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SHORT FORM ORDER

COPY

INDEX NO. 1596-2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-23-17
ADJ. DATE 10-31-17
Mot. Seq. # 005 - MD; 006 - MG ;
007 - MD ; 008 - MD;

BRUCE W. BROWNYARD, ANTON BONDY, HARBOR CLUB, LLC, and those persons whose identities were unknown at the time of this action was commenced and who are also aggrieved as taxpayers of the Southwest Sewer District #3, herein named as Plaintiffs listed in Schedules A and B annexed to the Amended Complaint, Plaintiff(s), - against - THE COUNTY OF SUFFOLK AND THE SOUTHWEST SEWER DISTRICT NO. 3, Defendant(s).	**Reilly, Like & Tenety** Attorneys for Plaintiff 179 Little East Neck Road North Post Office Box 818 Babylon, New York 11702 **Paul Sabatino II, Esq.** 1617 New York Avenue Huntington Station, New York 11746 **Arnold & Porter Kay Scholer LLP** 250 West 55th Street New York, New York 10019 **Berkman, Henoch, Peterson, Peddy & Fenchel, P.C.** Attorneys for Defendants 100 Garden City Plaza Garden City, New York 11530

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff to certify class action, dated May 1, 2017, and supporting papers, including Memorandum of Law; (2) Notice of Cross-Motion by the defendant to disqualify attorney, dated May 31, 2017, and supporting papers, including Memorandum of Law; (3) Notice of Motion by the plaintiff for Summary Judgment, dated June 27, 2017, and supporting papers, including Memorandum of Law; (4) Notice of Cross-Motion by the defendant to dismiss third amended complaint, dated August 27, 2017, and supporting papers, including Memorandum of Law; (5) Affirmation in Opposition by the plaintiff to defendant's cross- motion to disqualify counsel, dated June 12, 2017; (6) Memorandum of Law by the plaintiff in Opposition to the defendant's cross-motion to dismiss, dated September 5, 2017; (7) Plaintiff's Reply Affirmation to defendant's motion to certify class action, dated June 12, 2017; (8) Defendant's Memorandum of Law in support of cross-motion to disqualify plaintiff's counsel, dated June 26, 2017; (9) Affirmation by Plaintiff in Opposition to defendant's cross-motion to dismiss, dated October 11, 2017; (10) Plaintiff's Memorandum of Law in Opposition to defendant's cross-motion to dismiss, dated October 11, 2017; (11) Plaintiff's Memorandum of Law in Reply to defendant's opposition to motion for summary judgment; October 11, 2017; Defendant's Reply Affirmation, dated October 30, 2017; (12) Memorandum of Law by defendant, dated October 30, 2017; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (seq. #005) by plaintiffs, which seeks an order pursuant to CPLR §902 permitting this matter to proceed as a Class Action, is hereby denied; and it is further

ORDERED that the cross-motion (seq. #006) by defendants, which seeks an order disqualifying Paul Sabatino II, Esq. as counsel for plaintiffs, is hereby granted; and it is further

ORDERED that the motion (seq. #007) by plaintiffs, which seeks an order granting summary judgment in favor of plaintiffs pursuant to CPLR 3212, is hereby denied; and it is further

ORDERED that the motion (seq. #008) by defendants, which an order pursuant to CPLR 3211(a)(2), (3), (5) and (7) dismissing plaintiffs' Third Amended Complaint, is hereby denied; and it is further

ORDERED that counsel for plaintiffs shall promptly serve a copy of this Order upon counsel for the defendants via First Class Mail, and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

In this putative class action, plaintiffs' counsel alleges that the plaintiffs are comprised of over 340,000 residents and over 75,000 taxpayers/ratepayers of the Suffolk County Southwest Sewer District #3 (the "District"), who have been overtaxed and overcharged by the defendants in the collective amount of more than $259,000,000.00 as of the adopted 2017 Suffolk County Operating Budget and the County's adopted 2017-2019 Capital Budget and Program. Plaintiffs contend that the District consists of approximately 75,845 parcels, including about 46,265 parcels in Babylon, 29,579 in Islip, and 1-3 in Huntington, as well as 78 contract vendees who are outside the District but have contracts for sewer service, and 11 special connections. According to plaintiffs' counsel, an average taxpayer in the District is entitled to a refund of $3,419.16.

