

Avery v Caldwell

2007 NY Slip Op 32412(U)

July 27, 2007

Supreme Court, New York County

Docket Number: 0108829/2006

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice

Index Number : 108829/2006

AVERY, DENNIS

vs.

CALDWELL, MOLLY

SEQUENCE NUMBER : # 004

REFER

INDEX NO. 10882906

MOTION DATE 7/004

MOTION SEQ. NO. 7004

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied*
in accordance with the attached.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

AUG 06 2007

NEW YORK

COUNTY CLERK'S OFFICE

Dated: July 27, 2007

EJG

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X

DENNIS AVERY,

Plaintiff,

-against-

Index No. 108829/06

MOLLY CALDWELL,

FILED

Deuser

AUG 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

EMILY JANE GOODMAN, J.S.C.:

The underlying proceeding involves a dispute between two individuals regarding monies paid for the purchase of an apartment, what their relative interests are and what their original intentions were. The pending motions are procedural in nature. (The Court previously denied plaintiff's motion for a default judgment, calling it "incomprehensible," when defendant's then - counsel was late in answering the complaint due to his extremely ill health. However, the litigation is decidedly contentious, lacking, as observed by the Court, the expected collegiality and professionalism.) The plaintiff is Dennis Avery, an attorney who resides in California and whose daughter (not a party to this lawsuit), purchased an apartment with another woman with whom she had a domestic relationship which has since ended; plaintiff now seeks to establish or clarify his own financial interest in the monies originally used to purchase the apartment of his daughter and her former partner. The defendant is the former domestic partner, Molly Caldwell.

Discussion

Upon discovering (after not having previously noted the address), that the apartment is in the same building where I reside and in which I own the shares assigned to my apartment, I made disclosure to counsel for both parties. I also informed them that I do not know their clients or

plaintiff's daughter, have never met them, and, in a building of approximately 150 units, have no connection to them whatever. Moreover, the issue does not involve the building, but rather a divorce-like dispute in which one of the parties is actually the parent of one of the partners; the situation is also variously characterized as involving a loan or an investment by the plaintiff father.

Upon the disclosure of my personal residence, Yetta Kurland, counsel for plaintiff, wrote a wholly unprofessional and accusatory letter to me carelessly (and ungrammatically) stating:

"You have a financial interest in the outcome of this matter i.e. sale of shares of a corporation which You are an owner of, and because Defendant Molly Caldwell is a real estate broker who sells apartments in the building."

At oral argument on the issue of recusal, Kurland denied writing the above-quoted letter despite it being on her letterhead and bearing her signature, but eventually acknowledged it as hers, claiming, however, that she hadn't really meant to send it to the Court.

I have informed all counsel that I see no way that anything in this case could affect or benefit me or could be detrimental to me inasmuch as it involves the parties' obligation (if any) to each other, not the unit itself or any economics surrounding it. Therefore, I have no conflict of interests, potential conflict of interests, or any rational appearance of a conflict of interests.

If recusal were nevertheless sought, counsel was directed to make a motion and to submit exactly what the Court's "financial interest in the outcome of this matter," would be, and to support, with law, what the basis would be for recusal under these circumstances, and how the Court could possibly have a personal interest in the outcome of the case and could benefit or be harmed financially or in any other way, by the relationships of these individuals or the father's position with respect to the residence of his non-party daughter and her former partner.

Subsequently, Kurland did move for recusal, even suggesting mandatory statutory recusal (Judiciary Law § 14) as well as Canon of Judicial Ethics 22 NYCRR § 100.3(E), but submitted no law or facts which would support recusal. Nor is there any explanation or analysis as to how the dispute between attorney Avery and his daughter's former live-in partner could possibly effect me in a positive or negative way, or have any impact on me, the building, the corporation or the shareholders. The only issue is the relative interests of the parties in the funds used to purchase the apartment, following the dissolution of a personal relationship to which the plaintiff is not a party, but, perhaps, a lender or investor. However, there is no issue concerning the apartment itself or the shares in the corporation.

Nevertheless, Kurland, without any basis, states that the Court's impartiality might reasonably be questioned, and that there may be an "economic interest in the subject matter in controversy and other interests that could be substantially affected by the proceeding." At the same time, Kurland agrees that, "the interest must be real; it must be certain and not merely possible or contingent; it must be one which is visible, demonstrable, and capable of precise proof; it must be a present interest..." (Matter of Estate of Sherburne, 124 Misc.2d 708, 476 NYS2d 419 [1984]).

Still, Kurland goes on to say, "...there may *potentially* (emphasis added) be interests of the Court in this matter which would rise to the level of statutory grounds for recusal" under Judiciary Law § 14. Kurland goes on further to suggest that the California plaintiff, who is the father of a shareholder of the cooperative corporation, who was in a personal relationship with the defendant (although it would appear that the two women no longer jointly reside in the building), might experience *potential* (emphasis added) "adversity or discomfort both during the proceedings and after, including extrajudicial contact and communications with the Court."

Kurland and plaintiff raise such extraneous, even frivolous and inaccurate arguments as stating that a sale of the apartment (which is not part of this litigation) would benefit the building and therefore, me, because of the “flip tax.” Kurland, relying on poor, or no, research should be aware that the building does not have a “flip tax” upon the sale of apartments.

In another frivolous argument, Kurland suggests that a conflict of interests would exist in the event that I served on the Board of Directors of the building. I do not serve on the Board, have never served on the Board, and have no intention of serving on the Board at any time.

Relying on inapposite cases which hold that “where the corporation is a party to the suit, a judge cannot sit in an action in which he (sic) is a stockholder” (In re Dodge v Stevenson Mfg. Co., 77 NY 101 [1879]), Kurland at the same time concedes that “the cooperative corporation at issue here is not a party....” Yet plaintiff’s counsel imagines complications if there is a trial, or “if one shareholder may refuse to pay the corporation’s legal bills incurred when he sues the corporation for his attempted eviction,” which is totally irrelevant to the case at issue.

In papers submitted, Kurland wonders if Ms. Avery or Ms Caldwell can “joke in an unabashed manner at building functions, or should she avoid them altogether.” There are no building social functions. Also, Ms. Caldwell, Kurland says, is a “real estate agent with a listing for an apartment in the same building,” which has nothing to do with this case or Court.

Kurland further posits another hypothetical: “what if the Court knows them, not by name, but as the loud neighbor, the pushy neighbor, or the nice neighbor.” My apartment is at the top of the building in virtual isolation from most of the other apartments. I have only a few neighbors in total and they are not these individuals.

In addition, an affidavit (on Kurland stationery) is submitted by Dennis Avery, who, although he is an attorney, states incorrectly that the shares of the corporation “are a material

element of this action and ownership of which potentially exercises control over the corporation, not just financial, but could also effects (sic) the parties' appurtant lease and tenancy," suggesting that the Court could therefore not be impartial.

In the meantime, plaintiff's daughter, Halina Avery, described as a "potential party," submits, in a surprising sworn statement, that she has known that we reside in the same building, saying, under oath:

"I am very much aware of the Judge's presence in the building and I have often thought of the fact that a resident in my building will be the person deciding the fact of my home, and in a proceeding in which I may be a party."

It is revealing that the concern, knowledge and discomfort of this "potential party," was never expressed or brought to my attention through counsel, until I discovered and disclosed the coincidence. Ms. Avery goes on to say, "In addition, there may be other issues which may also involve Judge Goodman," but gives no further explanation of what those issues could possibly be.

Ms. Avery's affidavit is also on Kurland stationery and is notarized by Yetta Kurland, who thereby attests to its having been sworn to in counsel's presence. While that does not indicate counsel's attesting to the veracity of the statements themselves, they may well have been prepared by Kurland; this could cause counsel to have a conflict of interest or perhaps become a witness in the future, as credibility is always an issue, and there is no lawyer-client relationship between Kurland and Ms. Avery.

Despite the state of the law, and movant's vapid arguments, Kurland repeats the unseemly and unprofessional accusation against this Court, writing, "the circumstances smack of having, however, unfortunately, built within them economics however small, conflicts however large...."

In opposition to all of the foregoing, counsel for Molly Caldwell, D. Cameron Moxley, submits that there is no basis for mandatory recusal Judiciary Law § 14 or discretionary recusal under case law or Canon of Judicial Ethics 22 NYCRR § 100.3(E), and relies on the state of the law and the law of this state.

Conclusion

This Court is mindful that, "A judge shall not sit as such in, or take any part in the decision of an action, claim, matter, motion or proceeding...in which [s]he is interested..." Judiciary Law § 14, and finds nothing that would create or suggest a conflict of interests 22 NYCRR § 100.3(E). The Court is further mindful that it is within the judge's discretion and conscience to measure her own ability to be fair and impartial that controls. (Khan v. Dolly, 39 AD3d 649, 650 [2nd Dept 2007]). I conclude, unambiguously, that there is nothing in the facts, circumstances or law that would cause me to be anything other than fair and impartial in this case.

Accordingly, motion for recusal is denied.

This constitutes the Decision and Order of the Court.

Dated: July 27, 2007

ENTER:


J.S.C.
EMILY JANE GOODMAN

FILED
AUG 06 2007
NEW YORK
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