

Broton v County of Onondaga
2024 NY Slip Op 35539(U)
January 22, 2024
Supreme Court, Onondaga County
Docket Number: Index No. 000609/2022
Judge: Gregory R. Gilbert
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ONONDAGA

SHAWN BROTON,

Plaintiff

DECISION & ORDER

v.

COUNTY OF ONONDAGA,
ONONDAGA COUNTY BOARD OF ETHICS,
WILLIAM J. FITZPATRICK individually and in his
Capacity as Onondaga County District Attorney,
ROBERT DURR individually and in his capacity as
Onondaga County Attorney,
JOHN AND JANE DOES individually and in their
capacity as Onondaga County public officers
DUANE OWENS individually and in his capacity as
Onondaga County Commissioner of Personnel,
STEVEN WILLIAMS individually and in his capacity
as investigative consultant to the Onondaga County
Board of Ethics,
JOHN CUCINOTTA in his capacity as a member of
The Onondaga County Board of Ethics,
MARY BETH PRIMO in her capacity as a member of
The Onondaga County Board of Ethics, and
Fr. ROBERT SCULLY, S.J. in his capacity as a member
Of the Onondaga County Board of Ethics,

Index No.: 000609/2022
HON. GREGORY R. GILBERT JSC

Defendants.

Appearances: Gary J. Lavine, Esq.
Bousquet Holstein PLLC
Attorneys for Plaintiff
110 W. Fayette St., Ste. 1000
Syracuse, New York 13202

John E. Heisler, Jr., Esq.
Onondaga County Dept. of Law
Attorneys for Defendants Except Williams
421 Montgomery Street
Syracuse, New York 13202

Kevin E. Hulslander, Esq.
Smith, Sovik, Kendrick & Sugnet, P.C.
Attorneys for Defendant Williams
250 South Clinton Street, Ste. 600
Syracuse, New York 13202

BACKGROUND

This action was commenced with the filing of a summons and complaint on January 27, 2022. A Scheduling Order set an end date for disclosure by May 9, 2023 and a trial note of issue to be filed by May 9, 2023. The trial note of issue was extended first to October, 5, 2023 and then to October 26, 2023. Discontinuance has been filed as to the Board of Ethics, Cucinotta, Primo, and Scully on June 17, 2022. The action has continued against the County, Fitzpatrick, Durr, and Williams.

Plaintiff previously filed a motion to compel production of all investigator notes made by Williams during inquiry into a complaint made to the Onondaga County Ethics Board in 2019. Nothing in the Scheduling Order expressly precluded a demand for production after September 9, 2022 and the parties allowed for a short period to wrap up disclosure and file the trial note of issue and certificate of readiness to follow the September 6, 2023 deposition. By all accounts, the investigative notes remained the only obstacle to a trial note of issue. Accordingly, disclosure of the investigative notes was directed by December 1, 2023 at which time the trial note of issue was to be filed. The trial note of issue was filed November 29, 2023.

A consent to change attorney was filed for defendant Williams on December 19, 2023. At the same time Williams made the present motion to strike the trial note of issue. The motion is timely under 22 NYCRR §202.21(e). The basis for the motion is that Williams and his new counsel have not had an opportunity to depose plaintiff. Plaintiff has filed a cross motion to disqualify the Smith Sovik firm from representing Williams and to enforce the previous Decision & Order of November 9, 2023 to require Williams to execute an affirmation of compliance. Williams filed a "cross motion" on January 8, 2024 seeking to have plaintiff's counsel disqualified. Fitzpatrick filed a consent to change attorney on January 8, 2024 followed by a "cross motion" joining in the motion to strike the trial note of issue. Looking for "necessary discovery...including a deposition of the Plaintiff". The motion was heard on argument via Microsoft Teams on January 16, 2024.

DISCUSSION

I. Motion to Strike Trial Note of Issue.

The Scheduling Order required depositions to be completed by November 4, 2022. The Court is aware by reason of the previous motion that the Williams deposition was not taken until September 6, 2023. There is nothing before the Court to suggest that plaintiff's deposition was properly noticed pursuant to CPLR §3107 prior to November 4, 2022 or, for that matter, prior to the December 1, 2023 trial note of issue deadline.

The request to depose plaintiff is untimely and does not serve as a proper basis to strike the trial note of issue as previously directed by the Court. In similar fashion, the Court plainly directed that the matter of the Williams investigative notes constituted the sole remaining item of disclosure between the parties directing that the trial note of issue be filed with that disclosure. A good faith effort to resolve the claimed dispute is not shown either. Grasso v. McCoy, 113 AD3d 1096 (4th

Dept 2014); Amherst Synagogue v. Schuele Paint Co., Inc., 30 AD3d 1055 (4th Dept 2006). The motion to strike the trial note of issue will be denied.