For purposes of this Decision and Order, plaintiffs' first motion (seq. # 005) seeks an order pursuant to CPLR §902 permitting the captioned matter to proceed as a Class Action. Defendants' cross-motion (seq. #006) seeks an order disqualifying Paul Sabatino II, Esq. as counsel for plaintiffs. Plaintiffs also move (seq. #007) for an order granting summary judgment in favor of plaintiffs pursuant to CPLR 3212. Lastly, defendants move (seq. #008) for an order pursuant to CPLR 3211(a)(2), (3), (5) and (7) dismissing plaintiffs' Third Amended Complaint.

Plaintiffs' Motion for Class Certification (seq. #005)

Pursuant to CPLR §901(a), one or more members of a plaintiff class may act in a representative capacity on behalf of all other members if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class which predominate over any questions affecting only individual members; (3) the claims of the representative parties are typical of the claims of the class; (4) the representative parties will fairly and adequately protect the interests of the class;

and (5) a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The prerequisites of a class action include, inter alia, a showing that there are questions of law or fact common to the class which predominate over questions affecting only individual members, that the claims or defenses of the representative parties are typical of the claims or defenses of the class, and that a class action will provide a fair and efficient adjudication of the controversy (see CPLR 901[a]; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 871 NYS2d 263 [2d Dept 2008]; *Negrin v Norwest Mortgage, Inc.*, 293 AD2d 726, 741 NYS2d 287 [2d Dept 2002]).

Whether a lawsuit qualifies as a class action matter is a determination made upon a review of the statutory criteria as applied to the facts presented, and such determination ordinarily rests within the sound discretion of the trial court (see *City of New York v Maul*, 14 NY3d 499, 903 NYS2d 304 [2010]; *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43, 698 NYS2d 615 [1999]; *Globe Surgical Supply v GEICO Ins. Co.*, 59 AD3d 129, 871 NYS2d 263 [2d Dept 2008]; *Tosner v Town of Hempstead*, 12 AD3d 589, 785 NYS2d 101 [2d Dept 2004]).

A class action certification must be founded upon an evidentiary basis (see *Rallis v City of New York*, 3 AD3d 525, 770 NYS2d 736 [2d Dept 2004]; *Yonkers Contracting Co. v Romano Enterprises of New York, Inc.*, 304 AD2d 657, 757 NYS2d 339 [2d Dept 2003]). The plaintiff class representative has the burden of establishing compliance with the statutory requirements for class action certification under CPLR 901 and 902, and mere general or conclusory allegations in the pleadings or affidavits are insufficient to sustain this burden (see *Rallis v City of New York*, 3 AD3d 525, 770 NYS2d 736 [2d Dept 2004]; *Yonkers Contracting Co. v Romano Enterprises of New York, Inc.*, 304 AD2d 657, 757 NYS2d 339 [2d Dept 2003]; *Canavan v Chase Manhattan Bank*, 234 AD2d 493, 651 NYS2d 916 [2d Dept 1996]; *Hoerger v Board of Educ.*, 98 AD2d 274, 471 NYS2d 139 [2d Dept 1983]). Likewise, a motion supported merely by an attorney's affirmation and the exhibits attached thereto is insufficient to sustain plaintiff's burden of establishing compliance with the statutory requirements for class action certification (see CPLR 901; *Weitzenberg v Nassau County Dept. of Recreation and Parks*, 29 AD3d 682, 815 NYS2d 466 [2d Dept 2006]; *Rallis v City of New York*, 3 AD3d 525, 770 NYS2d 736 [2d Dept 2004]).

Where governmental operations are involved, class actions are generally not superior to other available methods of adjudication (see *Gonzalez v Blum*, 96 AD2d 1091, 467 NYS2d 58 [2d Dept 1983]). It is generally supposed that in matters involving government operations, class action relief is not necessary because similarly situated persons will be adequately protected by the *stare decisis* effect of the decision if plaintiff is successful (see *Matter of Martin v Lavine*, 39 NY2d 72, 382 NYS2d 956 [1976]; *Oak Beach v Town of Babylon*, 100 AD2d 930, 474 NYS2d 818 [2d Dept 1984]; *Suffolk Housing Servs. v Town of Brookhaven*, 69 AD2d 242, 418 NYS2d 452 [2d Dept 1979]).

In support of plaintiffs' motion, counsel submits an attorney affirmation with no affidavit from a party plaintiff. Plaintiffs' complaint and amendments thereto are, likewise, verified by counsel only. Where, as here, a motion for class action status is supported merely by an attorney affirmation, the court properly exercises its discretion in denying such motion, since an attorney affirmation an exhibits annexed thereto are insufficient to sustain plaintiff's burden of establishing compliance with the statutory requirements for

class action certification (see CPLR 901; *Weitzenberg v Nassau County Dept. of Recreation and Parks*, 29 AD3d 682, 815 NYS2d 466 [2d Dept 2006]; *Rallis v City of New York*, 3 AD3d 525, 770 NYS2d 736 [2d Dept 2004]; *Yonkers Contracting Co., Inc. v Romano Enterprises of New York, Inc.*, 304 AD2d 657, 757 NYS2d 339 [2d Dept 2003]; *Weitzenberg v Nassau County Dept. of Recreation and Parks*, 249 AD2d 538, 672 NYS2d 110 [2d Dept 1998]).

Since plaintiffs' motion is supported merely by an attorney's affirmation, and since the plaintiffs' pleadings are unverified by a party and consist of general and conclusory allegations, plaintiffs have failed to sustain the burden of establishing compliance with the statutory requirements for class action certification (see *Rallis v City of New York*, 3 AD3d 525, 770 NYS2d 736 [2d Dept 2004]; *Yonkers Contracting Co. v Romano Enterprises of New York, Inc.*, 304 AD2d 657, 757 NYS2d 339 [2d Dept 2003]). Therefore, plaintiffs' motion for class action status is denied.

Defendants' Cross-motion for Disqualification (seq. #006)

The disqualification of an attorney is a matter that rests within the sound discretion of the Supreme Court (see *Falk v Gallo*, 73 AD3d 685, 901 NYS2d 99 [2d Dept 2010]; *Nationscredit Financial Services Corp. v Turcios*, 41 AD3d 802, 839 NYS2d 523 [2d Dept 2007]). Any doubts are to be resolved in favor of disqualification (*Stober v Gaba & Stober, P. C.*, 259 AD2d 554, 686 NYS2d 440 [2d Dept 1999]). A party's entitlement to be represented by counsel of his or her choice is a valued right which should not be abridged absent a clear showing that disqualification is warranted (see *Falk v Gallo*, 73 AD3d 685, 901 NYS2d 99 [2d Dept 2010]; *Aryeh v Aryeh*, 14 AD3d 634, 788 NYS2d 622 [2d Dept 2005]). Therefore, the party seeking to disqualify an attorney bears the burden on the motion (*id.*; *S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp.*, 69 NY2d 437, 515 NYS2d 735 [1987]; *Nationscredit Fin. Servs. Corp. v Turcios, supra*).

It is an undeniable maxim of the legal profession that an attorney must avoid even the appearance of impropriety (see *Bridges v Alcan Constr. Corp.*, 134 AD2d 316, 520 NYS2d 793 [2d Dept 1987]; *Sirianni v Tomlinson*, 133 AD2d 391, 519 NYS2d 385 [2d Dept 1987]; *Matter of Hof*, 102 AD2d 591, 478 NYS2d 39 [2d Dept 1984]; *Seeley v Seeley*, 129 AD2d 625, 514 NYS2d 110 [2d Dept 1987]; *Solomon v New York Prop. Ins. Underwriting Assn.*, 118 AD2d 695, 500 NYS2d 41 [2d Dept 1986]). Moreover, doubts as to the existence of a conflict of interest must be resolved in favor of disqualification (see *Heelan v Lockwood*, 143 AD2d 881, 533 NYS2d 560 [2d Dept 1988]; *Seeley v Seeley*, 129 AD2d 625, 514 NYS2d 110 [2d Dept 1987]; *Solomon v New York Prop. Ins. Underwriting Assn.*, 118 AD2d 695, 500 NYS2d 41 [2d Dept 1986]; *Death v Salem*, 111 AD2d 778, 490 NYS2d 526 [2d Dept 1985]). Where a conflicting interest may, even inadvertently, affect or give the appearance of affecting the obligations of the professional relationship, the courts have been scrupulous in resolving all doubts in favor of disqualification (see *Kelly v Greason*, 23 NY2d 368, 296 NYS2d 937 [1968]; *Heelan v Lockwood*, 143 AD2d 881, 533 NYS2d 560 [2d Dept 1988]; *Bridges v Alcan Constr. Corp.*, 134 AD2d 316, 520 NYS2d 793 [2d Dept 1987]; *Seeley v Seeley*, 129 AD2d 625, 514 NYS2d 110 [2d Dept 1987]). When faced with a disqualification motion, the court's function is to take such action as is necessary to insure the proper representation of the parties and fairness in the conduct of the litigation. A court may disqualify an attorney to avoid the appearance of impropriety (see *Bridges v Alcan Constr. Corp.*, supra).

