shall not communicate ... about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." They also contend Roth's conduct included making a false statement by omission (in violation of RPC 4.1) and knowingly engaging in dishonesty, fraud, deceit and misrepresentation (in violation of RPC 8.4[c]).

Plaintiffs argue that defendants are collaterally estopped from bringing these motions as the issue of Roth's alleged violation of the rules of professional conduct has already been brought, briefed, argued and decided by US District Court for the Eastern District of NY in the case of *Da Silva v NYCTA, et al.* (17-cv-04550, EDNY) (Vera M. Scanlon, J.) ("Da Silva Case") [an action arising from an accident at the Atlantic Terminal], which found in favor of plaintiffs. Judge Scanlon found that Roth did not engage in dishonesty or fraud or violate any ethics rule. Moreover, she noted that Roth did not communicate 'about the subject of [Ms. Da Silva's] representation.' ECF No. 62 at 20. Ms. Da Silva's claims concern allegations of negligence in the maintenance and design of the Atlantic Terminal station, and the operation of the train she contends struck her. Roth inquired about the possibility of adding platform screen doors as part of the Fast Forward initiative and throughout the system. The only overlap between the matters discussed at the Meeting and the *DaSilva* matter was at a broad policy level. Regardless of any attenuated overlap concerning these broader matters of public policy, the Federal Court found that Mr. Roth's conduct was permitted under Rule 4.2(a). "The rights to complain to public officials and to seek administrative and judicial relief from their actions are protected by the First Amendment." *Dougherty v Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002)." (See Exhibit D [Decision], pp. 4-5.)

Plaintiffs contend that defendants' failure to modify or withdraw the requested relief after *Da Silva*, and their conduct seeking to restrict future speech of Roth Firm employees in any public forum held by Transit, on any topic, for all time, is clear evidence of retaliation by a municipality. They seek sanctions to compensate for all legal fees incurred.

Collateral estoppel precludes a party from relitigating an issue that has been previously decided against it in a prior proceeding in which the party has had a full and fair opportunity to litigate the issue, *Howard v Stature Elect.*, 20 NY3d 522[2013]. It is a flexible doctrine grounded in fairness, which should not be pleaded or decided mechanically. *Buechel v Bain*, 97 NY2d 295 [2001]. Since the consequences of application of the doctrine are significant, care must be taken not to deprive the parties of a full hearing on the issue. *Gramatan Home Investors v Lopez*, 46 NY2d 481 [1979]. Indeed, collateral estoppel need not be applied even where all the requisites are met. *People v Morrison*, 156 AD3d 126, *leave to appeal denied* 30 NY3d 1118 [2018].

Initially, it appears that the defendants should be estopped from bringing these five motions to disqualify Roth and the Roth Firm from representing these plaintiffs based upon Judge Scanlon's decision in *DaSilva*, which was decided first, insofar as all motions are

predicated upon Roth's inquiry of Byford at the Town Hall meeting. However, Judge Scanlon decided the defendants' motion in *DaSilva* in the context of the subject of the representation in that action, where plaintiff was struck by a train in the Atlantic Terminal Station. Four of these five motions pertain to gap cases, which was not examined or evaluated in *DaSilva*. The fifth, which does involve a fall from the platform into the tracks, pivots on the date representation commenced, which was not addressed in *DaSilva*. Accordingly, this court is declining to apply collateral estoppel as to do so would clearly prevent a full and fair hearing on the issues involved in these five motions.

Disqualification of a lawyer or law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants as it denies a party's right to representation by the attorney of its choice (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]). Any restriction on that right must be carefully scrutinized. *Mayers v. Stone Castle Partners, LLC.*, 126 AD3d 1,6 [1st Dept 2015]. A movant seeking disqualification of an opponent's counsel bears a heavy burden (*Id* at 5).

