

Matter of Diplacido v Goldberg

2008 NY Slip Op 30992(U)

March 31, 2008

Supreme Court, Nassau County

Docket Number: 9181-07/

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

In the Matter of the Application of

ANTHONY JOHN DIPLACIDO and
ENERGEX, LTD.,

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 19181/07

Petitioners,

Motion Sequence No. 001

For Judgment disqualifying Steven R. Goldberg,
Esq. as counsel for Jerry Sica and Gary Katich in
an Arbitration pending before the New York
Mercantile, Exchange (#05-05) and disqualifying
Arbitrators Vito Pucci and Raymond Chung
Arbitration #05-05
- against -

STEVEN R. GOLDBERG, ESQ., VITO PUCCI
and RAYMOND CHUNG,

Respondents.

The following papers having been read on this motion:

Notice of Petition, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2, 3, 4, 5</u>
Replying Affidavits	<u>6, 7</u>
Briefs: Plaintiff's / Petitioner's	<u> </u>
Defendant's / Respondent's	<u>8, 9</u>

The petitioners seek judgment pursuant to, *inter alia*, CPLR Article 4, 22 NYCRR § 1200.27 and 22 NYCRR § 1200.19 directing Steven R. Goldberg, Esq. be disqualified from representing Jerry Sica and Gary Katich in the pending Arbitration proceeding, to wit #05-05 before the New York Mercantile Exchange, Inc. and any related proceeding

involving petitioners Anthony John DiPlacido and Energex, Ltd., disqualifying Arbitrators Raymond Chung and Vito Pucci from serving as arbitrators in the subject Arbitration proceeding, and the petitioners be awarded costs and reasonable attorneys' fees incurred in bringing the instant special proceeding. The respondents Raymond Chung and Vito Gucci, and the New York Mercantile Exchange, Inc. oppose this petition, but take no position on the portion of the petition seeking to disqualify Steven R. Goldberg, Esq., as counsel for some of the parties in the subject Arbitration proceeding, but notes that application is made two years after Goldberg has appeared for the respondents in the subject Arbitration proceeding. Chung has already recused himself as an Arbitrator in the subject Arbitration proceeding, so the petition is moot as to him.

The petitioners claim Goldberg should be disqualified because of a longstanding attorney-client relationship with the petitioners, and handling numerous material matters for them which are substantially related to issues pending at the subject Arbitration proceeding. The petitioners claim Arbitrator Pucci is disqualified by his decision in a prior proceeding; the previous removal of two other arbitrators in the same prior disciplinary proceeding against DiPlacido ; and a personal relationship with a potential material witness. The petitioners assert, through counsel's affirmation dated October 24, 2007, Arbitrator Pucci failed to disclose the existence of the relationship, so he should be disqualified, and petitioners' counsel refers to DiPlacido's affidavit dated October 24, 2007, in support of this instant special proceeding.

The attorney for the respondents Raymond Chung and Vito Gucci, and for the New York Mercantile Exchange, Inc. states, in an affirmation dated November 30, 2007, the New York Mercantile Exchange, Inc. takes no position on that portion of the petition seeking to disqualify Goldberg as counsel for some of the parties in the arbitration, but notes that portion is made two years after Goldberg appeared for the respondents in the pending Arbitration proceeding. The attorney for the respondents Raymond Chung and Vito Gucci, and for the New York Mercantile Exchange, Inc. points out the petitioners waived any objection to Arbitrator Pucci over a year and a half ago under Rule 5.16 of the New York Mercantile Exchange, Inc., and the petitioners have not provided a factual nor a legal basis to disqualify Arbitrator Gucci. The attorney for the respondents Raymond Chung and Vito Gucci, and for the New York Mercantile Exchange, Inc. notes the petitioners switched lawyers and hired new counsel, and the petitioners now again request the New York Mercantile Exchange, Inc. to disqualify Arbitrator Gucci on the same grounds that had already been rejected more than a year ago.

The respondent Steven R. Goldberg, Esq. and the attorney for the respondents Jerry Sica and Gary Katich in the Arbitration pending before the New York Mercantile Exchange, Inc. states, in an affidavit dated November 29, 2007, the petition should be dismissed based upon collateral estoppel, election and waiver with to Arbitrator Gucci, and as to all respondents because the petitioners have failed to name two necessary parties, the respondents in the underlying matter, and for *laches*. The respondent Steven

R. Goldberg, Esq. and the attorney for the respondents Jerry Sica and Gary Katich in the Arbitration pending before the New York Mercantile Exchange, Inc. asserts , in the event dismissal is not upon those grounds, the petition should be dismissed based on the sworn statements and exhibits included, or, in the alternative, a trial of the factual issues. The respondent Steven R. Goldberg, Esq. and the attorney for the respondents Jerry Sica and Gary Katich in the Arbitration pending before the New York Mercantile Exchange, Inc. points out, in detail, the work performed upon behalf of the petitioners, and notes he has not had any conversations with DiPlacido since some point in 2003, at the most a rare perfunctory greeting in the building. The respondent Steven R. Goldberg, Esq. and the attorney for the respondents Jerry Sica and Gary Katich in the Arbitration pending before the New York Mercantile Exchange, Inc. challenges, in detail, DiPlacido's credibility, provides a procedural history of the Arbitration pending before the New York Mercantile Exchange, Inc., a statement regarding the Clearing Houses and Business Conduct Committee, and demands a hearing on any factual questions unless the instant petition is dismissed on legal grounds.

The petitioner Anthony John DiPlacido states, in detail, in an affidavit dated December 12, 2007, submitted in further support of this special proceeding, the circumstances in this matter. The petitioners' attorney states, in detail, in a reply affirmation dated December 13, 2007, in further support of this special proceeding, Goldberg admitted representing the petitioners at least 10 consecutive years and the

documentary evidence reveals the true extent and nature of such representation. The petitioners' attorney states the New York Mercantile Exchange, Inc. is not a party in this proceeding nor sought leave of the Court to intervene as party in this special proceeding, and therefore cannot appear on its own behalf.


This Court has carefully reviewed and considered all of the papers submitted by the parties. This Court finds the petitioners have not met their burden under CPLR Article 4, 22 NYCRR § 1200.27 and 22 NYCRR § 1200.19.

Accordingly, the petition dismissed.

So ordered.

Dated: March 31, 2008

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEEN

FINAL DISPOSITION XXX

NON FINAL DISPOSITION

ENTERED

APR 03 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**