Here, based upon the facts presented, the Court finds that plaintiffs' counsel, Paul Sabatino, Esq., was involved with drafting, enacting and implementing the very Charter provisions and laws that plaintiffs are now challenging in this litigation, and that such involvement creates a conflict of interest or, at minimum, the appearance of impropriety, warranting his disqualification as counsel for plaintiffs.

Plaintiffs' Motion for Summary Judgment (seq. # 007)

It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (see *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*id*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]; *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]).

Issue finding rather than issue determination is the key to the procedure (see *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (see *Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepcos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (see *Dowsey v Megerian*, 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). In fact, the party opposing summary relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties (see *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385, 759 NYS2d 171 [2d Dept 2003]).

A motion for summary judgment will not be granted if it depends on proof that would be inadmissible at the trial under some exclusionary rule of evidence (see *Rosenblatt v St. George Health and Racquetball Assoc., LLC*, 119 AD3d 45, 984 NYS2d 401 [2d Dept 2014]). An affirmation or affidavit of a party's attorney submitted in support of or opposition to a motion, and which is without actual knowledge of the facts, has no probative value (see *Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]; *Niyazov v Bradford*, 13 AD3d 501, 786 NYS2d 582 [2d Dept 2004]; *Demetri v Mallard*, 295 AD2d 395, 743 NYS2d 317 [2d Dept 2002]; *Browne v Castillo*, 288 AD2d 415, 733 NYS2d 494 [2d Dept 2001]; *Grosvenor v Niemand Bros.*, 149 AD2d 459, 539 NYS2d 793[2d Dept 1989]; *Dicupe v City of New York*, 124 AD2d 542, 507 NYS2d 687 [2d Dept 1986]; *Farina v Pan American World Airlines, Inc.*, 116 AD2d 618, 497 NYS2d 706 [2d Dept 1986]). A motion supported by an affirmation of an attorney who demonstrates no personal knowledge of the substantive facts is without evidentiary value and is, therefore, unavailing on the issues presented to the Court (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, the plaintiffs' motion is supported merely by an attorney's affirmation with no probative or

evidentiary value. In any event, the motion papers present questions of fact concerning actual taxpayer status of the purported residents, as well as the purported amounts of tax overpayments. Therefore, summary judgment in favor of the plaintiffs must be denied.

Defendants' Motion for Dismissal (seq. #008)

Generally, on a CPLR 3211 motion to dismiss, the court will accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Nonnon v City of New York*, 9 NY3d 825, 842 NYS2d 756 [2007]; *Sokol v Leader*, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010]). However, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true (see *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 864 NYS2d 70 [2d Dept 2008]; *Paolino v Paolino*, 51 AD3d 886, 859 NYS2d 463 [2d Dept 2008]; *Parola, Gross & Marino, P.C. v Susskind*, 43 AD3d 1020, 843 NYS2d 104 [2d Dept 2007]). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914, 891 NYS2d 445 [2d Dept 2009]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]).

On the question of whether the complaint states a cause of action sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the court is to liberally construe the pleadings, accept as true the facts alleged in the complaint, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]; *Corsello v Verizon New York, Inc.*, 77 AD3d 344, 908 NYS2d 57 [2d Dept 2010]; *Lawlor Consultants, Ltd. v Shoreham-Wading Riv. Cent. School Dist.*, 40 AD3d 1048, 834 NYS2d 875 [2d Dept 2007]; *Fay Estates v Toys "R" Us, Inc.*, 22 AD3d 712, 803 NYS2d 135 [2d Dept 2005]).

In construing the pleadings liberally, accepting as true the facts alleged in the complaint and affording the plaintiff the benefit of every favorable inference, the Court finds that the defendants have failed to show entitlement to dismissal of the complaint as a matter of law. Therefore, the defendants' motion for dismissal is denied.

This constitutes the Decision and Order of the Court.

Dated: July 13, 2018

PETER H. MAYER, J.S.C.

[ ] FINAL DISPOSITION

[X] NON FINAL DISPOSITION