The disqualification of an attorney is a matter that rests within the sound discretion of the court (*Flores v Willard J. Price Associates, LLC*, 20 AD3d 343 [1st Dept 2005]). Courts should examine whether a motion to disqualify, made during ongoing litigation, is made for tactical purposes, such as to delay litigation and deprive an opponent of quality representation (*Mayers, supra*). Indeed, the respective prejudice of the parties is an issue considered by the courts in determining whether a motion to disqualify an attorney should be granted (*In re Metrop. Transp. Auth.*, 222 AD2d 340 (1st Dept 1995) [claimant failed to demonstrate that he would suffer any actual prejudice as a result of the continued representation of defendants by counsel which claimant sought to disqualify]).

Disqualification is not warranted where the conveyed information does not have the potential to be significantly harmful in the matter from which a party seeks to disqualify counsel (*Id. at 7*). Disqualification of counsel may be necessary where, through deceitful conduct, counsel obtains access to otherwise unobtainable privileged material (*Matter of Beiny*, 129 AD2d 126 [1st Dept 1987]; however, where counsel engages in a deceptive practice that leads to counsel obtaining information, that is not privileged material or is material that counsel would have been entitled to obtain in the normal course of litigation, disqualification should be denied (*Estate of Kochovos*, 140 AD2d 180 [1st Dept 1988] [deposition of nonparty without notifying opponent]). Considering all the significant interests to be balanced, it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation. The Code instead provides "guidance for the courts in determining whether a case would be tainted by the participation of an attorney or a firm." (*S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437 [1987]).

The question at issue in these motions is whether the information Byford provided in his response to Roth was material to the five actions. A platform edge system, for those who are unfamiliar, is a clear panel which runs from one end of a station to the other with doors that line up with the doors on the rail/subway car and automatically open when the corresponding car door does.

Defendants assert that plaintiffs raise the issue of a platform edge system in the gap cases in the ambiguous boiler plate language of their bills of particulars. Strikingly, plaintiffs argue that they did not mean to implicate the need for a platform edge system in those cases and have agreed to withdraw the language. Defendants have refused to accept the withdrawal of the language in question.

Despite the ambiguous language in the pleadings, a platform edge system is not relevant to a gap case. In a gap case, the plaintiff is attempting to enter or exit the subway rail car and mistakenly places his/her foot in the gap between the outer edge of the car door opening and the platform. A platform edge system would not prevent injuries sustained as the result of a fall between the car and the platform as the platform screen doors would be open for egress and ingress and defendants have failed to establish anything else in those systems to protect against falling into the gaps. Accordingly, there is simply no basis for disqualification of Roth or the Roth Firm or any further action against them in *Cepeda, Merinstein, Morang and Pollack*.

McLennon-Wier, on the other hand, is completely different. Indeed, Roth's story about his mother is eerily similar to the facts presented to Byford. However, the court's determination rests not on the facts, but on the issue of representation. In the four gap cases, the Roth firm represented plaintiffs from the inception of the proceedings. In *Mclennon-Wier*, the Roth firm was brought in as trial counsel. Initial counsel informed the court and all formal filings confirm that Roth did not become associated with the case until after the Town Hall. The defendants ask the court to speculate that the representation began long before that, but offer nothing beside bare innuendo to support their position. Without more, there is no basis to find that the Roth Firm represented plaintiff at the time of the Town Hall; therefore, defendants fail to establish grounds for disqualification in this case. Indeed, it has long been held that speculation and innuendo are insufficient to raise a question of fact necessary to defeat summary judgment [*Lopez v American United Transp.*, 66 AD3d 407 [1 Dept 2007]]. This court finds a speculative assertion is similarly insufficient to support a disqualification motion.

There is no factual support for the defendants' claim that Roth acted deviously or improperly by asking Byford a question at the Town Hall without counsel being present. Roth didn't approach Byford on the street or catch him at an unguarded moment. He posed the question at a forum held for the purpose of disseminating information and answering questions. The Town Hall event was planned by Transit. Byford and Transit had to have known that at least some of the attendees had agendas and that the information he imparted could be used against Transit in lawsuits present and future. Many of Byford's department heads were present. A Transit attorney could have been present had Byford and the team thought it necessary. Although the Town Hall is not a court room, it is certainly arguable that Byford knowingly, intelligently and voluntarily waived counsel (see, e.g., *People v Henriquez*, 3 NY3d 210 [2004]; *Franklin v Leff*, 192 AD2d 328[1 Dept 1993]).

