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| Bank of N.Y. Mellon v Izmirligil |
| 2016 NY Slip Op 32311(U) |
| November 18, 2016 |
| Supreme Court, Suffolk County |
| Docket Number: 47361/2009 |
| Judge: C. Randall Hinrichs |
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

Motion Dates: 013: 7/11/16; 014: 7/26/16;
015: 8/11/16 016: 9/19/16; 017: 9/19/16
Adjourned Date: 9/22/2016
Motion Sequence.: 013: MD; 014: MG;
015: MG 016: MD; 017: MG

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

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BANK OF NEW YORK MELLON FKA THE
BANK OF NEW YORK, AS TRUSTEE FOR
CHASE MORTGAGE FINANCE TRUST
SERIES 2006-S2

Plaintiff,

-against-

ARIF IZMIRLIGIL, BOARD OF MANAGERS
FOR SAILOR'S HAVEN HOMEOWNERS
ASSOCIATION CORP., MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS,
INC. AS NOMINEE FOR E-LOAN CENTER,
INC., MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. AS
NOMINEE FOR PNC MORTGAGE CORP. OF
AMERICA, "JANE DOE",

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Defendant/Third Party Plaintiff Dr. Arif Izmirligil ("Defendant Izmirligil") Motion to Add Necessary Joinder of Third-Party Defendant and Joinder of Trials dated June 20, 2016 (Mot Seq. 013); (2) Motion to Dismiss by Third-Party Defendant the Honorable Mark Cohen ("Defendant Justice Cohen") (including Memorandum of Law) dated June 27, 2016, (Mot. Seq. 014); (3) Affirmation in Opposition by the plaintiff Bank of New York Mellon FKA The Bank of New York, As Trustee for Chase Mortgage Finance Trust Series 2006-2 ("Plaintiff BONY"), dated July 1, 2016, and supporting papers; (4) Affirmation in Opposition and Motion for Filing Injunction by the Defendant Justice Cohen dated August 2, 2016, and supporting papers (015); (5) Defendant Izmirligil sur-reply in the form of affidavits in opposition to Plaintiff BONY and Defendant Justice Cohen both dated July 15, 2016 and (6) Defendant Izmirligil Motion to Disqualify and Sanction Defendant Judges and Their Attorneys dated August 26, 2016 and sur-reply dated September 20, 2016 (Mot. Seq. 016); (7) Defendant Justice Cohen Affirmation in Opposition to Motion to Disqualify and Sanction dated September 6, 2016; and (8) Notice of Motion by the Plaintiff BONY to impose Filing Injunction dated September 22, 2016 (Mot. Seq. 017); it is

ORDERED that motion of Defendant Izmirligil to add Defendant Justice Cohen as a third-party defendant and motion for necessary joinder of trials is dismissed (013); and it is further

ORDERED that cross-motion of Defendant Justice Cohen and Plaintiff BONY to dismiss both the third-party complaint and motion for joinder is granted (014) ; and it is further

ORDERED that motion by Defendant Izmirligil to sanction and disqualify Defendant Justice Cohen and his attorney is denied (016); and it is further

ORDERED that motions of Plaintiff BONY and Defendant Justice Cohen to enjoin the Defendant Izmirligil from initiating any further actions and proceedings in any court in the Unified Court System in the State of New York without prior judicial approval is granted (015 and 017).

The Foreclosure Action

On November 30, 2009, the Plaintiff BONY commenced a foreclosure action against Defendant Izmirligil alleging failure to make installment payments on a mortgaged property located at 15 Sailors Court, Miller Place, New York 11764 ("Mortgaged Property") (hereinafter referred to as the "Foreclosure Action").

Defendant Izmirligil failed to answer the complaint within twenty days required pursuant to CPLR § 320(a) and defaulted. Izmirligil then moved for leave to serve a late answer that was denied by order of Justice Thomas F. Whelan on July 16, 2010. Shortly thereafter, Defendant Izmirligil moved to renew and reargue. The motion to renew and reargue was denied by order of Justice Whelan on September 22, 2010. Defendant Izmirligil appealed both the July 16, 2010 and September 22, 2010 orders. Both orders were affirmed by the Appellate Division, Second Department on October 25, 2011.

Plaintiff BONY then, sought a declaration that the affirmation required by Administrative Order 431/11 is unconstitutional and further sought leave to proceed without filing same. Justice Whelan granted Plaintiff BONY's motion in an order dated January 28, 2014.

In a motion returnable April 22, 2014, Defendant Izmirligil moved for recusal of Justice Whelan and to stay this Foreclosure Action until such time as another Supreme Court Justice is assigned to preside over said action or, in the alternative, a change of venue from the Suffolk County Supreme Court to the Kings County Supreme Court. Justice Whelan denied Defendant Izmirligil's motion by order dated May 20, 2014.

