Kaufman v Board of Assessors of the County of Nassau
2009 NY Slip Op 32096(U)
August 28, 2009
Supreme Court, Nassau County
Docket Number: 403417/06
Judge: Stephen A. Bucaria
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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

MARK AND ROBIN KAUFMAN A.K.A.
H.K. REALTY,

Petitioners,

INDEX No. 403417/06

MOTION DATE: July 7, 2009
Motion Sequence # 002

-against-

THE BOARD OF ASSESSORS AND/OR THE ASSESSOR OF THE COUNTY OF NASSAU AND THE NASSAU COUNTY ASSESSMENT REVIEW COMMISSION,

Respondents.

The following papers read on this motion:

Order to Show Cause..... X
Notice of Motion..... X
Affirmation in Opposition..... XX
Affirmation in Support..... X
Reply Affirmation XX
Memorandum of Law..... X

This motion, by petitioners, brought on by order to show cause, for an order pursuant to CPLR §3404 restoring tax years 1994/95 through 2002/03 to the Court calendar, pursuant to CPLR §602 and RPTL §710 consolidating all tax years 1994/95 through 2009/10 for trial, and adjourning the trial scheduled for June 8, 2009, together with such other and further

relief as may be just, proper and equitable; and a motion (incorrectly denominated as a "Cross-Motion"), by the respondents, for an order of recusal of this Court from hearing the instant action, are determined as hereinafter set forth.

As a threshold matter, this Court will address the County's application, and hold in abeyance the petitioner's motion.

The respondents' attorney seeks this Court's recusal based upon a purported "ex parte" communication regarding the "Black Hole" cases with the Chairman of the Tax Certiorari and Condemnation Committee of the Nassau County Bar Association.

Factually, the background is founded upon this Court's order in the matter **Transtechnology Corp. v The Board of Assessors, et al**. In that matter, the case was marked off the Court's calendar on August 25, 1999 and no application was made to restore it to the trial calendar until the motion was made which resulted in the Short Form Order of May 15, 2008. The "Black Hole" cases may be described, in part, as follows: The present matter is part of what is likely the most onerous burden that the Court has been asked to shoulder in many years. The simple fact is that because of the inability of the Respondents to administratively resolve a significant number of the assessment challenges filed annually in the years 1993 — 2003, this Court has become the residuary of all such claims. In what was an accommodation to the Respondents, the Court (McGinity, J.) struck from the active trial calendar many thousands of cases, so as to enable the Respondents to obtain appraisals which were adequate for negotiation, if not for trial. The 7-year travail of Petitioner's counsel, culminating in the current motion, appears to be the upshot of the accommodation afforded the Respondent by the Petitioner's voluntary agreement to permit matters to be stricken from the trial calendar.

This Court, in **Transtechnology Corp.**, restored it to the trial calendar and determined that the petitioner had met the four-fold requirement for restoration, thus paving the way for the many others (perhaps "hundreds" [NYLJ, 7/15/08, p.24] of cases) that were similarly situated.

The respondents' attorney states that a meeting was held in November 2008 with the tax certiorari bar (which includes the deputy county attorneys in the Tax Certiorari bureau) in which the bar was tasked with supplying a list of cases that were considered viable. At that meeting, asserts counsel, the County objected to the restoration of the "Blackhole" cases, and no formal decision was made concerning the status. Counsel asserts that a subsequent, separate conversation was had with ". . .Andrew Mahony, Chairperson of Petitioner's Bar"

(Varley affirmation, ¶5) in which, she opines that ". . .Petitioner's Bar was advised by Your Honor how and when to make their motions to restore their "black hole" cases to the Court's calendar and what type of relief they should seek". Counsel further asserts that the County had no notification of this conversation; that said conversation gave petitioners a "...procedural and tactical advantage because Your Honor is telling them now is a 'good time' to make these motions and that they should seek ancillary relief", and inferring that such relief will be granted (Varley affirmation, ¶9). Counsel argues that this Court has violated 22 NYCRR§100.3 (b)(6) and is an interested party herein; and the conversation with Mr. Mahony calls into question this Court's impartiality.

In opposition, petitioner's attorney disputes the facts as asserted by the County, in that Mr. Mahony was acting in his capacity as the Chair of the Nassau County Bar Association's Tax Certiorari and Condemnation Committee and was relaying that two procedural matters that were under discussion, i.e., that a separate order and judgment for each year after trial was not necessary, that all the "Black Hole" cases were stricken from the trial calendar; and that the Court suggested that each firm make a single motion for all their black hole cases. He further stated that the Black Hole discussion would continue at a lunch to be scheduled later. Counsel argues that any communication was for administrative purposes only and by this Court's directive that motions to restore would have to be made, the Court actually agreed with the County's position that those cases were to be stricken from the trial calendar. He further argues that no tactical or procedural advantage accrued to the Petitioners' Bar. This is supported by an affidavit by Andrew Mahony. Counsel contends that the motion to recuse is sanctionable, in that such motion is frivolous and seeks to delay the action with the unsubstantiated claim of ex parte communication, compounded by repeated ex parte communications with administrative judges to hinder true and swifter action on the merits. Mr. Mahony avers that his communication with the Court reveals only a prolonged effort to work out an equitable solution to a long-standing problem that was compounded by the County's change in position about re-calendaring these cases. He explains that the confirming e-mail did not include all members of the Committee, but he understood that the County Attorney was already aware that the cases were stricken from the calendar; and that the e-mail was informational to explain the reversal reached earlier.

In reply, counsel argues that, in fact, the Petitioners' Bar did receive a tactical advantage, in that while ". . .the County may have been aware that Petitioners were going to be making motions to restore. . .[the fact that] the Court instructed Mahony that now would be a good time to make motions and that all ancillary relief such as consolidation, joinders [be included]. . .this encouraged Petitioners to make their motions and to do so in a form to

which the Court would be receptive" (emphasis original) (Varley affirmation, ¶2). Counsel avers that the Court told Petitioners on timing, form, and content of motions to be made. Counsel contends that her motion is well founded in the Judiciary Law and the Court rules and the petitioner's request for sanctions is itself sanctionable.

DECISION

Initially, the Court observes that the resopndents' motion posits, as a basis, that this Court is legally, pursuant to Judiciary Law §14, bound to recuse itself. That statute provides as follows:

> "**§ 14. Disqualification of judge by reason of interest or consanguinity**
>
> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But no judge of a court of record shall be disqualified in any action, claim, matter, motion or proceeding in which an insurance company is a party or is interested by reason of his being a policy holder therein. No judge shall be deemed disqualified from passing

> upon any litigation before him because of his ownership of shares of stock or other securities of a corporate litigant, provided that the parties, by their attorneys, in writing, or in open court upon the record, waive any claim as to disqualification of the judge".

A careful perusal of that provision demonstrates that it has no applicability herein. No consanguinity has been alleged herein. No affinity to any party herein has been alleged or demonstrated herein. There is no allegation or showing that there is any "ownership of shares of stock" that is relevant herein.

Accordingly, no legal basis for this motion has been demonstrated.

The Court now turns to the applicability of 22 NYCRR§100.3(b)(6), the other basis of the County's application. That provides as follows:

> "(6) A judge shall accord to every person, who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except:
>
> (a) Ex parte communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication,

> and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allows an opportunity to respond.
>
> (b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and a copy of such advice if the advice is given in writing and the substance of the advice if it is given orally, and affords the parties reasonable opportunity to respond.
>
> (c) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.
>
> (d) A judge, with the consent of the parties, may confer separately with the parties and their lawyers on agreed-upon matters.
>
> (e) A judge may initiate or consider any ex parte communications when authorized by law to do so".

Subsections (b) through (e) have no applicability herein.

The tortured history of these Black Hole cases has sufficiently been set forth herein. A chronological rendering is significant to a true picture of this Court's efforts to

resolve this "Gordian knot" problem that is equitable and fair to all taxpayers of Nassau County within the bounds of our legal system. From November 2008, a number of meetings with the County and Petitioners' Bar have been held. Initially, there appeared to be an agreement that all these cases were to be restored to the trial calendar in order to ascertain their respective status. At some point subsequent to that point in time, the County Attorney declined to agree to that professional accommodation and took the position that the Black Hole cases should be stricken and that motions would have to be made. This is demonstrated by the transcript from a meeting on March 10, 2009 with the entire Tax Certiorari Bar, including the County Attorney's office. ". . .[W]e * * * request that these cases either be struck from the calendar or some arrangement be made for petitioners to have to carry the burden laid out in Trans-Technology to show that they were for restoration". (tr., Peter Clines, DCA, p.5-6). The remainder of that meeting re-iterated the various arguments of both sides and no consensus was reached at that time. Subsequently, at a calendar call on March 27, 2009, this Court made the following statement on the record to the Tax Certiorari Clerk:

> "THE COURT: Effie [Vogel], in November of 2008, I directed that certain cases be put on the calendar, on the January calendar. They were called black-hole cases.
>
> After a review of the meeting held on March 10, 2009, it is clear to the Court that there was no consent, and accordingly, I direct that they be removed from the calendar".

This Court stated that public determination to Mr. Mahony, which he clearly repeated in the March 30, 2009 e-mail. The controversial e-mail reads as follows:

> "Justice Bucaria called today with word on two concerns:
>
> 1) It will no longer be necessary to submit a separate Order and Judgment for each year after a joint trial. All of the captions,

index numbers, etc., can be included in one Order and Judgment.

2) Justice Bucaria instructed the Calendar Clerk to strike all of the black hole cases from the calendar.

He indicated now would be a good time to make motions to restore, and that all ancillary relief such as consolidation, joinder etc., be requested in the same motion. He also thought each firm might want to consider making a single motion covering all of their black hole cases.

The black hole issue obviously merits further discussion. I will schedule a lunch meeting.

Andrew M. Mahony
Chairperson
Nassau County Bar Association
Tax Certiorari & Condemnation Committee"

Mr. Mahony freely admits that, although three individuals from the County Attorney's office are constituent members of his Committee, they were not sent this e-mail, reasoning that the County already knew of the Court's agreement with the County's position – that those cases were marked off the trial calendar and that motions to restore would have to be made. This Court does not characterize Mr. Mahony's failure (as Chair of the Condemnation Law and Tax Certiorari Committee of the Nassau County Bar Association) to notify all members as one that renders the conversation ex parte. The other "concern", the Court notes, was not a subject of the focus of the motion. Relative to the remainder of the e-mail which addresses motion practice, the notion that a Court's suggestion as to the "timing" of a motion and what sort of relief may be sought in such motion so as to "reduce calendar congestion and economize legal and judicial effort" (Siegal, New York Practice, 4th edition, p.221), is a communication that requires recusal, is meritless. The County's position relative to this communication cannot be considered as reasonable except when viewed through a prism of hostility which, objectively, does not exist. The Court notes that this is the second of such

recusal applications from the same party, and based not on the law but on discretion. As such it raises the specter of judge-shopping.

With respect to the petitioner's request for sanctions, the attorney bases his request on his factual assertion that "[t]he motion is fact sensitive and easily supported on the record; [that] the County Attorney has created an unsubstantiated claim of an ex parte communication between the Court and an unrelated party in order to delay. . .". He argues that sanctions are warranted because "[t]he County has followed a course of action in making recusal motions and writing letters to Administrative Judges concerning imagined ex parte communications in a concerted effort to avoid reaching the merits of any case". He also notes the lack of merit of the County's opposition to the re-assessment as ". . .the County itself reduced the assessment 50% upon the revaluation of the property in 2003/04". Such request, while serious in nature, cannot be considered herein.

The application for recusal is **denied** in all respects. The initializing Order to Show Cause herein was adjourned to August 20, 2009 for submission. At that time, the parties were told the Court would deny the "cross-motion" to recuse and would send the initiating Order to Show Cause to a Court-Attorney Referee for consideration. The respondents consented for the referee to "hear and determine". The petitioners have also consented.

This matter is referred to Jeffrey Grob to hear and determine the initial Order to Show Cause.

Dated AUG 28 2009

J.S.C.

ENTERED
SEP 10 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE