112 A.D.3d 1213
Supreme Court, Appellate Division, Third Department, New York.

Kimberly HURRELL–HARRING et al., on Behalf of Themselves and All Others Similarly Situated, Appellants,
v.
STATE of New York et al., Respondents, et al., Defendants.

Dec. 19, 2013.

Synopsis
Background: Indigent defendants who were assigned counsel in criminal cases pending in five counties commenced putative class action alleging that systemic deficiencies in public defense system denied them their right to counsel. The Supreme Court, Albany County, Devine, J., denied plaintiffs' motion for class action certification, and they appealed. The Supreme Court, Appellate Division, 81 A.D.3d 69, 914 N.Y.S.2d 367, reversed. Subsequently, the Supreme Court, Devine, J., denied plaintiffs' motion to withdraw certain plaintiffs as named class representatives, and appeal was taken.

[Holding:] The Supreme Court, Appellate Division, Peters, P.J., held that withdrawal of seven out of 20 named class representatives would not prejudice State defendants, so as to preclude voluntary discontinuance as to those plaintiffs.

Affirmed as modified.

West Headnotes (6)

[1] **Pretrial Procedure**
Discretion and leave of court

While the decision to grant an application to discontinue a proceeding is generally committed to the sound discretion of the trial court, a party cannot ordinarily be compelled to litigate and, absent special circumstances-such as prejudice to a substantial right of the defendant or other improper consequences-discontinuance should be granted. McKinney's CPLR 3217(b).

Cases that cite this headnote

[2] **Pretrial Procedure**
Dismissal as to part of parties in general
Pretrial Procedure
Class actions

Withdrawal of seven out of 20 named class representatives from action challenging public defender system in five counties would not prejudice State defendants, so as to preclude voluntary discontinuance as to those plaintiffs; although defendants claimed they had expended significant resources investigating the cases of the named plaintiffs in preparation for litigation, they failed to identify any resources that they expended for discovery that would not have otherwise been expended, and at least one class representative from each of the five defendant counties would remain if withdrawal were permitted. McKinney's CPLR 3217(b).

Cases that cite this headnote

[3] **Pretrial Procedure**
Right in general

Delay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for a voluntary discontinuance. McKinney's CPLR 3217(b).

1 Cases that cite this headnote

[4] **Pretrial Procedure**
Dismissal as to part of parties in general
Pretrial Procedure
Class actions

To the extent that State defendants could show wasted effort or expense with respect to the named plaintiffs seeking withdrawal as class representatives in action challenging public defender system in five counties, the proper remedy would be reimbursement of costs or the provision of additional time to conduct discovery, not a denial of voluntary discontinuance as to those class plaintiffs. McKinney's CPLR 3217(b).

Cases that cite this headnote

[5] **Parties**
Representation of class; typicality

Because a certified class acquires an existence and legal status separate from that of the named individual class representatives, the claims of the class members would not be impaired or destroyed by the failure of the named plaintiffs' individual claims.

Cases that cite this headnote

[6] **Parties**
Representation of class; typicality

Class representatives have a duty to adequately and vigorously represent the interests of class members; thus, if a class representative fails to maintain contact with class counsel or is otherwise no longer willing or able to serve in that capacity, he or she cannot fulfill the duties of a class representative and should withdraw.

Cases that cite this headnote

Attorneys and Law Firms

****465** Schulte Roth & Zabel, LLP, New York City (Kristie M. Blase of counsel) and Corey Stoughton, New York Civil Liberties Union Foundation, New York City, for appellants.

****466** Eric T. Schneiderman, Attorney General, Albany (Victor Paladino of counsel), for respondents.

Before: PETERS, P.J., LAHTINEN, SPAIN and EGAN JR., JJ.

Opinion

PETERS, P.J.

***1213** Appeal from that part of an order of the Supreme Court (Devine, J.), entered December 14, 2012, which denied plaintiffs' motion to withdraw certain plaintiffs as named class representatives.

Plaintiffs, 20 indigent persons who were represented by assigned counsel in various criminal cases pending in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties (hereinafter collectively referred to as the counties), commenced this action ***1214** in 2007 alleging that the current public defense system is systemically deficient and has functioned to deprive them and similarly situated indigent criminal defendants in the counties of their constitutional right to counsel. This litigation has been before us on three prior occasions (81 A.D.3d 69, 914 N.Y.S.2d 367 [2011], 75 A.D.3d 667, 905 N.Y.S.2d 334 [2010], 66 A.D.3d 84, 883 N.Y.S.2d 349 [2009], *mod.* 15 N.Y.3d 8, 904 N.Y.S.2d 296, 930 N.E.2d 217 [2010]).[1] When this matter was last before us, we reversed Supreme Court's denial of plaintiffs' motion for class certification and certified a class of "[a]ll indigent persons who have or will have criminal felony, misdemeanor, or lesser charges pending against them in New York state courts in [the counties] who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel" (81 A.D.3d at 71, 914 N.Y.S.2d 367). At the time, the parties were in the midst of several years of discovery, and depositions of 12 of the 20 class representatives were thereafter conducted between May and September 2012.

In October 2012, plaintiffs moved to withdraw eight of the 20 class representatives as plaintiffs in this action. Plaintiffs Edward Kaminski and Ricky Lee Glover submitted affidavits stating that they were no longer able to serve in that capacity. Plaintiffs' counsel averred that Kaminski's medical condition rendered him unable to perform his duties as a class representative, and that personal circumstances interfered with Glover's ability to adequately serve as a class representative. As for the other six class representatives seeking withdrawal, counsel stated that they had failed to maintain contact with or acknowledge communications from her office in recent years, and submitted an affidavit from a paralegal documenting the diligent, albeit unsuccessful, efforts to communicate with those class representatives. Defendants State of New York and Governor Andrew Cuomo (hereinafter collectively referred to as defendants) opposed the motion, claiming that they would be prejudiced by the withdrawal of eight of the class representatives at such stage of the litigation. Supreme Court granted the motion as to Kaminski, but denied the motion as to the other seven class representative plaintiffs who sought to withdraw. Plaintiffs appeal.

[1] Supreme Court abused its discretion in declining to permit the seven class representatives to withdraw from this action. CPLR 3217(b) provides that an action or proceeding may be discontinued "upon order of the court and upon terms and ***1215** conditions, as the court deems proper." While the decision to grant such an application is generally ****467** committed to the sound discretion of the trial court (*see Tucker v. Tucker,* 55 N.Y.2d 378, 383, 449 N.Y.S.2d 683, 434 N.E.2d 1050 [1982]), a party cannot ordinarily be compelled to litigate and, absent special circumstances—such as prejudice to a substantial right of the defendant or other improper consequences—discontinuance should be granted (*see id.* at 383–384, 449 N.Y.S.2d 683, 434 N.E.2d 1050; *Wells Fargo Bank, N.A. v. Chaplin,* 107 A.D.3d 881, 883, 969 N.Y.S.2d 67 [2013]; *Matter of Bianchi v. Breakell,* 48 A.D.3d 1000, 1001–1002, 852 N.Y.S.2d 454 [2008]; *Christenson v. Gutman,* 249 A.D.2d 805, 806, 671 N.Y.S.2d 835 [1998]).

[2] [3] [4] Here, defendants claim that they would be prejudiced by the withdrawal of these seven class representatives because they have expended significant resources investigating the cases of the named plaintiffs in preparation for litigation, such as obtaining thousands of records relating to their criminal cases and traveling to the five counties to conduct meetings with prosecutors, indigent defense attorneys and plan administrators. Yet, defendants have failed to identify any resources that they expended for discovery that would not have otherwise been expended (*see Matter of Vitamins Antitrust Litigation,* 198 F.R.D. 296, 304 [D.D.C. 2000]). Indeed, were withdrawal permitted, there would remain at least one class representative from each of the five defendant counties, and most of the individuals that defendants allegedly interviewed possess information regarding another class member and/or the public defense system generally, which remain relevant to defendants' defense. More importantly, "[d]elay, frustration and expense in preparation of a contemplated defense do not constitute prejudice warranting denial of a motion for a voluntary discontinuance under CPLR 3217(b)" (*Eugenia VI Venture Holdings, Ltd. v. MapleWood Equity Partners, L.P.,* 38 A.D.3d 264, 265, 832 N.Y.S.2d 155 [2007]). To the extent that defendants could show wasted effort or expense with respect to the named plaintiffs seeking withdrawal, the proper remedy would be reimbursement of costs and/or the provision of additional time to conduct discovery, not a denial of voluntary discontinuance as to those class plaintiffs (*see Matter of Vitamins Antitrust Litigation,* 198 F.R.D. at 304–305).

[5] Furthermore, there is no claim that the proposed withdrawal of the seven class representatives is based upon any illegitimate motive or for the purpose of gaining an unfair litigation advantage (*compare Tucker v. Tucker,* 55 N.Y.2d at 384–385, 449 N.Y.S.2d 683, 434 N.E.2d 1050 [denying motion for discontinuance where the plaintiff's admitted purpose was to take advantage of a newly enacted statute]; *Matter of Oneida Indian Nation of N.Y. v. Pifer,* 43 A.D.3d 579, 580, 840 N.Y.S.2d 672 [2007] [discontinuance was properly denied where the "evident ***1216** motive" for the request was simply to avoid the consequences of an adverse decision on the merits]; *Kaplan v. Village of Ossining,* 35 A.D.3d 816, 817, 827 N.Y.S.2d 278 [2006] [discontinuance was improper where the purpose was to circumvent an order of the court]; *NBN Broadcasting v. Sheridan Broadcasting Networks,* 240 A.D.2d 319, 319, 659 N.Y.S.2d 262 [1997] [same]). Nor does the defense of the class claims hinge on facts specific to these withdrawing class representatives, such that the absence of their individual claims would serve to prejudice defendants.[2] As the Court of Appeals ****468** noted in reinstating that portion of the complaint asserting claims of "outright" and "constructive denial" of the right to counsel at a critical stage of the criminal proceeding, the issue presented in this action distills to whether, "in one or more of the five counties at issue[,] the basic

constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions" (15 N.Y.3d 8, 25, 904 N.Y.S.2d 296, 930 N.E.2d 217 [2010]). Because a certified class acquires an existence and legal status separate from that of the named individual class representatives, the claims of the class members would not be impaired or destroyed by the failure of the named plaintiffs' individual claims (*see East Tex. Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 406 n. 12, 97 S.Ct. 1891, 52 L.Ed.2d 453 [1977]; *Franks v. Bowman Transp. Co.,* 424 U.S. 747, 752–757, 96 S.Ct. 1251, 47 L.Ed.2d 444 [1976]).

[6] Lastly, to the extent that Supreme Court found that the class representatives' status as fiduciaries to the class members militates against withdrawal, we simply cannot agree. Class representatives have a duty to adequately and vigorously represent the interests of class members (*see City of Rochester v. Chiarella,* 65 N.Y.2d 92, 100, 490 N.Y.S.2d 174, 479 N.E.2d 810 [1985]; *Pruitt v. Rockefeller Ctr. Props.,* 167 A.D.2d 14, 24–25, 574 N.Y.S.2d 672 [1991]; *Dagnoli v. Spring Val. Mobile Vil.,* 165 A.D.2d 859, 860, 560 N.Y.S.2d 323 [1990]). Thus, if a class representative fails to maintain contact with class counsel or is otherwise no longer willing or able to serve in that capacity, he or she cannot fulfill the duties of a class representative and should withdraw (*see Miller v. Hewlett–Packard Co.,* 2006 WL 2506434, *1, 2006 U.S. Dist. LEXIS 65724, *3, [Idaho, Aug. 25, 2006, No. CV–05–111–5–BLW]; *Matter of Currency Conversion Fee Antitrust Litig.,* 2004 WL 2453927, *1, 2004 U.S. Dist. LEXIS 22132, *3–4, [S.D.N.Y., Nov. 3, 2004, No. MDL 1409]). The remedy under such circumstances is not to penalize the entire class by forcing an unwilling plaintiff to remain in the litigation.

***1217** With no showing of any "special circumstances [or][p]articular prejudice to ... defendant[s] or other improper consequences flowing from discontinuance" (*Tucker v. Tucker,* 55 N.Y.2d at 383, 449 N.Y.S.2d 683, 434 N.E.2d 1050), plaintiffs' motion to withdraw the eight class representatives should have been granted in its entirety (*see Bank of Am., N.A. v. Douglas,* 110 A.D.3d 452, 452, 973 N.Y.S.2d 42 [2013]; *Blackwell v. Mikevin Mgt. III, LLC,* 88 A.D.3d 836, 837–838, 931 N.Y.S.2d 116 [2011]; *Matter of Bianchi v. Breakell,* 48 A.D.3d at 1001–1002, 852 N.Y.S.2d 454).

ORDERED that the order is modified, on the law, without costs, by reversing so much thereof as denied plaintiffs' motion to withdraw certain plaintiffs as named class representatives; motion granted in its entirety; and, as so modified, affirmed.

LAHTINEN, SPAIN and EGAN JR., JJ., concur.

All Citations

112 A.D.3d 1213, 977 N.Y.S.2d 464, 2013 N.Y. Slip Op. 08503

Footnotes

1 Plaintiffs have also appealed Supreme Court's December 16, 2011 order denying their motion to compel and its January 30, 2013 order partially denying their motion to renew (appeal No. 517132 [decided therewith]).

2 Plaintiffs agreed not to use or rely on any evidence related to the criminal cases of the withdrawing class members (*see Spatz v. Wide World Travel Serv.,* 80 A.D.2d 519, 519–520, 435 N.Y.S.2d 605 [1981]). This is certainly not to say that defendants may not introduce evidence regarding these named plaintiffs if it so chooses.

End of Document