There is no omission or misrepresentation by Roth for failing to identify himself as an attorney if his question is not connected to his representation of a client. Attorneys are permitted to contemplate public policy issues. Many who have traveled to foreign cities with platform edge systems in the subway or have ridden on skyways, have wondered why New York City does not have a similar system. The question posed by Roth could have been posed by anyone in the room and perhaps might have been had Roth not gotten the opportunity first. It is a question unrelated to his profession or any cases brought before this court. Defendants have neglected to submit any evidence that had Byford known Roth was an attorney his answer would have changed.

22 NYCRR § 130-1.1(a) authorizes the award of costs and the imposition of sanctions for "frivolous conduct," which, under paragraph (c) is deemed frivolous if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;

- (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

(22 NYCRR 130-1.1[a]).

The motions, for the most part, were arguable and thus not subject to sanctions. However, plaintiffs offered to withdraw the potentially offensive language from the four gap cases, which defendants refused. That refusal supports plaintiffs' contentions that as to those matters the disqualification motions were intended to prolong litigation and to maliciously injure plaintiffs. The TA defendants may be subject to sanctions where appropriate (*Perez v New York City Transit Authority*, 73 AD3d 529 [1st Dept 2010]). Accordingly, sanctions are warranted as to the gap cases.

If plaintiffs have paid their counsel's legal fees in full by May 1, 2020; this court awards fifty percent of those fees paid. If plaintiffs do not have proof of payment by May 1, 2020; the issue of sanctions is referred to a referee to hear and report on the reasonableness of legal fees, fifty [50%] percent of which is payable to plaintiffs by defendants.

It is hereby

ORDERED, the plaintiffs' application for collateral estoppel or preclusion is denied; and it is further

ORDERED, that defendants' motions for disqualification of counsel is denied; and it is further

ORDERED, that plaintiff's cross-motion for sanctions is granted to the extent that defendants shall pay plaintiffs within 90 days of service of this order the sum of 50% of the attorneys' fees charged if the fees were paid by May 1, 2020; and it is further

ORDERED, that if plaintiffs have not paid their attorneys' fees in full by May 1, 2020, the court, having on its own motion determined to consider the appointment of a referee to hear and report, and it appearing to the court that an exceptional condition requiring the appointment in this case exists as a matter of account has been presented, it is now

ORDERED, that a Judicial Hearing Officer ("JHO") or Special Referee be designated to hear and report to this court on the issue of the reasonableness of the legal fees charged by plaintiff's counsel in this matter; and it is further

ORDERED, that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR unless otherwise indicated as follows:

- the powers of the JHO/Special Referee shall be limited as follows [*specify each particular limitation*]: the powers of the JHO/Special Referee shall be limited in that (1) s/he may only determine the reasonableness of the legal fees charged;

and it is further

ORDERED, that this matter is referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the required information and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED, that the plaintiff(s)/petitioner(s) shall serve the full and complete invoice for services rendered in connection with this action and a pre-hearing memorandum within 24 days from the date of this order and the defendant(s)/respondent(s) shall serve objections to the fees charges and a pre-hearing memorandum within 20 days from service of plaintiff(s)/petitioner's(s') papers and the foregoing papers shall be filed with the Special Referee Clerk prior to the original appearance date in Part SRP fixed by the Clerk as set forth above; and it is further

ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED, that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED, that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further]

ORDERED, that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED, that, unless otherwise directed by this court, in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

6/26/2020

DATE

Hon. LISA A. SOKOLOFF, AJSC

CHECK ONE:

CASE DISPOSED

NON FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE