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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

In the Matter of the Application of
HEMPSTEAD COUNTRY CLUB,

Petitioner,

INDEX No. 401842/07

MOTION DATE: Aug. 19, 2009
Motion Sequence # 002

-against-

ASSESSOR OF THE COUNTY OF NASSAU and THE NASSAU COUNTY ASSESSMENT REVIEW COMMISSION,

Respondents.

The following papers read on this motion:

Notice of Motion..... X
Affidavit/Affirmation in Opposition..... XX
Affidavit/Affirmation in Response..... XXXX
Memorandum of Law..... X

This motion, by the respondents, for an order requesting this Court to recuse itself from hearing the instant action, as well as **Rockville Links v Assessor of The County of Nassau and The Nassau County Assessment Review Commission, Index no. 401847/07, Rockaway Hunting Club v Assessor of The County of Nassau and The Nassau County Assessment Review Commission, Index no. 402614/04, Glen Head Country Club v Assessor of The County of Nassau and The Nassau County Assessment Review**

Commission, Index no. 400563/07, Nassau Country Club v Assessor of The County of Nassau and The Nassau County Assessment Review, Index no. 400567/07, is determined as hereinafter set forth.

Currently, there are approximately 20 separate "Country Club" actions seeking tax assessment reductions that are pending before this Court. This Court has clearly stated that, as a member of the Cherry Valley Country Club, it will recuse itself from that action. This was stated, in an appropriate and timely fashion, a number of months ago. All counsel are, and have been, aware of that recusal, made **sua sponte**.

The movants' attorney avers that this Court's determination on the methodology of evaluation of the private country clubs and golf courses will be "persuasive authority in other golf course cases" (DeMaro affirmation, ¶4) because this Court has administrative responsibilities on all tax certiorari matters. He contends that based on that "administrative" authoritative position, this Court should recuse itself from these instant proceedings. Counsel acknowledges that the instant motion is not one with a legal basis, but a request for a discretionary determination. He cites to legal precedent, that he avers is controlling herein, in that the valuation determination of this Court ". . .would likely affect the rates [a golf club] charges its members. . ." (DeMaro affirmation, ¶7) and that same ". . .decision might 'substantially affect' the membership fees that all members pay at all clubs, including Your Honor at the Cherry Valley Country Club" (**Id**. ¶7). He contends that, while this Court has recused itself from the Cherry Valley Country Club matter, the valuation determination in any of the other golf course cases may impact the membership fees at the Cherry Valley Country Club, creating a question on the Court's impartiality.

In response, counsel who represents 10 golf clubs on Long Island avers that the respondents have proferred no foundation that warrants recusal herein. He argues that the case law cited by respondent's counsel is factually and legally distinguishable from the case at bar; and that there is no sign that this Court has pre-judged any issue pertinent to this action. Counsel points out that it is well-settled that recusal in this instance, without a firm legal connection, is in the Court's discretion. He argues that the request and comments by the movant's attorney are "gratuitous" and should be rejected; and that the respondent's theory for recusal, when analogized to another situation, would lead to a conclusion that a judge should recuse from a case when he/she owned a home in a particular tax district and ruled on a tax certiorari matter for a parcel in that district. He notes that the attorney who has executed the moving affirmation was, prior to his retirement, the presiding judge in the tax certiorari part who decided the tax years 1996/7 through 2005/6 ". . .in his character as judge

as per the **Rockville** decision". (Santemma affirmation, ¶9).

Petitioner's counsel avers that the moving attorney should disqualify himself from any involvement in the golf club cases because this action was previously decided by him.

Counsel for the petitioners Glen Head Country Club and Nassau Country Club points to the multitude of conferences and adjournments, as well as adjournments of trial exchanges, without a mention of an objection to this Court presiding over the golf course cases and then, on ". . .the eve of trial. .grumble[s] and object[s] to the jurist" (Cangemi affirmation, ¶8); and that this request is untimely and meritless. Counsel finds it ironic that the moving attorney, himself a former judge who defined the parameters of the assessment of golf courses, represents the County and that if the County were to have followed his parameters, none of the current judicial intervention would be necessary. He argues that the County ignores judicial precedent and taxpayers' rights, only seeking to delay the ultimate legal resolution, notwithstanding its obligations to all its taxpayers. Counsel cites to federal case law for support of his position that the County's motion is untimely, and distinguishes case law cited by the moving attorney. Counsel analogizes the basis for this motion to a conclusion that this Court, a homeowner, should recuse itself from hearing any tax certiorari cases involving other homeowners because of the administrative oversight of this Court.