Defendant Izmirligil filed a Notice of Appeal of both the January 28, 2014 and the May 20, 2014 orders issued by Judge Whelan. Oral arguments on the appeal have been held although an Appellate Division decision was not available at the time of this decision.

On May 29, 2014, Defendant Izmirligil brought suit against Justice Whelan in the United States District Court, Eastern District of New York. The lawsuit was dismissed with prejudice by order of the Honorable Sandra J. Feuerstein, U.S.D.J. dated March 27, 2015. That same day, Defendant Izmirligil moved for reconsideration of the federal matter. The motion to reconsider was denied in all respects save the request to correct the caption from "Azir" Izmirligil to "Arif" Izmirligil.

On January 26, 2015, Plaintiff BONY moved for an order, to enter a default judgment against Defendant Izmirligil and all other defaulting defendants pursuant to CPLR § 3215(a) and appoint a referee to ascertain and compute the amount due on the mortgage pursuant to RPAPL § 1321. In response, and while still in default, Defendant Izmirligil filed a motion to dismiss the Foreclosure Action pursuant to CPLR § 3215(c) for failure to timely prosecute; cancel the successive Notice of Pendency pursuant to CPLR § 6514(b); and also filed a second motion for the recusal of Justice Whelan and a stay of the Foreclosure Action until such time as another Supreme Court Justice is assigned to preside over said action or, in the alternative, a change of venue from the Suffolk County Supreme Court to the Kings County Supreme Court. Justice Whelan denied the second motion for recusal and the motion to dismiss, and granted the motion for reference by order dated March 26, 2015. Defendant Izmirligil then filed a Notice of Appeal of the March 26, 2015 order. A decision is pending.

The RICO Action

On November 20, 2015, Defendant Izmirligil initiated a civil Racketeering Influenced and Corrupt Organizations ("RICO") cause of action against the Plaintiff BONY, Steven Baum Esq. and others alleging forgery, fraud and deception associated with the mortgage, title and foreclosure on the Mortgaged Property under Suffolk County Index Number 612313/2015 (herein after referred to as the "RICO Action").

On or about February 2, 2016, Defendant Izmirligil filed a "First Amended Verified Complaint" to include Justice Whelan as a defendant in the RICO Action.

Repetitive Requests for Relief

On or about February 26, 2016, Defendant Izmirligil filed a third motion seeking recusal of Justice Whelan and a stay of the Foreclosure Action until such time as another Supreme Court Justice is assigned to preside over said action or, in the alternative, a change of venue from the Suffolk County Supreme Court to the Kings County Supreme Court.

Before a decision could be issued on the third recusal motion, Defendant Izmirligil sought the joinder of Justice Whelan as a third-party defendant to the instant Foreclosure Action, seven (7) years after the initial complaint. Defendant Izmirligil also sought joinder of the Foreclosure and RICO Actions. Justice Whelan recused himself from both the instant Foreclosure and the RICO Actions.

This Foreclosure Action and the RICO Action were then assigned to the Honorable Mark D. Cohen, Court of Claims Judge and Acting Supreme Court Justice. On April 28, 2016, Defendant Izmirligil filed an Order to Show Cause in the RICO Action requesting Justice Cohen recuse himself in both the RICO and Foreclosure Actions.

On May 25, 2016, Justice Cohen issued a decision in response to the order to show cause in the RICO Action, wherein Justice Cohen denied Defendant Izmirligil's Order to Show Cause to recuse himself from presiding over both instant Foreclosure and RICO Actions following a non-binding May 6, 2016 opinion of the Advisory Committee on Judicial Ethics.

On May 26, 2016, Justice Cohen issued a decision on Defendant Izmirligil's February 26, 2016 Order to Show Cause in this Foreclosure Action in which he declared the branch of the motion seeking recusal of Judge Whelan moot; denied the defendant's request for joinder of the instant Foreclosure and RICO Actions; denied the request for change of venue; and denied the motion to add Justice Whelan as a necessary party.

By Order to Show Cause dated June 3, 2016, Defendant IZMIRLIGIL filed yet a fourth motion to request change of venue and to stay the Foreclosure Action. By decision dated June 17, 2016, Justice Cohen denied the fourth application.

Defendant Izmirligil's Actions Against Justice Cohen

Following Justice Cohen's the denial of his motions, Defendant Izmirligil filed a third-party summons and complaint seeking to add Justice Cohen as a third-party defendant to the Foreclosure Action. Simultaneously, he also filed a supplemental summons and complaint against Justice Cohen seeking to add him as a defendant to the RICO Action. Defendant Justice Cohen moved to dismiss both actions by motion dated June 27, 2016.

The motions seeking to add Justice Cohen to the Foreclosure and RICO Actions were reassigned to this court while Justice Cohen retained the cases for all other purposes.

Defendant Justice Cohen and Plaintiff BONY opposed and cross-moved to dismiss Defendant's Izmirligil's addition of Judge Cohen to the Foreclosure Action. Both parties also seek a filing injunction to prevent Defendant Izmirligil's further abuse of the court system in the instant Foreclosure and the RICO Action.

On August 8, 2016, Defendant Izmirligil's attorney withdrew his representation and Defendant Izmirligil proceeded pro se in the Foreclosure and RICO Actions.

In response to the Plaintiff BONY and Defendant Justice Cohen's Cross-Motion for a Filing Injunction, Defendant Izmirligil filed a motion, pro se, to disqualify Defendant Justice Cohen and sanction him and his counsel.

Subsequent to the assignment of the immediate motions to this court and in keeping with Defendant Izmirligil's practice, Defendant Izmirligil filed a motion to add this court as a third-party defendant to both the Foreclosure Action and the RICO Action.

The following is a decision on the motion to add Defendant Justice Cohen as a party a to this Foreclosure Action, the associated cross-motions to dismiss, and motions for sanctions by all parties.

Recusal

Before deciding the substance of the motions currently pending, this court must first address its ability its ability to decide the motions in a fair and impartial manner.

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” (*People v. Alomar*, 93 N.Y.2d 239, 246[citations omitted]; *Matter of Stampfler v. Snow*, 290 A.D.2d 595, 596; *People v. Grier*, 273 A.D.2d 403, 405; *Khan v. Dolly*, 39 A.D.3d 649, 650–51[2007]). This court has no direct, personal or pecuniary interest in reaching a decision regarding the joinder of Defendant Justice Cohen to this foreclosure or the civil RICO Action. Thus, recusal is not mandated.

“Absent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal.” (*People v. Moreno*, 70 N.Y.2d 403, 405[1987]). “Even in circumstances where recusal is not mandated, however, a trial judge nonetheless must take steps to ensure that his or her conduct does not create even the appearance of impropriety.” (*Stampfler*, supra at 596). In an over abundance of caution, this court sua sponte addresses recusal in light of Defendant Izmirligil’s unrelated and undecided motion to enjoin it as a third-party defendant.

“A judge is not disqualified merely because a litigant sues or threatens to sue him” (*United States v. Grismore*, 564 F.2d 929, 933, 10th Cir.1977, cert. denied, 435 U.S. 954). In fact, “[a] judge has an obligation *not* to recuse himself ...even if sued in connection with his ...duties, unless he ...is unable to serve with complete impartiality, in fact or appearance. (*Spremo v. Babchik*, 155 Misc. 2d 796, 799 [Sup. Ct. 1992], aff’d as modified, 216 A.D.2d 382, 628 N.Y.S.2d 167 [1995][emphasis added]). “A litigant cannot be allowed to create a sham controversy by suing a judge without justification, and to then use that sham as a means for achieving the judge’s recusal.” (*Id.*). Defendant Izmirligil has begun litigation against every jurist who has attempted to hear this matter to-date and cannot hope to frustrate justice and eliminate jurists by pursuit of such a strategy. Defendant Izmirligil has sued Judge Whelan in Federal Court and attempted to add him as a third party defendant to this foreclosure and subsequent RICO Action. Defendant Izmirligil has also initiated claims against Defendant Justice Cohen once Justice Cohen began presiding over this cases. It is no surprise that the Defendant now seeks to add this court following the assignment of the instant motions to it. This court remains without bias and completely impartial regarding the original motion to add Justice Cohen as a third-party defendant, subsequent cross motions seeking dismissal and other various relief. Accordingly, there is no cause for this court to recuse itself.

Justice Cohen as a Third Party Defendant

Where the defendant is in default, and concedes liability, as is the case in the instant matter, motions effecting liability have no sway. (See, *Rokina Opt. Co. v. Camera King*, 63 N.Y.2d 728, 730 [1984]; *U.S. Natl Ass’n v. Gonzalez*, 99 A.D.3d 694, 694-695 [2d Dep’t 2012]). Despite his efforts, Defendant IZMIRLIGIL has been unsuccessful in vacating his default. Defendants in default have forfeited his rights to participate in the proceedings, except to contest damages. (*Woodson v. Mendon Leasing Corp.*, 100 N.Y.2d 62,71 [2003]) This preclusion includes impleading additional defendants in matters not related to damages. (See, *Rokina Opt. Co v. Camera King*, 63 N.Y.2d 728,130 [1984])

Furthermore, Defendant Izmirligil has failed to establish that the Judge Cohen is a necessary party under to CPLR § 1001. There is no showing that Judge Cohen is necessary or “indispensable to

the case in the sense that the action cannot fairly proceed without [him]" or that his presence in the litigation is required to afford complete relief between the parties. (*NC Venture I, L.P. v. Complete Analysis, Inc.*, 22 A.D.3d 540 [2005]). "RPAPL 1311 sets forth the necessary defendants in a mortgage foreclosure action, 'codifies the equitable principle that persons holding title to the premises or acquiring any right to or lien on the property should be made defendants.'" (*Id.* at 542). Defendant Izmirligil does not make any allegation or provide documentation that Justice Cohen has any interest in the Mortgaged Property or that Justice Cohen holds title to, rights in or liens against the mortgage or Mortgaged Property. Accordingly, Defendant Izmirligil's motion to join Judge Cohen is dismissed.

Sanctions against Justice Cohen and his Counsel

Defendant Izmirligil's request for disqualification and sanctions against Defendant Justice Cohen and his attorney is without merit and is therefore denied.

Joinder of Trial

The doctrine of *law of the case* precludes the re-litigation of judicial determinations made in the course of a single litigation. (*People v. Evans*, 94 N.Y.2d 499,502 [2000]). The doctrine is designed to limit re-litigation of issues where parties had a "full and fair" opportunity to litigate the initial determination. (*Id.*). Joinder has been fully adjudicated and was decided by order of Justice Cohen on May 26, 2016. Re-litigation of this issue is barred by the *law of the case* doctrine. Defendant Izmirligil's request for joinder is not properly before this court. Defendant Izmirligil's request for joinder is therefore denied.

Filing Injunction

The motion of the Plaintiff BONY and Defendant Justice Cohen for a filing injunction are granted to the extent specified herein.

"[A]lthough public policy generally mandates free access to the courts, courts have imposed injunctions barring parties from commencing any further litigation where those parties have engaged in continuous and vexatious litigation." (*Robert v. O'Meara*, 28 A.D.3d 567, 568, [2006] [internal citations omitted]). Though rare, when circumstances warrant it, the Court can order injunctive relief "to forestall further vexatious litigation or to prevent use of the judicial system as a vehicle for harassment, ill will and spite." (*Miller v. Lanzisera*, 273 AD2d 866, 869 [4th Dep't 2000] [internal citations and quotations omitted])

Defendant Izmirligil's meritless motions and collateral attacks go well beyond that of a zealous advocate. Defendant Izmirligil's repetitious motions seek to re-litigate identical issues previously addressed and dismissed by the court. He requests motions to reargue and when they are denied, he then initiates new litigation alleging fraud and forgery by the court, the plaintiff, and their counsel. He has initiated litigation against every Suffolk County jurist who has presided over his case. Defendant Izmirligil has also sought sanctions against his opponents counsel. The court notes that the Defendant Izmirligil unsuccessfully sued Justice Whelan under 42 U.S.C. § 1983 in the Eastern District of New York alleging equal protection violations, corruption and conspiracy. The matter was dismissed and his

motion for reconsideration denied. He then unsuccessfully moved to implead Justice Whelan in the Supreme Court of the State of New York, 10th Judicial District, in this Foreclosure Action and the RICO Action. Those actions were dismissed against Justice Whelan. Interspersed with Defendant Izmirligil's impleader motions are duplicative motions for recusal and change of venue. He then filed the immediate motion to add Justice Cohen as a third-party defendant claiming fraud, forgery and collusion as a way to collaterally attack those prior orders.

Defendant Izmirligil's collateral attacks, repetitious motions and serial motions to implead jurists have only served to delay adjudication of the underlying Foreclosure Action. Defendant Izmirligil has used his motions as a bludgeon against the Plaintiff BONY and the court system itself. Having failed at achieving a change of venue through a legitimate motions which were denied at the trial level and in the appellate term, Defendant Izmirligil has employed a strategy of impleading judges in the 10th Judicial District in the hope that he can ultimately bully the 10th Judicial District and force a change of venue. Defendant Izmirligil has become no more than a paper reprobate who abuses judicial proceedings and drains judicial resources.

As the defendant has clearly seen fit to abuse the legal system, it is hereby ordered that Defendant Izmirligil is henceforth hereby enjoined and prohibited from initiating any further actions and proceedings in any court in the Unified Court System in the State of New York without prior judicial approval. This injunction includes the courts in all of the counties of this state. Any violation of this order will result in service upon Mr. Izmirligil of an order to show cause issued by the court for him to show cause why he should not be adjudicated and punished for Criminal Contempt pursuant to § 750 et seq. of the Judiciary Law.

This constitutes the decision and order of the court.

DATED: November 18, 2016


C. RANDALL HINRICHS
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION