

Vullo v Park Ins. Co.
2021 NY Slip Op 30256(U)
January 26, 2021
Supreme Court, New York County
Docket Number: 452877/2017
Judge: Shlomo S. Hagler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHLOMO S. HAGLER PART IAS MOTION 17EFM

Justice

-----X

MARIA VULLO,

Petitioner,

- v -

PARK INSURANCE COMPANY,

Respondent.

-----X

INDEX NO. 452877/2017

MOTION DATE N/A

MOTION SEQ. NO. 023

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 023) 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515¹

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Respondent Park Insurance Company (“Park” or “Respondent”) moves by Order To Show Cause to vacate, pursuant to CPRL 5015, this Court’s Decision and Order dated September 22, 2020 (“Liquidation Order”), and to recuse this Court from further participation in these proceedings. Petitioner, the Superintendent of the New York State Department of Financial Services (“Petitioner” or “DFS”) opposes the motion.

Procedural History and Background

In the Liquidation Order, this Court recited the lengthy history of this proceeding. Familiarity with this Court’s prior Liquidation Order is presumed, and the Court will not provide detailed background of this litigation, which has spanned some four years, except as is relevant to the instant motion. By way of brief background, this proceeding is a complex matter wherein Petitioner sought liquidation of Respondent based on numerous grounds including, but not

¹ While this Court has accepted and reviewed the Memorandum of Law in Reply, Respondent submitted the same even though it was omitted, and therefore unauthorized, in the subject Order To Show Cause dated November 9, 2020.

limited to, the primary basis of insolvency (Insurance Law § 7402[a]), that Park has willfully violated state law on multiple occasions (Insurance Law § 7402[f]), and that Park is in such a condition that its further transaction of business will be hazardous to the public (Insurance Law § 7402 [c]). In sum and substance, Petitioner credibly alleged that the “Superintendent’s determination to seek an order liquidating Park follow[ed] years of regulatory actions taken by DFS that Park routinely ignored with impunity...” (Petitioner’s Post-Hearing Brief dated July 19, 2019, at 7). Notwithstanding Respondent’s assertions to the contrary that this proceeding was limited to one sole ground of liquidation based on insolvency, Petitioner had also alleged serious allegations that Park “willfully violated state law on multiple occasions”.

At the commencement of this proceeding, this Court signed an Order To Show Cause dated October 19, 2017 containing a Temporary Restraining Order (“TRO”) to limit Respondent’s new business, except with DFS’s express consent, in order to safeguard the public from further harm pending the outcome of this proceeding. On multiple occasions, Petitioner alleged that Respondent had been consistently violating the terms of the TRO. This Court essentially deferred these allegations until the trial of this proceeding. This Court conducted an extended trial in this matter on December 4, 5, 6, and 11 of 2018, and February 14, March 5, 6, and 7, April 9, 10, and 11, and May 7, 8, 28 and 29 of 2019. Post-trial briefs were filed by the parties on July 19, 2019, and closing arguments from counsel for the parties occurred on September 5, 2019.

In late October 2020, Respondent requested an emergency in person appearance without any prior notice to this Court and Petitioner’s counsel. Although the court was only scheduling limited in person appearances at this time, the request was granted, and counsel appeared in person at a retrofitted courtroom with plexiglass and all safety precautions observed. At an

October 28, 2020 hearing, Respondent's attorneys apprised this Court that Thomas Polsinelli, president of Park, informed them that this Court's brother may be the principal of Senior Care, an ambulette company, which is a policyholder of Park. Mr. Polsinelli also alleged that this Court's brother stated that "I know everything." In addition, Mr. Polsinelli alleged that this Court's brother indicated that he and others may potentially seek to purchase a majority interest or make an investment stake in Park. In response to a flurry of pointed questions from Respondent's attorneys, this Court unequivocally stated that it did not have any prior knowledge that its brother's company, Senior Care, was a Park policyholder, that it has never spoken to its brother about this proceeding, and it neither has any financial interest in Senior Care nor is part of any investment group that may be seeking an interest in Park. In fact, this Court candidly stated that all of these allegations were a complete surprise as it was raised for the first time at the hearing. Notwithstanding the unfettered due process afforded Respondent at this hearing, and despite this Court's unequivocal rejection of all these allegations, Respondent continues to pursue the same unsupported and rejected allegations in the instant motion.²

Standard for Disqualification of a Judge

The standard for disqualification of a judge due to conflict of interest or consanguinity is governed by Judiciary Law § 14 which states, in relevant part, as follows:

"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 has been [an] 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."

² Due to this Court's rejection of the very same allegations at the hearing, the branch of the motion seeking mandatory disqualification and vacatur of the Liquidation Order lacks any basis in law or fact.

As pointed out by Petitioner's counsel, Respondent cites the above passage from Judiciary Law § 14, but it "conspicuously omits from its quote of the statutory language the only provision directly relevant to this motion":

"But no judge of a court of record shall be disqualified in any action, claim, matter motion or proceeding in which an insurance company is a party or is interested by reason of his [or her] being a policy holder herein."

(Petitioner's Memorandum of Law at 8).

There are several procedural and substantive reasons which require denial of Respondent's motion. Mr. Polsinelli alleges that on May 27, 2020, he first learned that this Court's brother was a principal of Senior Care, even though it had been a policyholder of Park for several years. Significantly, this Court issued the Liquidation Order on September 22, 2020. Thus, Respondent had direct knowledge of this Court's brother's relationship with Senior Care for about four months, but only raised this issue for the first time after this Court issued its Liquidation Order. Respondent was stirred to action (a month later) when it received an unfavorable determination on the merits, and then only belatedly raised the specter of these unsupported allegations of bias. This dubious tactic was uncovered by Petitioner's counsel: "A cynic might conclude that Park decided to keep quiet about this information hoping Senior Care's status as Park's largest insured might somehow work to its advantage in the case, with the intent to use the information as a get-out-jail-free card on a recusal motion if the decision turned out to be unfavorable (as happened) (Petitioner's Memorandum at 13)."³ Respondent has not offered any reasonable explanation for the lengthy delay.

It is well settled that where a party "inexplicably withholds an allegation of bias until after the court adversely rules against it, denial of the motion is generally warranted and the

³ To reiterate, this Court had no knowledge of these unsupported allegations at any time prior to October 28, 2020.

court's discretion in so ruling will not be disturbed" (*Glatzer v Bear, Stearns & Co., Inc.*, 95 AD3d 707 [1st Dep't 2012]; see also *Oxman v Moutain Lake Camp Resort Inc.*, 105 AD3d 653 [1st Dep't 2013]). Here, too, Respondent deliberately withheld the unsupported allegations of bias until after this Court issued the unfavorable Liquidation Order. Again, Respondent has not set forth any valid reason for its unexplained delay. Thus, Respondent has waived its opportunity to raise the unsupported allegations of bias.

More importantly, there is no basis in law or fact for the unsupported allegations. The relevant portion of the Judiciary Law § 14, which Respondent omitted from its supporting papers, clearly requires denial of the motion for mandatory disqualification and recusal in this proceeding based on an insurance company-policyholder relationship. Simply stated, Respondent knew, or should have known, that more than 65 years ago in 1935, the Judiciary Law was amended to include the insurance company-policyholder relationship exclusion for a judge's mandatory disqualification.

In this case, there is no alleged direct insurance company-policyholder relationship between Respondent and this Court, which would not in any event be grounds for disqualification under Judiciary Law § 14. Respondent merely alleges an indirect relationship through this Court's brother which is more attenuated to a direct relationship. As such, if a direct insurance company-policyholder relationship would not give rise to mandatory disqualification, then, *a fortiori*, it logically follows that an indirect insurance company-policyholder relationship certainly would not be grounds for mandatory disqualification. Accordingly, there is no basis in law or fact for mandatory disqualification of this Court and/or vacatur of the underlying Liquidation Order.

Collateral Attack on the Administration of Justice

Respondent's shocking conduct, enabled with the substantial assistance of counsel, amounts to a collateral attack on the administration of justice. Prior to the issuance of the Liquidation Order, Respondent and its counsel's conduct were professional and courteous. However, subsequent to issuance of the unfavorable Liquidation Order, that attitude soon changed beginning at the October 28 hearing, wherein Respondent's counsel engaged in a course of conduct that could be characterized as unprofessional and discourteous. Even though this Court had at multiple times during the hearing vehemently denied knowledge of the unsupported allegations, Respondent, with substantial assistance of counsel, persisted both at the hearing and later in this motion practice, in spewing sinister claims of secret conspiracies worthy of the best fiction novels or films. Unfortunately, this type of behavior has spawned from today's climate which somehow makes acceptable collateral attacks on the judiciary without any regard to the merits of the underlying decision. Lawyers, in particular, should recognize their enhanced responsibilities to uphold the law, and not be utilized as a vehicle by their clients to effectuate collateral attacks on the judiciary. This type of behavior is the height of hubris, and can be best described as unmitigated temerity. People of good faith must stand-up to denounce such behavior and state clearly that it is unacceptable and will not be tolerated in a society that values a strong and independent judiciary.

Standard for Recusal of a Judge

Just as there is no basis for mandatory disqualification and vacatur of the Liquidation Order, there is also no basis for seeking recusal of this Court.⁴ In conformity with Judiciary Law

⁴ After the October 28 hearing, this Court obtained an informal opinion from a member of the Advisory Committee on Judicial Ethics who stated that this Court is under no ethical obligation to recuse itself from further proceedings.

§ 14, 22 NYCRR Part 100 governs the conduct of judges. Specifically, Section 100.3 (E)(1)(c) requires a judge to disqualify/recuse himself or herself in a proceeding where:

“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” (Italics Added).

Similar to Judiciary Law § 14, “economic interest” does not include a policyholder in an insurance company (§ 100.0[D]). The word “knows” is defined as “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances” (§ 100.0[F]).

In this case, this Court is not subject to a recognized “economic interest” in either any aspect of this proceeding wherein Petitioner sought liquidation of Respondent, nor in any party to this Proceeding. As stated above, there is no prohibition for a judge to preside over a proceeding where he or she is a policyholder of the insured party to that proceeding. The same logical analysis would be true for a judge’s family members. Thus, again, the mere fact that this Court’s brother is a policyholder of Park neither requires disqualification nor recusal.

To reiterate, this Court neither had knowledge of any alleged conflicts of interest nor of any inferences from the surrounding circumstances of these unsupported allegations until the hearing of October 28, 2020, to somehow support disqualification or recusal pursuant to 22 NYCRR Part 100. In particular, Mr. Polsinelli’s claim that this Court’s brother suggested that he and others may potentially seek to purchase a majority interest or an investment stake in Park also does not trigger mandatory recusal because it is merely a self-serving conclusory allegation, and it would necessarily come within the discretion of DFS to approve or disapprove such a transaction.

Simply stated, even if Respondent was not subject to the Liquidation Order, any investment group would be required by Insurance Law § 1506 to submit an application to

Petitioner seeking its approval, which would be subject to an Article 78 Proceeding separate from this proceeding. The record reflects the glaring absence of any formal offer by an investment group; an application by an investment group to DFS; a determination by DFS on a non-existent application; and an Article 78 proceeding challenging a DFS determination. Thus, this allegation rests solely upon surmise and conjecture of a possible event that may or may not occur in the future.

Respondent has not Demonstrated any Actual Bias (As None Exists)

During the trial, based on the probative evidence, it became clear that Respondent either circumvented or even violated, at the very least, the intent and spirit of the TRO. Moreover, it became abundantly clear at trial that Respondent had “willfully” established its so-called High Deductible Program without having obtained DFS approval in violation of Insurance Law § 2307(b). As such, the “tenor of the factual findings by the Court” was quite understated given Respondent’s recurring violations of the TRO and the Insurance Law (Respondent’s Memorandum of Law at 17).

As stated above, at the October 28 hearing, this Court unequivocally stated that it did not have any prior knowledge (at time of trial, through drafting and issuance of the Liquidation Order dated September 22, 2020, and beyond) that its brother’s company, Senior Care, was a Park policyholder, that it has never spoken to its brother about this proceeding, and it neither has any financial interest in Senior Care nor is part of any investment group seeking an interest in Park. Indeed, Respondent was not concerned about these unsupported allegations until this Court issued the Liquidation Order which granted the application of the Petitioner. In any event, this Court could not have been subject to any conflict of interest as Respondent deliberately

withheld such information. Thus, it is abundantly clear that Respondent has not demonstrated any actual bias as none exists.

A Judge Should Avoid the Appearance of Impropriety

While there does not exist any grounds for mandatory disqualification or recusal, this Court must also consider whether there may be an appearance of impropriety. Specifically, §100.2 (A) states as follows:

“A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Even though this Court lacked any knowledge of the unsupported allegations until the October 28 hearing, now that this information has been provided, this Court must adhere to the highest ethical standards. Given the above circumstances, this Court will exercise discretion to recuse itself in order to avoid even any appearance of impropriety.

Conclusion

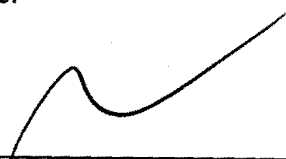
Based on the foregoing, it is

ORDERED, that Respondent’s Order To Show Cause (motion sequence 023) to vacate, pursuant to CPRL 5015, this Court’s Decision and Order dated September 22, 2020 (Liquidation Order), and to disqualify this Court from further participation in these proceedings is denied; and its

ORDERED, that this Court recuses itself to avoid even any appearance of impropriety.

The clerk shall randomly reassign this proceeding to another Justice.

1/26/2021
DATE



SHLOMO S. HAGLER, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER

OTHER

APPLICATION: