

Matter of Milbauer

2015 NY Slip Op 31300(U)

April 6, 2015

Sur Ct, Nassau County

Docket Number: 351171/A

Judge: Edward W. McCarty III

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SURROGATE’S COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
Probate Proceeding, Will of

File No. 351171/A

JEANETTE MILBAUER,

Dec. No. 30555

Deceased.

-----X
Probate Proceeding, Will of

File No. 351171/B

JEANETTE MILBAUER,

Dec. No. 30765

Deceased.

-----X
In the Matter of the Petition of Joan Husserl
to Compel an Accounting of Karen Silverman
as Preliminary Executor of the Estate of

File No. 351171/D

JEANETTE MILBAUER,

Dec. No. 30833

Deceased.

-----X
Miscellaneous Proceeding, Estate of

File No. 351171/E

JEANETTE MILBAUER,

Dec. No. 30564

Deceased.

-----X
Accounting by Karen Silverman as
Preliminary Executor of the Estate of

File No. 351171/F

JEANETTE MILBAUER,

Dec. No. 30834

Deceased.

-----X
Accounting by Karen Silverman as
Preliminary Executor of the Estate of

File No. 351171/G

JEANETTE MILBAUER,

Dec. No. 30566

Deceased.

-----X

-----X	
Accounting by Karen Silverman as Preliminary Executor of the Estate of	File No. 351171/H
JEANETTE MILBAUER,	Dec. No. 30567
Deceased.	
-----X	
Accounting by Karen Silverman as Preliminary Executor of the Estate of	File No. 351171/I
JEANETTE MILBAUER,	Dec. No. 30568
Deceased.	
-----X	
Miscellaneous Proceeding Pursuant to SCPA 2103 by Joan Husserl, as Limited Administrator, for Discovery and Turnover of Assets Belonging to the Estate of	File No. 351171/J
JEANETTE MILBAUER,	Dec. No. 30563
Deceased.	
-----X	
In the Matter of the Petition of Joan Husserl and Kenneth Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, Successor Trustee of the Trust dated November 1, 2000 Made by	File No. 2000-366177
HAZEL R. FLICKER,	Dec. No. 30835
Deceased.	
-----X	
In the Matter of the Petition of Joan Husserl to Compel Accounting of Karen Silverman, as Preliminary Executor of the Estate of Jeanette Milbauer, First Successor Trustee of the Trust July 1, 1995 Made by	File No. 2000-366177/A
HAZEL R. FLICKER,	Dec. No. 30836
Deceased.	
-----X	

-----X

Miscellaneous Proceeding - Supreme Court Action
of Karen Milbauer Silverman, individually as Beneficiary
and Trustee of the

File No. 2000-366177/B

Dec. No. 30565

HAZEL R. FLICKER IRREVOCABLE TRUST,

dated July 1, 1995,

-against-

Kenneth Husserl, individually,
Kenneth Husserl, as the Pretexted and Successor Trustee
in the Purported Document "named" the
Irrevocable Trust made by Hazel R. Flicker (Trustor)
and Stanley Milbauer (Trustee) dated
November 1, 2000.

-----X

In the Matter of the Petition of Joan Husserl
to Compel Accounting of Karen Silverman,
as Preliminary Executor of the Estate of Jeanette Milbauer,
First Successor Trustee of the Trust dated July 1, 1995, made by

File No. 2000-366177/C

Dec. No. 30569

HAZEL R. FLICKER,

Deceased.

-----X

In the Matter of the Petition of Joan Husserl to
Compel Accounting of Karen Silverman, as
Preliminary Executor of the Estate of Jeanette Milbauer,
Successor Trustee of the Trust dated November 1, 2000,
made by

File No. 2000-366177/D

Dec. No. 30570

HAZEL R. FLICKER,

Deceased.

-----X

In the Matter of the Petition of Joan Husserl
and Kenneth Husserl to
Compel Accounting of Karen Silverman, as
Preliminary Executor of the Estate of Jeanette Milbauer,
Successor Trustee of the Trust dated November 1, 2000,
made by

File No. 2000-366177/E

Dec. No. 30837

HAZEL R. FLICKER,

Deceased.

-----X

In connection with multiple proceedings filed in connection with the Estate of Jeanette Milbauer and trusts created by Hazel R. Flicker, an order to show cause has been filed on behalf of Karen Silverman seeking:

1. An order disqualifying Sally Donahue and the firm of Jaspan Schlesinger, LLP as attorneys for Kenneth Husserl and Joan Husserl;
2. An order of recusal by Surrogate Edward W. McCarty III;
3. An order of judicial disqualification of Surrogate Edward W. McCarty III; and
4. An order transferring all pending matters to Judge Thomas A. Adams, the Administrative Judge for the Tenth Judicial District Supreme Court, Nassau County; and
5. A stay of all proceedings pending a determination of the application.

In addition, Karen Silverman filed a petition for an extension of preliminary letters issued to her in the estate of Jeanette Milbauer.

Opposition to all of the relief requested has been filed on behalf of Joan Husserl and Kenneth Husserl.

BACKGROUND

The complete background and history of these proceedings are recited in the prior decisions and orders of this court and are incorporated into this decision by reference. Briefly, the court notes that Jeanette Milbauer died on February 18, 2008, survived by her two daughters, Karen Silverman and Joan Husserl. Joan Husserl is married to Kenneth Husserl. Hazel R. Flicker is the aunt of Ms. Silverman and Ms. Husserl. The decedent, Jeanette Milbauer, served as a trustee of two trusts created by Hazel Flicker. Ms. Silverman offered an instrument for probate, dated December 20, 2007, as the will of the decedent, in which Ms. Silverman is nominated as the executor. Ms. Husserl objected to probate. Preliminary letters testamentary issued to Ms.

Silverman on April 6, 2010 and were subsequently extended, despite objections filed by Ms. Husserl.

ANALYSIS

1. Disqualification of Sally Donahue and Jaspan Schlesinger, LLP

The disqualification of Sally Donahue and Jaspan Schlesinger, LLP (Jaspan) as counsel for Kenneth Husserl and Joan Husserl is sought pursuant to New York State Unified Court Systems Part 1200 Rules of Professional Conduct, Rules 1.10, imputation of conflict of interest; Rule 1.11, special conflicts of interest for former and current government offices and employees; and Rule 1.12, specific conflicts of interest from former judges, arbitrators, mediators or other third-party neutrals. The basis for the requested relief is Ms. Donahue's prior professional position as a court attorney-referee with this court (the Court), in which capacity she worked on an earlier proceeding brought in connection with the estate of Jeanette Milbauer, including supervising discovery and conducting conferences.

Ms. Donahue argues that there is no legitimate reason to grant this relief. She further maintains that Ms. Silverman waived any rights she might have in connection with the requested disqualification of Ms. Donahue and Jaspan by waiting until two years after Ms. Donahue began representing Joan Husserl and Kenneth Husserl.

While Ms. Donahue concedes that she was employed at the Court as a court attorney-referee from November 2006 until June 1, 2011, she argues that she had only ministerial involvement with the sole Jeanette Milbauer proceeding ongoing at that time, which was the probate petition filed by Ms. Silverman and contested by Ms. Husserl. All parties agree that in Ms. Donahue's position as a court attorney-referee, she conducted several conferences regarding the Jeanette Milbauer estate which counsel for Ms. Silverman, G. Ronald Hoffman, appeared on behalf of Ms. Silverman.

In December 2012, Ms. Donahue began working for Jaspan. In that capacity, she appeared on behalf of Joan Husserl and Kenneth Husserl in opposition to Mr. Hoffman at multiple conferences at the Court. As counsel for the Husserls, Ms. Donahue communicated with Mr. Hoffman and with the Court in writing and by telephone, and participated with Mr. Hoffman in settlement conferences, both at Jaspan and at Mr. Hoffman's law firm. Ms. Donahue states that at the start of her representation of Joan and Kenneth Husserl, she disclosed to Mr. Hoffman the extent of her involvement in the Milbauer probate proceeding while she was a court employee, a contention which Mr. Hoffman does not expressly refute. She argues that it is only now, two years later, after mutual attempts at settlement were unsuccessful, that Mr. Hoffman brought the order to show cause to disqualify her and Jaspan, and thus deny Joan and Kenneth Husserl the counsel of their choice.

In connection with the Hazel Flicker proceedings pending in the Court, Ms. Donahue argues that none of these proceedings were pending during her tenure at the Court, and that there are therefore no grounds for disqualifying her or Jaspan in connection with these matters. She argues further that since Ms. Silverman waited two years to argue for the disqualification of Ms. Donahue and Jaspan in the Hazel Flicker matters, the delay amounts to Ms. Silverman's waiver of this relief.

There is no disagreement among the parties that the applicable standard for disqualification of a court attorney-referee based on these present facts is whether the attorney personally and substantially participated in the matter before the Court. Rule 1.11 provides, in relevant part:

“Rule 1.11 Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly provide, a lawyer who has formerly

served as a public officer or employee of the government:

(1) shall comply with Rule 1.9(c); and

(2) shall not represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. This provision shall not apply to matters governed by Rule 1.12(a).

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.”

(Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.11).

Rule 1.12 provides, in relevant part:

Rule 1.12 Specific conflict of interest for former judges, arbitrators, mediators or other third-party neutrals.

(a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

(b) Except as stated in paragraph (d), and unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as:

(1) an arbitrator, mediator or other third-party neutral; or

(2) a law clerk to a judge or other adjudicative officer or an arbitrator, mediator or other third-party neutral. . . .

(d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm which with that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the firm acts promptly and reasonably to:

(i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom;

and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.”

(Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.12).

Not surprisingly, the parties disagree as to whether Ms. Donahue’s level of involvement with the case as a court attorney was such that she could be found to have “participated personally and substantially” with the case as a court attorney. Because the court finds that the movant has waived the right to move to disqualify Ms. Donahue or Jaspán, it need not reach that issue.

There is a dearth of case law on the issue of waiver in the context of attorney disqualification in the New York courts where the disqualification is sought on the basis that the attorney had previously been involved in the case as a public officer or employee. There are, however, quite a number of federal court cases on the analogous basis that the attorney had previously represented another party to the litigation or otherwise had a conflict. A state court, in deciding a case before it, may, of course, consider how the federal courts have resolved the same or a similar issue (*see Brady v Williams Capital Group, L.P.*, 14 NY3d 459 [2010]).

The courts have recognized that “disqualification has an immediate adverse effect on the client by separating him from counsel of his choice, and ... disqualification motions are often interposed for tactical reasons” (*Board of Ed of City of New York v Nyquist*, 590 F2d 1241, 1246 [2d Cir 1979]). Furthermore, “[c]ourts have disallowed disqualification on the basis of waiver or estoppel where the moving party has failed to move for disqualification in a timely manner. ‘It is

well settled that a former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right" (*Official Unsecured Creditors Comm. of Valley-Vulcan Mold Company v Ampco-Pittsburgh Corp*, 5 Fed Appx 396 *401 [6th Cir 2001], quoting *Trust Corp of Montana v Piper Aircraft Corp*, 701 F2d 85, 87 (9th Cir 1983).

“[T]he Court must also bear in mind that the court's authority to disqualify an attorney or craft appropriate relief to punish or deter attorney misconduct derives from the court's equitable powers, and as such equitable considerations like waiver and estoppel apply. The California Supreme Court has similarly noted that a disqualification motion may involve such considerations as a client's right to chosen counsel, an attorney's interest in representing a client, the financial burden on a client to replace disqualified counsel, and the possibility that tactical abuse underlies the disqualification motion. Thus, where delay in making the disqualification motion is unreasonable and the resulting prejudice is great, the court will assume an implied waiver of the right to disqualify. [A] former client who is entitled to object to an attorney representing an opposing party on the ground of conflict of interest but who knowingly refrains from asserting it promptly is deemed to have waived that right" (*Sirisup v It's Thai, L.L.C.*, 2015 US Dist LEXIS 11360 *5 [CD CA 2015][internal citations and quotations omitted]).

In another case, the court, in denying the motion to disqualify counsel and rejecting the movant's contention that it acted to remove counsel “at the first reasonable opportunity” held that “[w]aiting five months before raising the issue with opposing counsel cannot be characterized as “the first reasonable opportunity” under any circumstances. If [movant] had genuine concerns regarding whether confidences would be shared with [opposing] counsel, it would have acted immediately” (*Matter of National Century Financial Enterprises, Inc.* 2010 US Dist LEXIS 39524 *41 [SD OH 2010]).

Courts have identified several criteria to be considered in determining whether a party moving to disqualify an attorney has waived the right to do so based on waiver. They are:

- (1) the length of the delay in bringing the motion to disqualify
- (2) when the movant learned of the conflict
- (3) whether the movant was represented by counsel during the delay
- (4) why the delay occurred, and
- (5) whether disqualification would result in prejudice to the non-moving party (*Lyon v*

Goldstein, 2006 US Dist LEXIS 71274 *17 [D NJ 2006][internal citation omitted]).

Here, movant delayed not merely five months but nearly two years from the date she knew or should have known of Ms. Donahue's prior involvement in the case as a court attorney. Movant's affidavit in support of her motion is noticeably silent on when she learned of Ms. Donahue's representation of her sister but her attorney clearly knew immediately and to suggest, as has not even been done, that Mr. Hoffman failed to advise his client of Ms. Donahue's representation of her sister would be completely incredible. Movant was represented by counsel throughout the period of delay by the same attorney who had conferenced the case with Ms. Donahue when she was a court attorney; he continues to represent movant at the current time. Depriving Ms. Donahue's client of her attorneys of nearly eight years in this litigation would clearly be prejudicial to their interests. Any argument that the movant delayed moving timely for disqualification in the hopes of a settlement would be unavailing as the fact that settlement negotiations may have been ongoing does not relieve the movant of the obligation to move promptly to disqualify counsel where a basis for disqualification exists (*Safe-T-Products, Inc. v Learning Resources, Inc.* 2002 US Dist LEXIS 20540 *24 [ND Il 2002]). Finally, arguing against the possibility of a finding of waiver, Mr. Hoffman alleges that he delayed making the instant motion at Ms. Donahue's request. However, a movant cannot "rely on evidence

submitted for the first time in its reply papers in support of its motion” (*L’Aquila Realty, LLC v Jalyng Food Corp.*, 103 AD3d 692, 692 [2d Dept 2013]; *see also GJF Construction Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535 [2d Dept 2006]).

Accordingly, those branches of the motion which seek to disqualify Ms. Donahue or Jaspan Schlesinger LLP as counsel for Joan and Kenneth Husserl are denied.

2. Disqualification of, or Recusal by, Surrogate Edward W. McCarty III

The order of judicial disqualification is sought pursuant to Judiciary Law § 14, which provides in part: “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.” Mr. Hoffman bases this request for relief on the fact that my Principal Law Clerk served as counsel to Joan and Kenneth Husserl while employed at Jaspan and worked on the matters presently pending before me. While conceding that I never served as counsel to Joan and Kenneth Husserl, counsel argues that since my current Principal Law Clerk served in that capacity, mandatory judicial disqualification is required.

Mr. Hoffman’s argument for my disqualification fails to account for the fact that I never represented the parties in these proceedings and have no interest in these matters.

“The disqualification statute . . . is an adaptation of the common-law rule forbidding a Judge to sit in or take part in a cause or matter in which he is interested. The rule is based on the maxim that no man can be a Judge in his own cause and on the rule that a Judge not be, or appear to be, aligned with a party appearing before him. . . . [T]he nature of the interest required to disqualify a Judge is an interest as a party or in a pecuniary or property right from which he might profit or lose. It must be an interest in the subject matter of the suit. The interest need not be large, but it 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 and not merely one that formerly existed.”

Matter of Sherburne, 124 Misc 2d 708, 709-710 [Sur Ct Queens County 1984] [citations omitted]).

At the same time, I am being asked to recuse myself from this matter pursuant to Code of Judicial Conduct Canons 2 and 3 (1992). Mr. Hoffman notes that pursuant to Canon 2 of the Code of Judicial Conduct, a Judge must “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary (Code of Judicial Conduct [2.1] [2A]).

“[W]here an appearance of improper judicial interest emerges, the integrity of the judiciary requires that a Judge disqualify herself . . . No matter what the outcome of the case and the ultimate fairness of her judgment, the integrity of the court will be called into question because of defendant's doubt as to the Judge's impartiality. We deem it appropriate that the Judge disqualify herself in such case [citation omitted]” (*Murray v Murray*, 73 AD2d 1015, 1015-1016 [3d Dept 1980]).

I have no interest in these proceedings, past, present, or future, and my Principal Law Clerk has not been involved in any of these matters in her prior or current position at the Court. Nevertheless, I have concluded that the best interests of these proceedings will be furthered by my recusal from the matter, lest there be even the slightest question, even without a substantive basis, concerning the integrity of this Court.

Mr. Hoffman has requested, in the event of recusal, that these proceedings be transferred to Judge Thomas A. Adams, the Administrative Judge for the Tenth Judicial District Supreme

Court, Nassau County. Ms. Donahue argues for transfer of these proceedings to another Surrogate's Court. Generally, when I recuse myself, the matter is transferred to one of two Acting Surrogates for Nassau County, who is then assisted by a member of my law department. A conference to address the practical implications of the transfer of these proceedings to another court has been scheduled with a member of my law department on April 29, 2015 at 2:15 p.m.

3. Application for Extension of Preliminary Letters

Preliminary letters testamentary issued to Ms. Silverman on April 6, 2010 and were extended since. Ms. Silverman again seeks a further extension of her letters, and Ms. Husserl objects. Having recused myself from the matter, the decision on the request for an extension of preliminary letters shall be made by the judge to whom these matters are assigned.

This constitutes the decision and order of this court.

Dated: April 6, 2015

EDWARD W. McCARTY III
Judge of the
Surrogate's Court