Gulledge v Jefferson County
2016 NY Slip Op 32801(U)
August 17, 2016
Supreme Court, Albany County
Docket Number: A344-14
Judge: Jr., Richard J. McNally

At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 17th day of August 2016

PRESENT: HON. RICHARD J. MCNALLY, JR.
JUSTICE

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

GABRIELLE GULLEDGE, GABRIELE GULLEDGE on behalf of the minor child, D. GULLEDGE and the estate of DEMEARLE GULLEDGE,

Plaintiffs,

DECISION AND ORDER
INDEX NO. A344-14

-against-

JEFFERSON COUNTY; JEFFERSON COUNTY CORRECTIONAL FACILITY; ALBANY COUNTY; ALBANY COUNTY CORRECTIONAL FACILITY; JEFFERSON COUNTY SHERIFF JOHN BURNS; ALBANY COUNTY SHERIFF CRAIG APPLE; JEFFERSON COUNTY CORRECTIONS OFFICER CURTIS GALLAMORE; JEFFERSON COUNTY CORRECTIONS OFFICER NICHOLAS CUPPERNELL; JEFFERSON COUNTY CORRECTIONS OFFICER MARK KELOGG; JEFFERSON COUNTY CORRECTIONS OFFICERS DENNIS DAME; and JOHN DOE(s) and JANE DOE(s),

Defendants.

APPEARANCES: Bosman Law Firm, L.L.C.
Attorneys for Plaintiffs
(A.J. Bosman, Esq. of Counsel)

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Canastota, New York 13032

Burke, Scolamiero, Mortati & Hurd, LLP
Attorneys for Defendant Albany County
(Thomas A. Cullen, Esq. of Counsel)
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Albany, New York 12212

Sugarman Law Firm, LLP
Attorneys for Jefferson County Defendants
(Paul V. Mullin, Esq. of Counsel)
211 West Jefferson Street
Syracuse, New York 13202

Office of the Albany County Attorney
Attorneys for Sheriff Craig Apple/ Albany County Correctional Facility
(Kevin Cannizzaro, Esq., Assistant County Attorney)
112 State Street
Albany, New York 12207

MCNALLY, J.:

Plaintiff moves for an order pursuant to CPLR 3025 for leave to serve a Second Amended Complaint, for an Order pursuant to CPLR 3124 to compel the defendants to comply with discovery requests and for an Order pursuant to 22 NYCRR § 1200.0 disqualifying the law firm of Burke, Scolamier, Mortati & Hurd as attorneys for Albany County. The defendants oppose the plaintiff's motions.

Plaintiff, Gabrielle Gulledge, commenced this action to recover for the injuries, suffering and death of her husband, decedent Demearle Gulledge who died at the Albany County Correctional Facility on May 11, 2013 after being transferred from the Jefferson County Correctional Facility. After conducing discovery, the plaintiff now seeks to amend her compliant

and allege new facts, parties and a cause of action. The Albany County Attorney does not oppose the motion. The attorneys for the Jefferson County defendants oppose the motion and maintain the plaintiff failed to detail the alleged negligent actions of the proposed new defendants, failed to allege any meritorious claims and failed to demonstrate how her constitutional rights were violated.

Leave to amend a pleading rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit. (*see*, CPLR 3025; *Ramos v. Baker*, 91 AD3d 930 [2nd Dept. 2012]). Whether to grant or deny leave to amend is committed to the Supreme Court's discretion to be determined on a case by case basis. (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]). In exercising its discretion, the court will consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay is offered and whether prejudice will result. (*Sampson v. Contillo*, 55 AD3d 591 [2nd Dept. 2008]). Leave to amend may be denied where the opposing party has been or would be prejudiced by a delay in seeking the amendment. (*Fahey v. County of Ontario*, 44 NY2d 934 [1978]).

The plaintiff's motion for permission to file a second amended complaint is granted. The plaintiff's proposed amended complaint seeks to add additional facts, parties and a new cause of action. The granting of leave to amend would not prejudice or surprise the defendants and the proposed amendment was neither palpably insufficient nor totally devoid of merit. (*Complete Management, Inc. v. Rubenstein*, 74 AD3d 722 [2nd Dept. 2010]. This Court will utilize its discretion and permit the plaintiff to file a second amended complaint. (*see*, CPLR 3025(b);

Corwise v. Lefrak Organization, 93 AD3d 754 [2nd Dept. 2012]).

Plaintiff also moves to obtain compliance with her discovery demands pursuant to CPLR 3124. Plaintiff contends she served a discovery demand whereby she requested "copies of all photographs, videotapes, recordings, surveillance and/or other media . . ." for the units where the decedent was housed at the Albany County Jail for the period of April 15, 2013 to May 11, 2013. Plaintiff claims although she received CDs/DVDs from Albany County, the responses were deficient as they were not responsive to her demands. The Albany County defendants maintain they have produced all of the requested materials that are in their possession. Albany County offered several Affidavits from Brian Mooney, Chief Correction Officer at the Albany County Correctional Facility. In an Affidavit dated August 26, 2013, Officer Mooney stated "all of the said CDs/DvDs have been turned over to plaintiff" and "thus copies of all photographs, videotapes, recordings and surveillance in the ACCF's possession which show decedent at ACCF from April 15, 2013 to May 25, 2013 have been turned over to plaintiff." In an Affidavit dated March 15, 2016, Officer Mooney claimed the "the surveillance and recording systems maintained in the jail in May 1, 2013-May 25, 2013 did not have the capability of retaining 24 days of surveillance and/or recording" and the discovery items the plaintiff claims have not been produced "do not exist". Officer Mooney alleges all of the discovery items "have been turned over to the plaintiff". The defendant claims it cannot produce material that does not exist.

Pursuant to CPLR 3124, it is well established that disclosure provisions are to be liberally construed and a trial court is afforded broad discretion in managing disclosure. (*American Association of Bioanalysts v. New York State Department of Health*, 12 AD3d 868 [3rd Dept. 2004]; *Kavanagh v. Ogden Allied Maintenance Corp*, 92 NY2d 952 [1998]). CPLR § 3101(a)

requires full disclosure of all evidence material and necessary for the prosecution or defense of an action, regardless of the burden of proof. (*Weber v. Ryder TRS, Inc*, 49 AD3d 865 [2nd Dept. 2008]).

A trial court is vested with broad discretion in overseeing the discovery and disclosure process and only a clear abuse of that discretion will justify appellate review. (*Lue v. Finklestein & Partners, LLP*, 67 AD3d 1187 [3rd Dept. 2009]). CPLR § 3126 authorizes the court to fashion an appropriate remedy, the nature and degree of which is a matter committed to the court's sound discretion and will not be disturbed absent a clear abuse of the court's discretion. (*Kumar v. Kumar,* 63 AD3d 1246 [3rd Dept. 2009]). The nature and degree of a penalty imposed pursuant to CPLR § 3126 for failure to comply with discovery is within the trial court's discretion. (*MacDonald v. Leif*, 89 AD3d 995 [2nd Dept. 2011]).

CPLR 3120 provides that a party may be required to produce those items "which are in the possession, custody or control of the party served." Such items must be pre-existing and tangible to be subject to discovery and production. (*Rosado v. Mercedes-Benz of North America*, 103 AD2d 295 [2nd Dept. 1984]).

After a review of the record, it appears the defendants have substantially complied with the discovery requests of the plaintiff. The Affidavits of Officer Mooney indicate that all discovery items were produced and turned over to the plaintiff. As a result, plaintiff's request to compel compliance with plaintiff's discovery demands pursuant to CPLR 3124 is denied. A party cannot be compelled to produce documents which do not exist. (*Crawford v. Burkey*, 124 AD3d 1184 [3rd Dept. 2015]; Orzech *ex rel. Orzech v. Smith*, 12 AD3d 1140 [4th Dept. 2004]).

Plaintiff also seeks to disqualify the firm of Burke, Scolamier, Mortati & Hurd from further representing Albany County in this action. Plaintiff claims the firm also represents

Allegheny County in an action where Albany County is a named defendant in *Zilianda v. County of Albany (Index No. 1:12 CV 01194).* Plaintiff contends since the Burke firm raised a cross-claim on behalf of Allegheny County against the defendant Albany County for contribution and apportioned liability in the *Zilianda* action, it is precluded form representing Albany County in this action. The plaintiff claims the Burke firm has had confidential communications in both actions. Plaintiff alleges the Burke firm has a conflict of interest in this matter and should be disqualified.

The Albany County defendants maintain there is no conflict of interest as neither the plaintiff, plaintiff's decedent or plaintiff's counsel have had any involvement in the *Zikianda* action. The defendants contend the plaintiff has not shown the existence of a prior attorney-client relationship between her and opposing counsel. The defendants allege since the plaintiff is unable to show a prior attorney-client relationship, she lacks standing to move for the disqualification of the Burke law firm in this action.

A party to an action has a right to select his/her attorney. (*Cardinale v. Golinello*, 43 NY2d 288 [1977]). 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 absent a clear showing that disqualification is warranted. (*Aryeh v. Aryeh*, 14 AD3d 634 [2nd Dept. 2005]). The party seeking to disqualify a law firm or attorney bears the burden to show sufficient proof to warrant such a determination. (*Hele Asset, LLC v. S.E.E. Realty Associates*, 106 AD3d 692 [2nd Dept. 2013]). Whether or not to disqualify an attorney or law firm is a matter which rests in the sound discretion of the court. (*Matter of Madris v. Oliviera*, 97 AD3d 823 [3rd Dept. 2012]).

An attorney should not be disqualified unless there is a clear showing that disqualification is required. (*S & S Hotel Ventures, Ltd. Partnership v. 777 S.H. Corp.*, 69 NY2d

437 [1987]). The party seeking to disqualify an attorney bears the burden of establishing that the attorney will be called as a witness at trial and that the attorney's testimony is necessary. (*Old Saratoga Square Partnership v. Compton*, 19 AD3d 824 [3rd Dept. 2005]). Any question relating to whether an attorney should be disqualified should be resolved in favor of disqualification. (*Scohen v. Cohen*, 125 AD3d 589 [2nd Dept. 2015]).

The Court of Appeals outlined the applicable ethical principles regarding representation and disqualification of an attorney in *Tekni-Plex, Inc. v. Meyner & Landis*, 89 NY2d 123, 130-131, [1996]). The Court held in part:

> Attorneys owe fiduciary duties of both confidentiality and loyalty to their clients. The Code of Professional Responsibility thus imposes a continuing obligation on attorneys to protect their client's confidences and secrets. Even after representation has concluded, a lawyer may not reveal information confided by a former client, or use such information to the disadvantage of the former client or the advantage of a third party (Code of Professional Responsibility DR 4-101[B] [22 NYCRR 1200.19(b)]; *see also*, Code of Professional Responsibility DR 5-108[A][2] [22 NYCRR 1200.27(a)(2)]. An attorney, moreover, "must avoid not only the fact, but even the appearance, of representing conflicting interests"
>
> In accordance with these duties, the Code precludes attorneys from representing interests adverse to a former client on matters substantially related to the prior representation.
>
> Under DR 5-108(A)(1), 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. Satisfaction of these three criteria by the moving party gives rise to an irrebuttable presumption of disqualification. (Citations omitted)

After a review of the record, this Court finds the plaintiff has not sustained her burden of proof by demonstrating the existence of a prior attorney-client relationship between her and the Burke firm or that this action is substantially related to a prior proceeding. The plaintiff has the

burden to establish that a pre-existing attorney-client relationship existed between her and the Burke firm and if she fails to demonstrate this relationship, the motion to disqualify the Burke firm must be denied for lack of standing. (*Cunningham ex rel. Rogers v. Anderson*, 66 AD3d 1207 [3rd Dept. 2009]). As a result , the motion to disqualify the Burke firm from this action is denied. (*Scafuri v. De Maso*, 71 AD3d 755 [2nd Dept. 2010]).

Accordingly, it is

ORDERED, that the motion seeking permission to file a second amended complaint is granted. The motion to compel the production of discovery materials by the defendants pursuant to CPLR 3124 is denied. Plaintiff's application to disqualify the law firm of Burke, Scolamier, Mortati & Hurd in this action is also denied.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for the Albany County defendants. All original supporting documentation is being filed with the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.

ENTER.

Dated: August 17 , 2016
Troy, New York

RICHARD J. MCNALLY, JR.
Supreme Court Justice

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Papers Considered:

1. Notice of Motion dated March 4, 2016; Affirmation of A.J. Bosman, Esq. dated March 4, 2016 with annexed exhibits A-M;

2. Affirmation of Kevin M. Cannizzaro, Esq. dated March 15, 2016 with annexed exhibits A-D; Memorandum of Law dated March 15, 2016;

3. Affirmation of Thomas A. Cullen, Esq. dated March 15, 2016 with annexed exhibit A;

4 Affirmation of Paul V. Mullin, Esq. dated March 16, 2016; Memorandum of Law dated March 16, 2016;

5. Reply Affirmation of A.J. Bosman, Esq, dated March 26, 2016 with annexed exhibit E.