

Izmirligil v Steven J. Baum, P.C.

2016 NY Slip Op 32323(U)

November 18, 2016

Supreme Court, Suffolk County

Docket Number: 612313-2015

Judge: C. Randall Hinrichs

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

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

Motion Date: 016: 7-11-16; 019: 8-11-16; 020 & 021: 8-26-16
Motion Adjourned Date: 9-29-16
Motion Seq. #: 016-MD; 019-MG; 020-MD; 021-MG

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DR. ARIF S. IZMIRLIGIL,

Plaintiff,

-against-

STEVEN J. BAUM, P.C., STEVEN J. BAUM,
ESQ., BRIAN B. KUMIEGA, ESQ., PATRICIA
M. ESDINSKY, ESQ., THE BANK OF NEW
YORK MELLON F/K/A THE BANK OF NEW
YORK, AS TRUSTEE FOR THE CHASE
MORTGAGE FINANCE TRUST SERIES 2006-
S2 and J.P. MORGAN CHASE BANK, N.A.,

Defendants.

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Hon. Thomas F. Whelan & Hon. Mark D. Cohen
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Upon the reading and filing of the following papers in this matter: (1) Motion to Add Defendant Mark D. Cohen by Plaintiff Dr. Arif S. Izmirligil ("Dr. Izmirligil") dated June 20, 2016 (Mot Seq. 016); (2) Cross-Motion to Dismiss and for a Filing Injunction by Defendant the Honorable Mark D. Cohen ("Defendant Justice Cohen") dated August 2, 2016, (Mot. Seq. 019); (3) Motion to Sanction Defendant Bank of New York, as trustee for Chase Mortgage Finance Trust Series 2006-S2 ("BONY") and its Attorney David V. Mignardi, Esq. and supporting documents by Plaintiff Dr. Izmirligil dated August 26, 2016, Motion to Disqualify and Sanction Defendant Judges and Their Attorneys dated August 26, 2016 by Plaintiff Dr. Izmirligil and opposition by Defendant Justice Cohen dated September 6, 2016 (Collectively Mot. Seq. 020); and (4) Notice of Motion by the Defendant BONY to impose Filing Injunction dated August 19, 2016 (Mot. Seq. 021); it is

ORDERED that motion of Plaintiff Dr. Izmirligil to add Defendant Justice Cohen as defendant to the RICO is dismissed (016) and the cross-motion of Defendant Justice Cohen to dismiss the supplemental summons and complaint against Defendant Justice Cohen is granted in its entirety (019); and it is further

ORDERED that motions of Defendant BONY and Defendant Justice Cohen to enjoin the Plaintiff Dr. 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 (019 and 021); and it is further

ORDERED that motion by Plaintiff Dr. Izmirligil to sanction and disqualify Defendant BONY and his attorney is denied (020).

RICO Action

On November 20, 2015, Plaintiff Dr. Izmirligil initiated the instant civil Racketeering Influenced and Corrupt Organizations (“RICO”) cause of action against the Defendant BONY, Steven Baum Esq. and others alleging forgery, fraud and deception associated with the mortgage, title and foreclosure on the property located at 15 Sailors Court, Miller Place, New York 11764 (“Mortgaged Property”) (herein after referred to as the “RICO Action”).

The Foreclosure Action

The RICO Action stems from the November 30, 2009 commencement of a foreclosure action by BONY against Plaintiff Dr. Izmirligil, alleging failure to make installment payments on the Mortgaged Property under Suffolk County Index Number 47361/2009 (hereinafter referred to as the “Foreclosure Action”).

Plaintiff Dr. Izmirligil, the defendant in the Foreclosure Action, failed to answer the foreclosure complaint within twenty days as required pursuant to CPLR § 320(a) and defaulted. Dr. 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, Dr. Izmirligil moved to renew and reargue. The motion to renew and reargue was denied by order of Justice Whelan on September 22, 2010. Dr. 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.

Defendant BONY, the plaintiff in the Foreclosure Action, 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 BONY’s motion in an order dated January 28, 2014.

In a motion returnable April 22, 2014, Dr. Izmirligil moved for recusal of Justice Whelan and to stay the Foreclosure Action until such time as another Supreme Court Justice was 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 Dr. Izmirligil’s motion by order dated May 20, 2014.

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

On May 29, 2014, Plaintiff Dr. Izmirligil brought suit against Justice Whelan in the United States District Court, Eastern District of New York, which was dismissed with prejudice by order of the Honorable Sandra J. Feuerstein, U.S.D.J. dated March 27, 2015. That same day, Plaintiff Dr. 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” Dr. Izmirligil to “Arif” Dr. Izmirligil.

On January 26, 2015, BONY moved for an order, to enter a default judgment against Dr. Izmirligil and all other defaulting defendants in the Foreclosure Action 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, Plaintiff Dr. Izmirligil filed a motion to dismiss the Foreclosure Action pursuant to CPLR § 3215(c) for failure to timely prosecute; to 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. Dr. Izmirligil then filed a Notice of Appeal of the March 26, 2015 order. A decision is pending.

On November 20, 2015, Plaintiff Dr. Izmirligil initiated the instant RICO Action. Two and a half months later, on or about February 2, 2016, Plaintiff Dr. Izmirligil filed a "First Amended Verified Complaint" to include Justice Whelan as a defendant in the RICO Action.

Repetitive Requests for Recusal and Change of Venue

On or about February 26, 2016, Defendant Dr. 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, Plaintiff Dr. Izmirligil sought the joinder of Justice Whelan as a third-party defendant to the Foreclosure Action and joinder of the Foreclosure and RICO Actions. Justice Whelan recused himself from both the Foreclosure and instant RICO Action.

This RICO Action and the Foreclosure Action were then assigned to the Honorable Mark D. Cohen, Court of Claims Judge and Acting Supreme Court Justice. On April 28, 2016, Plaintiff Dr. Izmirligil filled an Order to Show Cause in this 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 Plaintiff Dr. Izmirligil's Order to Show Cause to recuse himself 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 Plaintiff Dr. Izmirligil's February 26, 2016 Order to Show Cause in the 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 Foreclosure and instant 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, Plaintiff Dr. 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.

Plaintiff Dr. Izmirligil's Actions Against Justice Cohen

Following Justice Cohen's the denial of his motions, Plaintiff Dr. Izmirligil filed a supplemental summons and complaint against Justice Cohen seeking to add him as a defendant to the RICO Action. Simultaneously, he also filed a third-party summons and complaint seeking to add Justice Cohen as a third-party defendant to the Foreclosure 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 Defendant BONY opposed and cross-moved to dismiss Dr. Izmirligil's addition of Judge Cohen to the Foreclosure Action. Both parties also seek a filing injunction to prevent Plaintiff Dr. Izmirligil's further abuse of the court system in the instant RICO Action and the Foreclosure Action.

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

Subsequent to the assignment of the immediate motions to this court and in keeping with Plaintiff Dr. Izmirligil's practice, Dr. 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 RICO Action, the associated cross-motions to dismiss and for filing injunction and Plaintiff's motion to sanction Judge Cohen and his attorney.

Recusal

Before deciding the substance of the motions currently pending, this court must first address its ability to decide the motions in a fair and impartial manner. In his moving papers, plaintiff alleges that recusal of this court, Judge Cohen and indeed all Supreme Court Justices in the 10th Judicial District is warranted since a Supreme Court Justice is named as a litigant.

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 Foreclosure or the civil RICO Action. Thus, recusal is not mandated regarding the limited scope of this decision.

"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 Plaintiff Dr. Izmirligil's unrelated and undecided motion to enjoin it as a defendant to the Foreclosure and RICO Actions, though those motions are not before this court. In his motion, Dr. Izmirligil alleges that recusal of Judge Cohen and indeed all Supreme Court Justices in the jurisdiction is warranted since a Supreme Court Justice is named as a party to this litigation.

“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.*). Plaintiff Dr. 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. Plaintiff Dr. Izmirligil has sued Judge Whelan in Federal Court and attempted to add him as a third-party defendant to the Foreclosure and this RICO Action. Plaintiff Dr. Izmirligil also initiated claims against Defendant Justice Cohen once Justice Cohen began presiding over his cases. It is no surprise that the Plaintiff 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, the subsequent cross motions seeking dismissal and other various relief. Accordingly, there is no cause for this court to recuse itself.

Supplemental Summons to Add Defendant Justice Cohen

The Court of Claims has exclusive jurisdiction over actions for money damages against State agencies, departments and employees acting in their official capacities in the exercise of the official capacity. (*Glendora v. Cohen*, 215 AD2d 529 [2d Dep’t 1995]). This court lacks subject matter jurisdiction. Plaintiff Dr. Izmirligil seeks to amend the summons and complaint to add Mark A. Cohen, a Justice of the Supreme Court, Suffolk County, as a party Defendant to the original civil RICO Action. Here, the allegations derived directly from Justice Cohen’s official duties as a Justice of the Supreme Court, Suffolk County. The instant RICO Action clearly includes money damages among the remedies and sanctions requested by Dr. Izmirligil. This Court lacks subject-matter jurisdiction over a tort action for money damages, against a state employee acting in his official capacity.

In addition, the court notes that the Plaintiff failed to properly serve the Amended Summons and Amended Complaint pursuant to CPLR § 307(2), and, therefore, has not obtained personal jurisdiction over Justice Cohen.

It is clear this court lacks jurisdiction. Accordingly, the motion seeking to dismiss the cause of action against Defendant, Justice Mark D. Cohen, is granted in its entirety.

Sanctions against Defendants and Their Counsel

Dr. Izmirligil’s requests for sanctions against Defendant BONY, Defendant Cohen and their attorneys are unsubstantiated and meritless and are therefore denied.

Filing Injunction

The motion of the Defendant 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])

Plaintiff Dr. Izmirligil's meritless motions and collateral attacks go well beyond that of a zealous advocate. Plaintiff Dr. 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. Plaintiff Dr. Izmirligil has also sought sanctions against his opponents' counsel. The court notes that the, Plaintiff Dr. 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. That matter was dismissed and his motion for reconsideration denied. Next, he unsuccessfully moved to implead Justice Whelan in the Supreme Court of the State of New York, 10th Judicial District, in both the Foreclosure and RICO Actions. Those actions were dismissed against Justice Whelan. Interspersed with Plaintiff Dr. Izmirligil's impleader motions are four 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.

Plaintiff Dr. Izmirligil's collateral attacks, repetitious and serial motions to implead jurists have only served to delay adjudication of the underlying Foreclosure Action. Defendant Dr. Izmirligil has used his motions as a bludgeon against the Defendant BONY and the court system itself. Having failed at achieving a change of venue through legitimate motions which were denied at the trial level and in the appellate term, Plaintiff Dr. 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. Plaintiff Dr. 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 Plaintiff Dr. 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 Dr. 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 this court.

DATED: November 18, 2016


 C. RANDALL HINRICHS
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION