

Schwarz v Schwarz

2014 NY Slip Op 33890(U)

March 25, 2014

Supreme Court, Kings County

Docket Number: 010942/12

Judge: Kathy J. King

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At an IAS Term, Part 64 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2014.

P R E S E N T:

HON. KATHY J. KING,

Justice.

-----X

SAMUEL SCHWARZ AND
SIMON SCHWARZ,

Plaintiffs,

- against -

Index No. 010942/12

HELENE SCHWARZ AND
JACK KARTAGINER,

Defendants.

-----X

The following paper numbered 1 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
_____ Affidavit (Affirmation) _____
Other Papers _____

Papers Numbered
_____ 1 _____

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Upon the foregoing papers, in this action which was brought by Simon Schwarz (Simon) on behalf of himself and purportedly on behalf of Samuel Schwarz (Samuel) against Helene Schwarz (Helene) and Jack Kartaginer (Jack) seeking to cancel and set aside deeds to certain real properties, to compel reconveyance of these real properties, and to compel an accounting as to the net rental income generated from such real properties, Simon moves for

an order, pursuant to the due process clauses of article 1, § 6 of the New York Constitution and the Fourteenth Amendment of the United States Constitution, Judiciary Law § 14, and the Rules of the Chief Administrator of the Courts (22 NYCRR Part 100) governing Judicial Conduct, recusing this court from presiding over any further hearings in this matter on the claimed ground of bias and prejudgment of the outcome of the related guardianship petition filed by him (*Matter of Schwarz*, Sup Ct, Kings County, index No. 100128/10), which was consolidated with a habeas corpus petition filed by him (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, index No. 10031/10), and which were both dismissed in a decision and order dated September 23, 2011 (*Matter of Schwarz*, 33 Misc 3d 1203[A], 2011 NY Slip Op 51770[U] [Sup Ct, Kings County Sept. 23, 2011]).

BACKGROUND

Simon is the brother of Samuel Schwarz (Samuel), who is a 59-year-old retired rabbi, Talmudic scholar, and retired economics professor. Samuel has been bedridden due to advanced multiple sclerosis, which, in recent years, became exacerbated by diabetes and leukemia. He is one of eight living siblings, which include Simon, his sister, Helene, and another sister, Risa Katz (Risa). By the filing of a petition dated June 29, 2010, Simon, as the petitioner, and as the attorney for himself, *pro se*, and purportedly as the attorney for Samuel, commenced a Mental Hygiene Law article 81 guardianship proceeding, on behalf of Samuel, as the co-petitioner and alleged incapacitated person (*Matter of Schwarz*, Sup Ct, Kings County, index No. 100128/10). The petition requested that Simon be appointed as the guardian of Samuel's personal needs and property with the powers to, among other things,

appoint Risa as Samuel's primary caretaker, relocate Samuel from Helene's home to a new place of residence in a rented apartment on the same floor as that of Risa's apartment, and collect his assets and pay his expenses. In the alternative, the petition sought an order, pursuant to Mental Hygiene Law § 81.16 (b), declaring that a power of attorney, which Samuel allegedly executed on January 21, 2010 (the 2010 power of attorney), appointing Simon as his attorney-in-fact, had been ratified. In opposition, Helene cross-petitioned to void the 2010 power of attorney and, if the appointment of a guardian were deemed to be appropriate, to appoint her as Samuel's guardian. Alternatively, Helene argued that the petition should be dismissed based upon the ground that the existence of advance directives, in the form of a power of attorney executed by Samuel on February 10, 2004, designating her as his attorney-in-fact (the 2004 power of attorney), and a health care proxy, which he granted her in 2008 (collectively, the advance directives), obviated the need for a guardian.

On April 28, 2011, upon Simon's application, the proceeding for the appointment of a guardian was consolidated with a prior proceeding which Simon had commenced for a writ of habeas corpus before Justice Larry Martin, by a petition dated April 22, 2010 (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, index No. 10031/10). The habeas corpus proceeding was based upon allegations that Helene and Jack had unlawfully detained and isolated Samuel, alienated Samuel from him and Risa, caused Samuel's physical and emotional health to deteriorate, and misappropriated his assets.