II. Attorney Disqualification.

One basis for disqualification is a claim that Attorney Hulslander will be a necessary witness at trial on the issue of who selected Williams to investigate the ethics charges at issue. The advocate-witness rule [22 NYCRR §1200 Rule 3.7] requires a showing that the attorney is likely to be a witness on a “significant issue of fact”. Jozefik v. Jozefik, 89 ASD3d 489 (4th Dept 2011). Plaintiff bears the burden of making a clear showing that disqualification is warranted. HoganWillig, PLLC v. Swormville Fire Company, Inc., 210 AD3d 1369 (4th Dept 2022).

Plaintiff puts forward no proof that Attorney Hulslander had anything to do with the Williams appointment or that he had any conversations with the District Attorney, County Executive or County Department of Law on the subject. As the appointment was by and for the Board of Ethics, the Court does not conclude that the testimony of Attorney Hulslander is necessary to that issue even if one assumes that the issue is significant or even material to the litigation.

The Court does not make the foregoing assumption and finds that, at best, the mechanics of the appointment are of limited if any value and relate solely to a matter of formality excluded from the advocate-witness rule under 22 NYCRR §1200 Rule 3.7(a)(4). The complaint already alleges and it is uncontested that Williams was engaged as an investigative consultant. The basis for the complaint is that the investigation was variously unfair and biased and the results thereof improper. At no point does the complaint allege that the manner of appointment or who appointed Williams violated any right of the plaintiff or provides any independent basis for liability. The motion for disqualification under the advocate-witness rule will be denied.

The second basis for disqualification is a claim that new counsel for Williams may possibly assert attorney-client privilege for the investigative notes prepared by Williams. The claim is speculative and the Court has already ruled that the notes are discoverable. That counsel may or may not assert an evidentiary objection provides no basis for disqualification of counsel and abridgment of the right of Williams to be represented by counsel of his choice. Lyons v. Lyons, 50 Misc3d 876 (Supreme Court Monroe County 2015). This claimed basis for disqualification of counsel is not shown to have any legal foundation and will be denied.

III. Affirmation of Compliance.

Plaintiff's request for an affirmation of compliance from Williams is premised on the claim that the investigative notes begin on October 9, 2019 but there is billing activity on September 23, 2019 that shows a telephone conference with the County Attorney. There is no note for September 23, 2019 and this “anomaly” is said to warrant the affirmation of compliance. The Court does not follow the logic of the argument and, in any event, plaintiff may have cross examination on the point at trial given that (as suggested by plaintiff) Williams is a “experienced, sophisticated”

practitioner. The notes were turned over. The Court has no need to re-visit the issue and the cross motion will be denied.

IV. "Cross Motion" to Disqualify Counsel.

Turning to the "cross motion" by Williams to disqualify plaintiff's counsel, it is not proper as a "cross motion" in the first instance. The same will be treated as a motion and will be placed on this Court's motion term for February 8, 2024 and the parties have been so notified.

V. Scheduling.

Adjustment of the Scheduling Order is needed but only in relation to the filing of dispositive motions. The deadline for filing dispositive motions will be extended to March 15, 2024 and this is by consent of counsel.

Accordingly, it is

ORDERED, that the motions of the defendants, Steven Williams and William J. Fitzpatrick, to strike the trial note of issue to allow a deposition of or continued disclosure from the plaintiff are **DENIED** in all respects; and it is

ORDERED, that the cross-motion of the plaintiff, Shawn Broton, to disqualify the law firm of Smith, Sovik, Kendrick & Sugnet, P.C. from continuing to represent the defendant, Steve Williams and/or compel an affirmation of compliance with this Court's Decision & Order of November 9, 2023 are **DENIED** in all respects; and it is

ORDERED, that the motion of defendant, Steven Williams, denominated as a "cross motion" shall appear on this Court's February 8, 2024 motion term unless withdrawn in the interim; and it is

ORDERED, that the date for filing of dispositive motion is hereby extended to March 15, 2024 on consent of counsel and that the previous Scheduling Order(s) of the Court shall remain unchanged in all other respects.

IT IS SO ORDERED.

ENTER

Dated: January 22, 2024
Oswego, New York


HON. GREGORY R. GILBERT
SUPREME COURT JUSTICE