The attorney for petitioner Rockaway Hunting Club opposes this motion on the basis that the County has cited to no authority for its position and the County offers no evidence to suggest that this Court cannot be impartial. Counsel argues that the County's argument is disingenuous and illogical. Counsel cites to legal precedent that the interest alleged is so indirect and insubstantial as to warrant denial of a recusal motion. Counsel avers that Deputy County Attorney DeMaro has ". . .run afoul of Judiciary Law §17 and new York Disciplinary Rule 1.12" (Memorandum of Law, p.6), in that he should not have accepted employment directly relevant to that which he had substantial responsibility prior to his retirement from the bench, including writing the decision which determined the formulation and methodology which the County asks this Court to mandate as exclusive.

In reply, the respondents' attorney asserts that he ". . .will have no role in the trial of these proceedings" (DeMaro affirmation); and that, with regard to timeliness, no "substantive issues of fact or law. . ." (**Id**) have yet arisen.

HEMPSTEAD COUNTRY CLUB **Index no. 401842/07**

DECISION

Initially, the Court notes that the instant application, bearing the caption of 5 separate and distinct tax certiorari proceedings, is procedurally improper. Notwithstanding that impropriety, this Court will consider and address the issue presented; and that issue is recusal.

22 NYCRR§100.3(E)(1) provides the sole legal and mandatory basis for a judge to disqualify himself, and it provides, in pertinent part, as follows:

> "(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other interest that could be substantially affected by the proceeding;
> >
> > (d) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the sixth degree of relationship to either of them, or the spouse of such a person:
> >
> > > (i) is a party to the proceeding;
> > >
> > > (ii) is an officer, director or trustee of a party;

(iii) has an interest that could be substantially affected by the proceeding".

It is critical to this determination to note that the sole basis upon which the instant motion is made is that "Such a decision again might "substantially affect" the membership fees that all members pay at all clubs, including Your Honor at the Cherry Valley Club" (DeMaro affirmation, ¶7).

The County's theory is that when this Court makes a determination on the valuation and the tax assessment of the first of these cases, such determination may have a substantial effect on the membership fee that this Court pays at a Country Club that has no affiliation, connection, or legal nexus with the case which will be decided.

In **Matter of Mill River Club v Board of Assessors** (48 AD3d 169, 847 NYS2d 670, 2007), the Appellate Division, 2nd Department affirmed then - Justice Joseph A. DeMaro's decision that awarded tax reductions and the methodology to calculate those reductions through tax year 2005. It concluded that Justice DeMaro did not err in his formulation, did not disturb it, while recognizing that " 'valuation remains largely a question of fact, and the courts have considerable discretion in reviewing the relevant evidence as to the specific property before them' (**Matter of Consolidated Edison Co. of N.Y., Inc. v City of New York**, 8 NY3d 591, 597 [2007])" (**Id**, p.177). Put another way, given the peculiar factors in golf course cases, which include, **inter alia**, the amount of rounds of golf per year, the beverages and food sold, the improvements at the particular club or course, the methodology in that case is an approved one – although not a necessarily exclusive methodology.

The rationale that the County urges this Court to accept is dependent on facts and circumstances too attenuated and, in fact, to speculative, to warrant approval. Petitioner's counsel has appropriately analogized that ". . .a judge who owned a home in a particular tax district could not sit on the valuation of any other home in that district" (Santemma affirmation, ¶6), and, in fact, the movants' attorney, when he was the justice presiding over tax certiorari matters in this County, made determinations which affected his home ownership tax interest in the municipality where he resided. This Court is not, and will not attribute any intent to that jurist. Similarly, this Court's impartiality is free of any such attribution.

Accordingly, in the Court's discretion, the respondents' motion is **denied**.

With respect to the petitioners' counsels' requests for the disqualification of the moving attorney, the Court notes that Mr. DeMaro states that his "role" is limited to the instant motion. However, tax certiorari litigation is a complex matter involving various interrelated steps leading to an actual trial. Any application relative to any purported violation of Judiciary Law §17 and New York Disciplinary Rule 1.12 is improperly presented to this Court and is not considered herein.

Dated AUG 20 2009

J.S.C.

ENTERED

AUG 31 2009

NASSAU COUNTY
COUNTY CLERK'S OFFICE