

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Gillespie v. City of Yonkers

Gillespie, 2025 NY Slip Op 06692 (Supreme Court of the State of New York Appellate Division Second Judicial Department 2025) · No. 2023-09038 · Decided December 3, 2025

SUMMARY

The Appellate Division, Second Department, affirmed an amended order denying the plaintiff's motion to disqualify the defendant's counsel under Rule 3.7 of the New York Rules of Professional Conduct. The court held that the plaintiff failed to demonstrate that the defendant's counsel's anticipated testimony was necessary, and dismissed the portion of the appeal concerning the sua sponte rejection of a proposed judicial subpoena because no appeal lay as of right from that determination.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Cheryl E. Chambers, J.P.; Paul Wooten, J.; Helen Voutsinas, J.; Laurence L. Love, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	December 3, 2025
DOCKET	2023-09038
DISPOSITION	other
PROCEDURAL POSTURE	The plaintiff appealed from an amended order that denied her motion to disqualify the defendant's counsel and sua sponte rejected a proposed judicial subpoena seeking the counsel's testimony.
STANDARD OF REVIEW	Attorney disqualification is reviewed for abuse of discretion; the appellate court also applied CPLR 5701 to determine whether an appeal as of right lay from the challenged portion of the order.
PRECEDENTIAL VALUE	Published New York Appellate Division decision
PARTIES	Lisa Bracey Gillespie v. City of Yonkers

TOPICS

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statute of limitations

PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the plaintiff demonstrated that the defendant's counsel should be disqualified under Rule 3.7 because counsel's testimony was necessary and would be prejudicial to the defendant.
2. Whether the plaintiff had an appeal as of right from the portion of the amended order that sua sponte rejected the proposed judicial subpoena for testimony by the defendant's counsel.
3. Whether leave to appeal should be granted from the subpoena-related portion of the amended order.

HOLDINGS

1. The plaintiff failed to demonstrate that any anticipated testimony by the defendant's counsel was necessary to her case; therefore, the Supreme Court properly denied the motion to disqualify counsel.
2. No appeal lies as of right from the portion of the amended order that sua sponte rejected the proposed judicial subpoena.
3. Leave to appeal was denied under the circumstances.

KEY QUOTATIONS

“A party moving to disqualify counsel on the ground that he or she may be called as a witness must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party” ([*1])

“Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence” ([*1])

FACTUAL BACKGROUND

The plaintiff alleged that she slipped and fell at a Yonkers intersection on November 19, 2021, and commenced a personal-injury action on March 1, 2023. The defendant asserted that the action was barred by the applicable statute of limitations. The plaintiff sought to disqualify the defendant's counsel, arguing that counsel's testimony was necessary to her contention that equitable estoppel barred the statute-of-limitations defense.

PROCEDURAL HISTORY

The plaintiff commenced a personal-injury action in Supreme Court, Westchester County, after an alleged slip-and-fall. The defendant asserted a statute-of-limitations affirmative defense. The Supreme Court denied the plaintiff's motion to disqualify defense counsel and rejected the proposed subpoena. The Appellate Division dismissed the portion of the appeal concerning the subpoena and affirmed the order insofar as reviewed.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand was ordered. The appeal from the subpoena-related portion of the amended order was dismissed, and the amended order was affirmed insofar as reviewed.

CASES CITED

- Alnoukari v Nokari, 218 AD3d 527, 528
- Matter of Blauman-Spindler v Blauman, 184 AD3d 636, 637
- Greenberg v Grace Plaza Nursing & Rehabilitation Ctr., 174 AD3d 510, 510
- Falk v Gallo, 73 AD3d 685, 685-686
- Gamez v Lopez, 220 AD3d 844, 846
- Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP, 218 AD3d 760, 761
- S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp., 69 NY2d 437, 446
- Levy v 42 Dune Rd., LLC, 162 AD3d 651, 652-653
- Sholes v Meagher, 100 NY2d 333, 335

OPINION

PER CURIAM.

Gillespie v City of Yonkers (2025 NY Slip Op 06692) Gillespie v City of Yonkers 2025 NY Slip Op 06692 Decided on December 3, 2025 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on December 3, 2025 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department CHERYL E. CHAMBERS, J.P.

PAUL WOOTEN HELEN VOUTSINAS LAURENCE L. LOVE, JJ. 2023-09038 (Index No. 57337/23) [*1]Lisa Bracey Gillespie, appellant, v City of Yonkers, respondent. Alyssa Gillespie, Mount Vernon, NY, for appellant. DECISION & ORDER In an action to recover damages for personal injuries, the plaintiff appeals from an amended order of the Supreme Court, Westchester County (Janet C. Malone, J.), dated July 25, 2023.

The amended order, insofar as appealed from, denied that branch of the plaintiff's motion which was to disqualify the defendant's counsel and, sua sponte, rejected a proposed judicial subpoena for the testimony of the defendant's counsel. ORDERED that the appeal from so much of the amended order as, sua sponte, rejected a proposed judicial subpoena for the testimony of the

defendant's counsel is dismissed, without costs or disbursements; and it is further, ORDERED that the amended order is affirmed insofar as reviewed, without costs or disbursements.

On March 1, 2023, the plaintiff commenced this action to recover damages for personal injuries she allegedly sustained after she slipped and fell at an intersection located in Yonkers on November 19, 2021. The defendant interposed an answer in which it asserted, inter alia, an affirmative defense that the action was barred by the applicable statute of limitations.

The plaintiff moved, among other things, to disqualify the defendant's counsel under rule 3.7 of the Rules of Professional Conduct (22 NYCRR 1200.0), on the ground that the testimony of the defendant's counsel is necessary to the plaintiff's claim that the defendant's statute of limitations defense should be barred by the doctrine of equitable estoppel.

The defendant opposed the motion. In an amended order dated July 25, 2023, the Supreme Court, inter alia, denied that branch of the plaintiff's motion and, sua sponte, rejected a proposed judicial subpoena for the testimony of the defendant's counsel. "The disqualification of an attorney is a matter that rests within the sound discretion of the court" (*Alnoukari v Nokari*, 218 AD3d 527, 528 [internal quotation marks omitted]; see *Matter of Blauman-Spindler v Blauman*, 184 AD3d 636, 637).

"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" (*Greenberg v Grace Plaza Nursing & Rehabilitation Ctr.*, 174 AD3d 510, 510 [internal quotation marks omitted]; see *Falk v Gallo*, 73 AD3d 685, 685).

On a motion to disqualify an attorney, "[t]he moving party bears the burden of showing that disqualification is warranted" (*Matter of Blauman-Spindler v Blauman*, 184 AD3d at 637 [internal quotation marks omitted]; see *Greenberg v Grace Plaza Nursing & Rehabilitation Ctr.*, 174 AD3d at 510). "Rule 3.7[a] of the Rules of Professional Conduct provides that unless certain exceptions apply, '[a] lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact'" (*Falk v Gallo*, 73 AD3d at 686, quoting Rules of Prof Conduct [22 NYCRR 1200.0] rule 3.7[a]).

"A party moving to disqualify counsel on the ground that he or she may be called as a witness must demonstrate that (1) the testimony of the opposing party's counsel is necessary to his or her case, and (2) such testimony would be prejudicial to the opposing party" (*Gamez v Lopez*, 220 AD3d 844, 846; see *Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d 760, 761).

"Merely because an attorney has relevant knowledge or was involved in the transaction at issue does not make that attorney's testimony necessary" (*Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d at 761 [internal quotation marks omitted]).

"Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence" (*S & S Hotel Ventures Ltd. Partnership v 777 S. H. Corp.*, 69 NY2d 437, 446; see *Kingston Check Cashing Corp. v Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d at 761).

Here, the plaintiff failed to demonstrate that any anticipated testimony by the defendant's counsel would be necessary to her case. Accordingly, the Supreme Court properly denied that branch of the plaintiff's motion which was to disqualify the defendant's counsel (see *Gamez v Lopez*, 220 AD3d at 846; *Levy v 42 Dune Rd., LLC*, 162 AD3d 651, 652-653).

The remainder of the plaintiff's appeal must be dismissed. No appeal lies as of right from so much of the amended order as, sua sponte, rejected the proposed judicial subpoena for the testimony of the defendant's counsel (see CPLR 5701[a][2]; *Sholes v Meagher*, 100 NY2d 333, 335), and, under the circumstances, we decline to grant leave to appeal from that portion of the amended order (see CPLR 5701[c]).

CHAMBERS, J.P., WOOTEN, VOUTSINAS and LOVE, JJ., concur. ENTER: Darrell M. Joseph
Clerk of the Court