The consolidated matter (the consolidated proceeding) proceeded to a hearing, with multiple hearing dates scheduled over the course of several months, which commenced on

August 11, 2010 and ended on June 22, 2011. The proceedings included the court's personal interview of Samuel at his home, the testimony of court evaluator Julie A. Clark, Esq. (Clark), who was initially appointed in the habeas corpus proceeding and reappointed in the guardianship proceeding, and the testimony of the court-appointed psychiatrist, Dr. James Lynch (Dr. Lynch). Dr. Lynch testified, among other things, that Samuel could not have executed a power of attorney with capacity in January 2010. In addition to testifying, Clark submitted two detailed court evaluator reports regarding her findings, based upon three interviews with Samuel, interviews with Samuel's five doctors, and interviews with his siblings, including Simon and Helene. Clark also consulted with Samuel's financial advisor, and Dr. Lynch submitted his evaluation as well.

At the close of Simon's case, Helene moved, pursuant to CPLR 4401, for judgment as a matter of law dismissing the petition on the basis that Simon had failed to establish a prima facie case. The court, in a September 23, 2011 decision and order, granted Helene's motion (*Matter of Schwarz*, 2011 NY Slip Op 51770[U], *1). The court also found that the claims raised in the habeas corpus petition were without merit.¹ Following an appeal by Simon, the Appellate Division, Second Department, by a decision and order dated June 20, 2012, affirmed the court's ruling granting Helene's motion, with costs payable by Simon

¹On March 25, 2013, Simon filed a second habeas corpus proceeding against Helene and Jack, alleging that after the prior guardianship petition filed by him was orally dismissed on June 24, 2011, Helene and Jack wrongfully imprisoned and imposed unlawful restraints on Samuel by terminating all visits by him with Samuel beginning on June 26, 2011 and that such termination of visitation and denial of access impeded him from making health care decisions for Samuel pursuant to a health care proxy dated June 8, 2010, which he asserts, was executed by Samuel at that time (*State of New York ex rel. Schwarz v Schwarz*, Sup Ct, Kings County, index No. 5418/13). The court, in a decision and order decided herewith, has dismissed that proceeding.

(*Matter of Samuel S. [Helene S.]*, 96 AD3d 954, 955 [2d Dept 2012], *lv dismissed* 19 NY3d 1065 [2012]).

On May 24, 2012, Simon, on behalf of himself and purportedly on behalf of Samuel, filed this action against Helene and Jack seeking to cancel and set aside deeds dated February 17, 2004, which transferred the ownership of Samuel's two-family house at 1406 Avenue N, Samuel's 50% interest in a two-family house co-owned by him and Helene located at 2024-26 Avenue L, and Samuel's 50% interest in a two-family house co-owned by him and Risa, located at 919 East 28th Street (collectively, the February 2004 deeds), to compel reconveyance of these real properties, and to compel an accounting as to the net rental income generated from such real properties. Simon, in this action, alleged that the February 2004 deeds were fraudulent and based upon forged signatures obtained by Helene with the aid of Jack, asserted claims of fraud in the execution, and/or undue influence. On November 16, 2012, Helene and Jack moved for an order dismissing the summons and complaint in this action, pursuant to CPLR 3211, for failure to state a cause of action, and imposing costs and sanctions upon Simon based upon his frivolous conduct in bringing that action. In support of their motion, Helene and Jack asserted that Simon lacked standing to bring this action on behalf of Samuel and that, pursuant to the court's September 23, 2011 decision and order, which was affirmed by the Appellate Division, Second Department, this action was barred by the doctrines of res judicata and collateral estoppel.

In a decision and order dated September 20, 2013 in this action, the court granted Helene and Jack's motion. In addressing Helene and Jack's claim as to Simon's lack of

standing, the court noted that Simon, in claiming to represent Samuel, relied upon a purported letter retainer agreement dated June 3, 2010. This June 3, 2010 letter stated that Samuel retained Simon as his attorney for the purpose of commencing a guardianship proceeding on his behalf, and had been used by Simon, along with the 2010 power of attorney, as the basis for his authority to commence the guardianship proceeding. The court, however, pointed to its prior ruling in its September 23, 2011 decision and order that Simon had failed to offer any credible evidence in support of his argument that Samuel's deficits had not impaired his judgment to the extent required to be declared incapacitated in law for transactional or contractual purposes. The court further noted that at a hearing held on February 7, 2013 in order to determine the court evaluator fees to be awarded to Clark, pursuant to the direction of the Appellate Division, in its June 20, 2012 decision and order, the court had granted the oral motion by Helene and Jack's attorney to disqualify Simon from representing Samuel since the purported retainer agreement dated June 3, 2010 and the power of attorney dated January 20, 2010 were void, invalid as a matter of law, and secured under false pretenses. The court thus found that this action was improperly brought by Simon.

The court, in its September 20, 2013 decision and order, also found that this action was barred by the doctrines of res judicata and collateral estoppel since the petition in the guardianship proceeding had set forth essentially the same allegations as it related to the alleged fraud and financial exploitation against Samuel which was alleged in the complaint in this action. Those allegations of financial exploitation were found to be wholly without

merit in the court's September 23, 2011 decision and order, which was affirmed by the June 20, 2012 decision and order of the Appellate Division, Second Department.

The court, in its September 20, 2013 decision and order, further found that Simon knew or should have known, based upon the prior guardianship proceeding, that his claim was completely without merit in law, and that he had brought this action in bad faith and was engaging in continuous vexatious litigation, and, therefore, it imposed a sanction, pursuant to 22 NYCRR 130-1.1, based upon Simon's frivolous conduct, requiring him to pay a sanction of \$5,000 for such frivolous conduct to the Lawyer's Fund for Client Protection (*see* 22 NYCRR 130-1.1 [a], [c]; *Selletti v Liotti*, 104 AD3d 835, 836-837 [2d Dept 2013]; *Grossman v New York Life Ins. Co.*, 90 AD3d 990, 992 [2d Dept 2011], *lv dismissed* 19 NY3d 991 [2012], *rearg denied* 20 NY3d 965 [2012]). The court, due to the egregious nature of Simon's frivolous conduct, also awarded Helene and Jack the reasonable attorney's fees and costs incurred by them in this action (*see* 22 NYCRR 130-1.1), and set down the issue of the amount of these fees and costs for a hearing to be held by the court, which has been scheduled for November 6, 2013 at 10:00 A.M. (*see Timoney*, 299 AD2d at 202). Thus, this action has been concluded except for this scheduled hearing, wherein the court shall determine the issue of the amount of these fees and costs. On April 5, 2013, Simon filed the instant motion seeking the court's recusal.

DISCUSSION

In support of his instant motion, Simon cites to Judiciary Law § 14, which provides that "[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 [or she] is a party, or in which he [or she] has been attorney or counsel, or in which he [or she] is interested, or if he [or she] is related by consanguinity or affinity to any party to the controversy within the sixth degree.” However, Simon does not allege any of these statutory grounds for disqualification under Judiciary Law § 14 and none exist since the court is not a party, has not been an attorney in this matter, is not interested in this matter, and is not related to any party to this controversy.

Simon also cites to the Rules of the Chief Administrator of the Courts (22 NYCRR Part 100) governing Judicial Conduct. 22 NYCRR 100.3 (E) (1), in pertinent part, provides as follows:

“Disqualification.

(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:

(a) (i) the judge has a personal bias or prejudice concerning a party; or (ii) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge knows that: (i) the judge served as a lawyer in the matter in controversy; or (ii) a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter; or (iii) the judge has been a material witness concerning it;

(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;

(e) the judge knows that the judge or the judge's spouse, or a person known by the judge to be within the fourth degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding or is likely to be a material witness in the proceeding.

(f) The judge, while a judge or while a candidate for judicial office, has made a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or has made a public statement not in the judge's adjudicative capacity that commits the judge with respect to:

(i) an issue in the proceeding; or

(ii) the parties or controversy in the proceeding.”

Simon, however, has failed to allege any basis for mandatory disqualification or recusal under this section, and none exist (*see Matter of Gutzmer v Santini*, 60 AD3d 1295, 1295 [4th Dept 2009], *lv dismissed* 12 NY3d 889 [2009]). “Absent a legal disqualification under Judiciary Law § 14 [or 22 NYCRR 100.3 (E) (1)], a court is the sole arbiter of the need for recusal, and its decision [concerning a motion seeking recusal based on alleged impropriety, bias, or prejudice] is a matter of discretion and personal conscience” (*Chusid v Silvera*, __ AD3d __, 2013 NY Slip Op 06337, *1 [2d Dept 2013], quoting *Matter of*

O'Donnell v Goldenberg, 68 AD3d 1000, 1000 [2d Dept 2009]; *see also People v Moreno*, 70 NY2d 403, 405-406 [1987]; *Sassower v Gannett Co., Inc.*, 109 AD3d 607, 609 [2d Dept 2013]; *Matter of Dior Polo G.*, 105 AD3d 739, 739 [2d Dept 2013]; *Vigo v 501 Second St. Holding Corp.*, 100 AD3d 870, 870 [2d Dept 2012]; *Daniels v City of New York*, 96 AD3d 895, 895 [2d Dept 2012]; *Matter of Imre v Johnson*, 54 AD3d 427, 427-428 [2d Dept 2008]; *Schreiber-Cross v State of New York*, 31 AD3d 425, 425 [2d Dept 2006]). Here, Simon has failed to set forth any proof of bias or prejudice on the part of the court which would warrant recusal (*see Matter of Dior Polo G.*, 105 AD3d at 739; *Vigo*, 100 AD3d at 870; *Daniels*, 96 AD3d at 895; *Gihon, LLC v 501 Second St., LLC*, 77 AD3d 709, 709 [2d Dept 2010]; *Daulat v Helms Bros., Inc.*, 57 AD3d 938, 938 [2d Dept 2008]; *Schreiber-Cross*, 31 AD3d at 425; *Matter of Alizia McK.*, 25 AD3d 429, 430 [1st Dept 2006]).

Simon cites to article I, section 6 of the New York Constitution, which provides that "[n]o person shall be deprived of life, liberty or property without due process of law." He also cites to the Fourteenth Amendment of the United States Constitution, which provides that no State shall "deprive any person of life, liberty, or property, without due process of law." Simon, however, has not shown that any deprivation of due process has occurred in this proceeding. Simon's argument that recusal is required as a matter of Federal constitutional law is wholly without merit (*see Avon Prods. v Solow*, 270 AD2d 122, 122 [1st Dept 2000], *lv dismissed* 95 NY2d 825 [2000]).

"Recusal, as a matter of due process, is required only where there exists a direct, personal, substantial or pecuniary interest in reaching a particular conclusion or where a clash

in judicial roles is seen to exist"" (*Levi v Levi*, 46 AD3d 520, 521 [2d Dept 2007], *lv dismissed* 10 NY3d 882 [2008], quoting *Matter of Khan v Dolly*, 39 AD3d 649, 650-651 [2d Dept 2007], quoting *People v Alomar*, 93 NY2d 239, 246 [1999]). Here, there are no circumstances which would bring the court's impartiality into question (*see Matter of Alizia McK.*, 25 AD3d at 430).

Simon's claims of bias and prejudice are largely based upon this court's rulings which were not in his favor. However, "bias or prejudice which can be urged against a judge must be based upon something other than rulings in the case" (*People v Glynn*, __ NY3d __, 2013 NY Slip Op 06730, *3 [2013], quoting *Berger v United States*, 255 US 22, 31 [1921]). Motions for recusal are not granted solely based upon an adverse ruling against a party (*see Matter of Petkovsek v Snyder*, 251 AD2d 1086, 1086 [4th Dept 1998]). There must be demonstrable proof of bias to warrant a recusal (*see Modica v Modica*, 15 AD3d 635, 636 [2d Dept 2005]).

In support of his motion, Simon, in his notice of motion, refers to paragraphs 72 through 98 of an affidavit by him affirmed on February 1, 2013 and an affidavit of Dr. Fred Fisher (Dr. Fisher) sworn to on January 23, 2013, the exhibits attached thereto, and an accompanying memorandum of law, which are on file with the Clerk of the Supreme Court, Kings County, under index number 100128/10 (i.e., the index number for the consolidated proceeding).² Simon asserts that there was ex parte communications and wrongful collusion

²These supporting papers were not annexed to the notice of motion, but the court has reviewed these papers which are on file with the Kings County Clerk's office.

between the court, its staff, Clark, and Anthony J. Lamberti, Esq. (Mr. Lamberti), who is the attorney for Helene and Jack, with respect to his presentation of his case and in the court's reaching its determination in the consolidated proceeding. He claims that these activities resulted in the suppression of evidence by the court, which resulted in the dismissal of the consolidated proceeding by the court's September 23, 2011 decision and order.

Simon argues that the presentation of his case was prematurely aborted in contravention of constitutional safeguards because the court, after a nonjury trial, granted Helene's motion, pursuant to CPLR 4401, for judgment as a matter of law dismissing the petition, made at the close of his case. The Appellate Division, Second Department, however (as noted above), affirmed this court's ruling, expressly holding that this court "properly granted Helene's motion pursuant to CPLR 4401 for judgment as matter of law dismissing the petition at the close of the petitioners' case, since Simon failed to establish a prima facie case" (*Matter of Samuel S. [Helene S.]*, 96 AD3d at 957). It found that "Simon failed to establish by clear and convincing evidence that a guardian was needed to provide for [Samuel's] person or property . . . since the advance directives were already in place and, as implemented by Helene, provided [Samuel] with a high quality of comprehensive medical care whose cost exceeds [his] income and provided for the management of his personal and property needs, consistent with the statutory goal of requiring dispositions which are the least restrictive form of intervention" (*Id.* at 957-958 [internal quotation marks omitted]).

Simon also relies upon the affidavit of Dr. Fisher, who is a retired dentist, age 75, who has a close personal relationship with him that spans about 35 years. Dr. Fisher asserts that

Simon had "no chance [of] winning," and that the "fix was on" because the court granted Helene's motion, pursuant to CPLR 4401, for judgment as matter of law dismissing the petition at the close of Simon's case. However, this ruling (as discussed above) was based upon the merits and was affirmed by the Appellate Division, Second Department, as being properly granted (*see Id.* at 957).

Simon claims, though, that he was denied the right to have doctors examine Samuel during the guardianship proceeding for the purpose of testifying at trial. Simon, however, was given the opportunity to have Dr. Steven K. Hoge (Dr. Hoge) examine Samuel at his residence, at the court's direction, but he then demanded that Dr. Hoge conduct this evaluation at his medical office in Manhattan, which was denied by the court. Simon elected not to have Dr. Hoge conduct the in-home assessment of Samuel that had been ordered by the court for the purpose of confirming his initial findings. Simon also unilaterally instructed Dr. Rimma Danov (Dr. Danov) not to appear for cross-examination, which resulted in the striking of Dr. Danov's direct testimony.

Contrary to Simon's contentions, there was no suppression of his evidence by the court. Multiple hearing dates over the course of several months were scheduled based on the number and availability of witnesses on Simon's direct case as represented by Simon to the court, and the court went to great lengths to arrange dates so that the inability of witnesses to appear would not be an issue. Simon, however, failed to produce any of the unnamed witnesses he claimed that he would be producing during the proceedings that lasted almost 10 months. The only witness produced by Simon that was fully cross-examined was Simon's

nephew, Michael Katz. Simon failed to produce his sister, Risa, despite the fact that Simon had sought to have Risa replace Helene as the primary caretaker for Samuel. After court inquiry on June 22, 2011, Simon had no additional witnesses and the court deemed him to have rested.

Simon further argues that evidence of the financial exploitation by Helene of Samuel's real estate assets was suppressed by the court. The court, in its September 23, 2011 decision and order, however, addressed the evidence before it and specifically held that Simon's allegation that Helene had misappropriated Samuel's income or engaged in financial mismanagement of Samuel's assets utilizing the February 10, 2004 power of attorney was wholly without merit (*Matter of Schwarz*, 2011 NY Slip Op 51770[U], *9). It noted that Clark (who, as noted above, was the court evaluator) had found no evidence of fraud or conversion based on a review of Samuel's recent bank statements and tax returns, together with a consultation with Samuel's financial advisor and accountant (*id.*).

Simon contends that the suppression of all evidence of Helene's alleged financial exploitation and her alleged theft of the bulk of Samuel's real estate assets worth about \$2 million through forged or fraudulently procured deeds in February 2004 are the very subject matter of this action by him to set aside such deeds on the grounds of forgery, fraud in the execution, and undue influence. As discussed above, however, this court, in its September 20, 2013 decision and order, has already dismissed this action based upon the grounds of res judicata and collateral estoppel since the petition in the guardianship proceeding set forth essentially the same allegations of alleged fraud and financial exploitation against Samuel

that he alleged in his complaint in this action and which were found to be wholly without merit in the court's September 23, 2011 decision and order. Significantly, the Appellate Division, Second Department, in its June 20, 2012 decision and order affirming this court's September 23, 2011 decision and order, found that there was a lack of any evidence that Samuel had suffered any manner of harm or loss, and that this was confirmed by the court evaluator (*Matter of Samuel S. [Helene S.]*, 96 AD3d at 958).

Simon additionally argues that the court permitted Samuel to be socially isolated from him. Such argument is rejected. The court, in its September 23, 2011 decision and order, specifically found, based upon the evidence, that Simon's claims that he and his sister, Risa, were unable to freely visit Samuel based on impediments and interferences to their visits by Helene and Jack and that this has resulted in the social isolation Samuel, was unfounded and without legal or factual basis (*id.*). The court declined to compel continuous access to Samuel where Simon's visits would be disruptive to the stability of his environment and contrary to his best interests (*id.*).

While Simon also claims that Samuel was locked up and denied access to him, as his selected attorney, during the guardianship proceeding, such a claim is belied by the fact that Simon had court-ordered visits with Samuel several days per week during that proceeding. In addition, during that time, Simon secured a power of attorney from Samuel, a retainer agreement, and a health care proxy dated June 8, 2010 under dubious circumstances when Samuel lacked the requisite legal capacity to enter into these documents.

Simon further contends that Samuel preferred that he be named as his guardian, and that the failure by the court to find that he should be appointed as his guardian violated Samuel's due process rights. The court's finding, however, was based upon the fact that due to Samuel's lack of capacity, he was unaware of the myriad of services required to support all of his activities of daily living and current level of care (*Id.* at *8). As discussed above, merely because a ruling is not in a party's favor does not constitute bias by the court against that party (*see Glynn*, 2013 NY Slip Op 06730, *3; *Matter of Petkovsek*, 251 AD2d at 1086).

The papers submitted by Simon grossly distort the facts and events in the prior consolidated proceeding. Simon seeks to impugn Mr. Lamberti's character by his unsubstantiated allegations of collusion merely because the guardianship proceeding was terminated in favor of Mr. Lamberti's client, Helene. The outcome of that proceeding, however, was based upon the merits of that proceeding, rather than any improper conduct. Indeed, the record of that proceeding was reviewed by the Appellate Division, Second Department, and (as previously noted) this court's September 23, 2011 decision and order was affirmed insofar as it granted Helene's motion for dismissal of that proceeding (*see Matter of Samuel S. [Helene S.]*, 96 AD3d at 957)..

While Simon alleges that there was collusion between Mr. Lamberti and the court evaluator, Clark, and claims that the court allowed or participated in this collusion, it is noted that Mr. Lamberti did not even represent Helene or Jack in the habeas corpus proceeding before Justice Martin, in which Clark was first appointed to act as the referee in that proceeding. Part of Clark's duties, as ordered by Justice Martin, included visiting Samuel at

the home of Helene and Jack, where he was, at that time, staying and receiving care for approximately four years. Simon decided to bring the guardianship proceeding during the pendency of the habeas corpus proceeding and entered into a stipulation, which was memorialized by an order by Justice Martin, dated June 21, 2010, setting forth that Simon and Helene and Jack had consented that Simon would file a Mental Hygiene Law article 81 proceeding that would be consolidated with the habeas corpus proceeding and that Clark would be appointed as the court evaluator in such guardianship proceeding since she was previously appointed as the referee in the habeas corpus proceeding.

Thereafter, Simon filed his guardianship petition, but did not disclose to the court his agreement to have Clark serve as the court evaluator. By a letter dated July 22, 2010, Mr. Lamberti wrote to the court, advising it that he was just retained by Helene, and he enclosed a copy of Justice Martin's June 21, 2010 order which set forth that the parties had agreed that Clark would be the court evaluator in the guardianship proceeding. He pointed out that since Justice Martin, in his June 21, 2010 order, had appointed Clark as the referee in the habeas corpus proceeding and she had already interviewed Samuel, visited the location where he was residing, and was aware of almost all of the facts and circumstances in the case, it would be duplicative and costly for another court evaluator to be involved. The court, which had previously appointed Frieda Rosengarten as the court evaluator, upon learning of the previous June 21, 2010 order by Justice Martin, appointed Clark as the court evaluator in the guardianship proceeding in an order dated July 28, 2012.

Simon contends that the court improperly relied upon the testimony of Clark and Dr. Lynch in the guardianship proceeding. This contention is devoid of merit. Mental Hygiene Law § 81.09 (c) sets forth the specific duties of a court evaluator, which include investigating and making a written report to the court regarding the person alleged to be incapacitated (the AIP). The duties of a court evaluator are that of "an independent investigator, empowered to assist the court in independently assessing the totality of circumstances affecting the [AIP], determining the AIP's personal capabilities, marshalling the AIP's resources, selecting and empowering an appropriate guardian, and assuring that the due process rights of the AIP are not violated" (*Matter of Wogelt*, 223 AD2d 309, 313-314 [1st Dept 1996]). It is "the court evaluator's responsibility to 'aid the court . . . to understand the facts and circumstances and to make recommendations to the court [regarding the personal and property needs of an AIP]'" (*Matter of Lee I.*, 265 AD2d 750, 752 [3d Dept 1999], quoting *Marquez v Presbyterian Hosp. in City of N.Y.*, 159 Misc 2d 617, 623, n 3 [Sup Ct, Bronx County 1994]; see also Mental Hygiene Law § 81.09). "The [court] evaluator has substantial input into the court's findings" (*Matter of F.R.*, 12 Misc 3d 247, 250 [Sup Ct, Kings County 2006]; see also *55th Mgt. Corp. v Goldman*, 1 Misc 3d 239, 244 [Sup Ct, NY County 2003]).

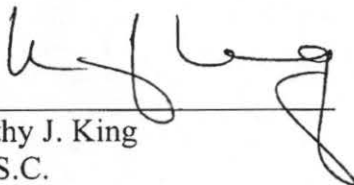
Thus, the fact that the court utilized Clark's recommendations and findings in rendering its determination was in accordance with Mental Hygiene Law § 81.09 and does not constitute improper or collusive conduct. Similarly, the court properly relied upon Dr. Lynch's testimony who was appointed by the court as an independent medical expert pursuant to Mental Hygiene Law § 81.09 (c) (7).

Consequently, the court finds that Simon has failed to set forth any proof of bias or prejudice on the part of the court. It further finds that Simon's claims of collusion, suppression of evidence, *ex parte* communications, or any other improper conduct are completely baseless and are merely the product of his dissatisfaction with the fact that the outcome of the consolidated proceeding was not in his favor. Denial of his motion for recusal is, therefore, warranted (*see Matter of Dior Polo G.*, 105 AD3d at 739; *Vigo*, 100 AD3d at 870; *Daniels*, 96 AD3d at 895; *Gihon, LLC*, 77 AD3d at 709; *Daulat*, 57 AD3d at 938; *Schreiber-Cross*, 31 AD3d at 425; *Matter of Alizia McK.*, 25 AD3d at 430).

CONCLUSION

Accordingly, Simon's motion for an order seeking a recusal of this court from presiding over any further hearings in this matter is denied.

ENTER:



Hon. Kathy J. King
J.S.C.

**HON. KATHY J. KING
JSC**

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