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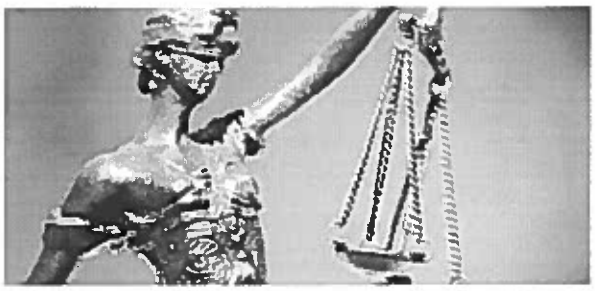
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588



DO YOU WANT SOME CHEESE WITH THAT WHINE?

Litigating & Negotiating with a Difficult Adversary and an Adversarial Judge

FACULTY

Hon. James C. Hudson
Glenn Auletta, Esq.
Charles Eichinger, Esq.
Robert Baxter, Esq.
John Flaherty, Esq.

PROGRAM COORDINATORS

Hon. Paul J. Baisley, Jr.
Hon. James C. Hudson

April 24, 2019
Suffolk County Bar Association, New York

Hon. James Hudson

Acting Justice of tl,e Supreme Court

The Hon. James Hudson has been a County Court Judge since 2000. In January of 2005 he was designated an Acting Justice of the Supreme Court and handled felony cases, non-matrimonial and matrimonial civil cases, mental hygiene proceedings, and was the presiding Judge of the Integrated Domestic Violence Court for Eastern Suffolk County. He is also the former Supervising Judge of the County Court. As of January 1st, 2016 he has presided over Part XLVI of the Commercial Division as well as continuing to handle general civil cases in Part XL.

Judge Hudson is former law clerk to the Hon. William L. Underwood, for many years the senior Supreme Court Justice in Suffolk County. Prior to his service in the Courts, Judge Hudson was Attorney-in-Charge of the Suffolk County District Attorney's Office White Collar Crime/Complex Litigation Bureau. He was also a Special United States Attorney in the Eastern District of New York.

In addition to his activities on the Bench, Judge Hudson was an Adjunct Professor at Dowling College for twenty-three years, where he taught business, labor and employment law on the undergraduate and graduate level. He has also taught law at Malloy College, the New York Institute ofTechnology, and Yan Shan University in China as part of the Dowling College MBA program.

Robert C. Baxter is among the most experienced and formidable trial attorneys in the New York Metropolitan area. Mr. Baxter is also admitted to the United States Supreme Court and various Federal Appellate Courts. From 1989 to 1995, Mr. Baxter served as senior trial attorney for two major defense firms in New York City. In 1995, he left to form Baxter & Smith, P.C.; the predecessor firm to Baxter Smith & Shapiro P.C. Mr. Baxter has been involved in the defense of many construction accident cases including the March 15, 2008 crane collapse case. Also, he regularly lectures on a variety of topics involving the litigation and trial of complex torts. He is currently trial and appellate counsel to the State Insurance Fund of the State of New York for cases involving "grave injury" and has appeared on their behalf in the Court of Appeals, in the matter of Largo-Chiciaza v. Westchester Scaffold Equipment Corp. He previously served on the Executive Committee for the Torts, Insurance & Compensation Law (TICL) Section of the New York State Bar Association. Mr. Baxter lectures extensively for the New York State Bar Association and recently was a speaker at the Labor Law/Construction Accidents in New York – The Law and the Trial seminar where he conducted the cross examination of the plaintiff. He previously was a speaker at a seminar on Recent Developments in the Court of Appeals held in Killarney, Ireland. He also spoke at the New York State Bar Association's 2002 Annual Meeting. He has lectured at the Buffalo Claims Association, and served as Moderator for their mock trial program at their 2003 Annual Convention.

JOHN P. FLAHERTY, ESQ.

John P. Flaherty is a Senior Partner in the firm's Litigation Practice Group. Mr. Flaherty is a trial attorney focusing his practice in all areas of personal injury defense work. He has defended cases including medical malpractice, aviation, construction site accidents, products liability, motor vehicle liability claims, premises, civil rights, school and municipal liability issues. Mr. Flaherty has tried over 100 cases to verdict in both State and Federal Courts.

Mr. Flaherty has been a member of the American Bar Association since 1974, the Nassau Bar Association since 1974, the Suffolk County Bar Association since 1980, the Nassau-Suffolk Trial Lawyers Association since 1980, the Hawaii State Bar Association since 1972.

Mr. Flaherty was admitted to practice before the Supreme Court of Hawaii in 1972; the New York State Appellate Division, Second Department in 1973; the United States District Court for the Southern and Eastern Districts of New York; the District of Hawaii in 1972-1973; the United States Court of Military Appeals in and the Supreme Court of the United States in 1986.

Mr. Flaherty has received Martindale-Hubbell, Inc., highest "AV" Rating.

Mr. Flaherty has lectured on trial techniques and medical issues, for the New York County Lawyer's Association, Nassau County Bar Association and the New York State Bar Association.

He has also conducted seminars on trial tactics and strategy in medical malpractice cases, including mock trials, at the New York University Medical School, St. John's Episcopal Hospital, the Suffolk County Podiatry Association, and the Suffolk County Medical Society. Mr. Flaherty has lectured on the issue of informed consent and related malpractice topics at seminars presented by the Medical Risk Management Advisory Corp.

Mr. Flaherty received his Juris Doctorate Degree from Fordham Law School where he was on Law Review and his Bachelor of Arts Degree from Villanova University. Additionally, he attended the Columbia University School of Law Masters Program and Molloy College School of Nursing.

22 NYCRR Part 700. Court Decorum

§ 700.1. Application of Rules

These rules shall apply in all actions and proceedings, civil and criminal, in courts subject to the jurisdiction of the Appellate Division of the Supreme Court in the Second Judicial Department. They are intended to supplement, but not to supersede, the Rules of Professional Conduct set forth in part 1200 of this Title and the Rules of Judicial Conduct set forth in part 100 of this Title. In the event of any conflict between the provisions of these rules and the Rules of Professional Conduct and/or the Rules of Judicial Conduct, the Rules of Professional Conduct and/or the Rules of Judicial Conduct shall prevail.

§ 700.2. Importance of Decorum in Court

The courtroom, as the place where justice is dispensed, must at all times satisfy the appearance as well as the reality of fairness and equal treatment. Dignity, order and decorum are indispensable to the proper administration of justice. Disruptive conduct by any person while the court is in session is forbidden.

§ 700.3. Disruptive Conduct Defined

Disruptive conduct is any intentional conduct by any person in the courtroom that substantially interferes with the dignity, order and decorum of judicial proceedings.

§ 700.4. Obligations of Attorneys

(a) Attorneys are both officers of the court and advocates. It is their professional obligation to conduct each case courageously, vigorously, and with all the skill and knowledge they possess. It is also their obligation to uphold the honor and maintain the dignity of the profession. They must avoid disorder or disruption in the courtroom and must maintain a respectful attitude toward the court. In all respects attorneys are bound, in court and out, by the provisions of the Rules of Professional Conduct.

(b) Attorneys shall use their best efforts to dissuade their client and witnesses from causing disorder or disruption in the courtroom.

(c) Attorneys shall not engage in any examination which is intended merely to harass, annoy or humiliate the witness.

(d) No attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on any objection without such permission. However, an attorney may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he or she may respectfully request reconsideration thereof.

(e) Attorneys have neither the right nor duty to execute any directive of a client which is not consistent with the Rules of Professional Conduct set forth in part 1200 of this Title. Nor may attorneys advise another to do any act or to engage in any conduct in any manner contrary to these rules.

(f) Once a client has employed an attorney who has entered an appearance, the attorney shall not withdraw or abandon the case without

(1) justifiable cause,

(2) reasonable notice to the client, and

(3) permission of the court.

(g) Attorneys are not relieved of these obligations by what they may regard as a deficiency in the conduct or ruling of a judge or in the system of justice; nor are they relieved of these obligations by what they believe to be the moral, political, social, or ideological merits of the cause of any client.

§ 700.5. Obligations of the Judge*

(a) In the administration of justice the judge shall safeguard the rights of the parties and the interests of the public. The judge at all times shall be dignified, courteous, and considerate of the parties, attorneys, jurors, and witnesses. In the performance of his duties, and in the maintenance of proper court decorum the judge is in all respects bound by the Canons of Judicial Ethics.

(b) The judge shall use his judicial power to prevent disruptions of the trial.

(c) A judge before whom a case is moved for trial shall preside at such trial unless he is satisfied, upon challenge or *sua sponte*, that he is unable to serve with complete impartiality, in fact or appearance, with regard to the matter at issue or the parties involved.

(d) Where the judge deems it appropriate in order to preserve or enhance the dignity, order and decorum of the proceedings, he shall prescribe and make known the rules relating to conduct which the parties, attorneys, witnesses and others will be expected to follow in the courtroom.

(e) The judge should be the exemplar of dignity and impartiality. He shall suppress his personal predilections, control his temper and emotions, and otherwise avoid conduct on his part which tends to demean the proceedings or to undermine his authority in the courtroom. When it becomes necessary during trial for him to comment upon the conduct of witnesses, spectators, counsel, or others, or upon the testimony, he shall do so in a firm and polite manner, limiting his comments and rulings to what is reasonably required for the orderly progress of the trial, and refraining from unnecessary disparagement of persons or issues.

(f) The judge is not relieved of these obligations by what he may regard as a deficiency in the conduct of any attorney who appears before him; nor is he relieved of these obligations by what he believes to be the moral, political, social, or ideological deficiencies of the cause of any party.

*(note to the reader- the use of the indeterminate masculine pronoun is no longer considered proper grammar [N.Y. L. Rep. Style Manual 12.1]

166 A.D.3d 43, 84 N.Y.S.3d 153, 2018 N.Y. Slip Op. 06708

**1 In the Matter of Gino L. Giorgini, III (Admitted as Gino Louis Giorgini, III), an Attorney, Respondent. Attorney Grievance Committee for the First Judicial Department, Petitioner.

Supreme Court, Appellate Division, First Department, New York
M-2305, M-3087
September 25, 2018

CITE TITLE AS: Matter of Giorgini

SUMMARY

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent was admitted to the bar on January 9, 1991, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department as Gino Louis Giorgini, III.

Respondent attorney was guilty of professional misconduct based upon charges pertaining to his comments in affirmations which went beyond the bounds of zealous advocacy and were derogatory, undignified and inexcusable and which evinced a flagrant disrespect for the judiciary and a fundamental disregard for the judicial process which he had been sworn to uphold (Code of Professional Responsibility DR 7-106 [c] [6]; DR 1-102 [a] [5], [7] [22 NYCRR 1200.37 (c) (6); 1200.3 (a) (5), (7)]). Under the totality of the circumstances, including that respondent had been cautioned by a justice overseeing the case and submitted a second offensive affirmation in the face of the unheeded warning, and that respondent did not express genuine remorse for his disrespectful conduct and consistently sought to justify his improper conduct by blaming the justices before whom he was trying cases, respondent was suspended from the practice of law for a period of three months.

HEADNOTE

Attorney and Client
Disciplinary Proceedings

Suspension

RESEARCH REFERENCES

Am Jur 2d Attorneys at Law §§ 37, 50, 113.

Carmody-Wait 2d Officers of Court §§ 3:298, 3:325, 3:332, 3:336.

22 NYCRR 1200.3 (a) (5), (7); 1200.37 (c) (6).

NY Jur 2d Attorneys at Law §§ 471, 511, 513, 515,

ANNOTATION REFERENCE

See ALR Index under Attorneys; Discipline and Disciplinary Actions.

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*44 Query: suspen! & criticism /4 court & disrespect

APPEARANCES OF COUNSEL

Jorge Dopico, *Chief Attorney*, *Attorney Grievance Committee*, New York City (*Kevin M. Doyle* of counsel), for petitioner.
Gino L. Giorgini, III, respondent pro se.**2

OPINION OF THE COURT

Per Curiam.

Respondent Gino L. Giorgini, III was admitted to the practice of law in the State of New York by the Second Judicial Department on January 9, 1991, under the name Gino Louis Giorgini, III. At all times relevant herein, respondent has maintained an office within the Second Department.

In September 2011, the Second Department transferred a disciplinary matter involving respondent to the First Judicial Department. In 2015, the Attorney Grievance Committee (AGC) brought six charges against respondent alleging violations of former Code of Professional Responsibility DR 7-106 (c) (6) (22 NYCRR 1200.37 [c] [6] [undignified or discourteous conduct which is degrading to a tribunal]), DR 1-102 (a) (5) (22 NYCRR 1200.3 [a] [5] [conduct prejudicial to the administration of justice]), and DR 1-102 (a) (7) (22 NYCRR 1200.3 [a] [7] [other conduct that adversely reflects on fitness as a lawyer]). In his answer, respondent denied all the charges and asserted affirmative defenses. Between December 2015 and September 2016, respondent brought two motions in which he requested that the charges be dismissed, or, in the alternative, that this matter be transferred back to the Second Department or the Referee removed. This Court denied the motions.

Charges 1 to 3 pertain to an affirmation respondent submitted in Supreme Court, Suffolk County in 2005 in support of a motion for reargument on behalf of his client W.C., after the court granted the defendants summary judgment dismissing the complaint. By way of example, addressing certain of the court's factual findings, respondent asserted that

> "I find it hard to believe that after the Court had the motion for 5 months to decide, that it could make up facts to support a finding . . . But then . . . if you do not read plaintiff's papers maybe it is possible. Close your eyes and wish for facts to *45 grant a defendant's summary judgment. I am sure it is not the first time it has happened in Suffolk County. . . .
>
> "WHERE DID THE COURT GET THIS?

> THIS IS STATED NO WHERE IN [Plaintiff's Expert's] REPORT. LA LA LAND, I COULD NOT MAKE THIS UP IF I TRIED. . . .
>
> "THIS IS LA LA LAND ON STEROIDS. . . . I CAN NOT COMPREHEND THE #%*%$^%* THAT IS THIS DECISION. . . . This is so bizzaro land that it is hard to type. What is even more pathetic is the case I cited (citation omitted) has been ignored."

In a February 2, 2006 order and decision, Justice Thomas Whelan granted reargument and reinstated W.C.'s complaint. However, he strongly criticized respondent, stating that his "vituperative criticism directed toward this Court . . . is totally unwarranted, completely unprofessional and . . . disrespectful to this Court." Justice Whelan also cautioned respondent that "[s]hould there be a recurrence of this type of unprofessional conduct, the Court may consider the imposition of sanctions under 22 NYCRR § 130-1.1 (c) (1) and referral to the Grievance Committee."

Charges 4 to 6 pertain to an affirmation respondent submitted in Supreme Court, Suffolk County in 2008 in connection with a motion to reargue in *Gemellis Fine Food, Inc. v Hoerning*, where the plaintiff sued to block termination of a commercial lease. In that affirmation, respondent demeaned the court and accused it and the Appellate Division of corruption, stating, among other things:**3

> "Nice Joke. DISGUSTING. . . . Can anyone say hello Department of Justice, where is someone suppose to turn when plaintiff's counsel openly puts forth that the court is on their side? And this was clearly stated in defendants papers. No sense appealing it, the attached Newsday article has [an] Appellate Judge [ ] hoping he is granted a meeting with the 'party leaders' so that he can be placed on the ballot to save his job. I'm sure we will get the same fair treatment there as well as with a party leader on the opposing side. Every judge in Suffolk County should recuse them self after that article from this case. No way to argue no bias. . . .
>
> ***46** "This is outrageous!!!!!!! How dare this court disrespect my elderly client for the benefit of some political contributors. I guess my reply/sur-reply was not read. I pointed this out in my first paragraphs Let me see . . . perjury. . . no problem . . . fraud . . . no problem . . . what a joke. I guess if you hire the right politically active lawyers like [opposing counsels] anything is excusable with this court. . . . I spent countless hours proving plaintiff's fraud; putting forth case law so on point that there is no issue of defendants prevailing and the Court doesn't read my papers. Do you know how angering that is. To me someone is stealing from my client and from me. . . .
>
> "Defendants took the effort to point out in detail how almost each and every one of [plaintiff's] 'receipts' were fake and manufactured in the days before the papers were filed. . . . The Court does not care about this? Fake evidence is ok? Lying is ok? Is this a Suffolk County rule? Does the office of Judicial Conduct and the Department of Justice know about this rule?"

Justice Arthur Pitts, who had granted the plaintiff injunctive relief, recused himself and the matter was assigned to Justice Ralph F. Costello, who denied the motion.

The Referee sustained charges 4 to 6, dismissed charges 1 to 3 and recommended that respondent be publicly censured. The AGC now moves to disaffirm the Referee's liability findings as to charges 1 to 3, confirm the Referee's liability findings as to charges 4 to 6, and disaffirm the Referee's sanction recommendation of a public censure and, instead, impose a six-month suspension. Respondent cross-moves to, among other things, disaffirm the Referee's findings and dismiss all charges.

Based on the evidence adduced, we find that all six charges against respondent alleging violations of former DR 7-106 (c) (6) and DR 1-102 (a) (5) and (7) have been established by a fair preponderance of the credible evidence and should be sustained. The record reflects that comments made by respondent which are the subject matter of this disciplinary proceeding went beyond the bounds of zealous advocacy and were derogatory, undignified and inexcusable. Respondent has evinced a flagrant disrespect for the judiciary and a fundamental disregard for the judicial process which he has been sworn to uphold. Far ***47** from expressing genuine remorse for his disrespectful conduct, respondent has consistently sought to justify his improper conduct by blaming the Justices before whom he was trying cases.

Further, as to charges 1 to 3, the Referee erred in not sustaining them because, as found by Justice Whelan, respondent's "vituperative criticism" was "totally unwarranted, completely unprofessional and . . . disrespectful to [the] Court." While Justice Whelan decided to caution respondent rather than sanction him or refer him to the AGC, he did note that respondent's manner was degrading to the profession and without reflection as to its effect on the integrity and dignity of the court. The Second Department's transfer order, which issued upon respondent's ****4** motion, in no way limited the AGC's prosecutorial discretion to incorporate the affirmation in the W.C. case into the charges, notwithstanding that the Second Department Grievance Committee chose not to do so.

As to charges 4 to 6, respondent accused the court of blatant political bias and corruption and disparaged his adversaries. As the Referee found, "[n]either the Code nor the Rules 'obligates,' much less permits, a lawyer to chastise a judge for what the lawyer speculates is corrupt political behavior on that judge's part in presiding over a matter or to effectively threaten the judge that he would be investigated by the Office of Judicial Conduct and the Department of Justice unless he reversed his opinion. Yet Respondent did so repeatedly."

In view of respondent's submission of a second offensive affirmation in *Gemellis*, in the face of Justice Whelan's prior, unheeded warning in the earlier case, a three-month suspension is appropriate (*see e.g. Matter of Teague*, 131 AD3d 268 [1st Dept 2015], *appeal dismissed* 26 NY3d 959 [2015], *lv denied* 26 NY3d 912 [2015]; *Matter of Dinhofer*, 257 AD2d 326 [1st Dept 1999];

Matter of Giampa, 211 AD2d 212, 213-216 [2d Dept 1995], *appeal dismissed* 86 NY2d 731 [1995], *cert denied* 516 US 1009 [1995]).

Accordingly, the AGC's motion to confirm in part and disaffirm in part is granted to the extent of affirming the Referee's liability findings sustaining charges 4 to 6, disaffirming the liability findings as to charges 1 to 3 and sustaining these charges, disaffirming the sanction recommendation of a public censure, and suspending respondent from the practice of law in the State of New York for a period of three months and until further order of this Court. Respondent's cross motion is denied in its entirety.

***48** Friedman, J.P., Richter, Andrias, Kapnick and Webber, JJ., concur.

Ordered that the Committee's motion is granted to the extent of affirming the Referee's liability findings sustaining charges 4 to 6; disaffirming the liability findings as to charges 1 to 3, and instead, sustaining those charges; disaffirming the sanction recommendation of a public censure; and suspending respondent from the practice of law in the State of New York for a period of three months, effective October 25, 2018, and until further order of this Court. Respondent's cross motion is denied in its entirety.

End of Document

32 N.Y.3d 121
Court of Appeals of New York.

In the MATTER OF **Terrence** C. **O'CONNOR**, a Judge of the Civil Court of the City of New York, **Queens** County.
Terrence C. **O'Connor**, Petitioner;
v.
New York State Commission on Judicial Conduct, Respondent.

No. 99
|
October 16, 2018

Synopsis
Background: Judge sought review of determination of New York State Commission on Judicial Conduct sustaining four charges of misconduct against him and concluding that he should be removed from office.

Holdings: The Court of Appeals held that:

[1] judge's conduct, including acting impatiently, raising his voice, making demeaning and insulting remarks, striking witness testimony and dismissing petitions for insufficient proof as a result of counsel's reflexive use of the word "okay," and failing to afford litigants the right to be heard before imposing counsel fees, violated Rules of Judicial Conduct, and

[2] removal was appropriate sanction.

Determined sanction accepted.

West Headnotes (9)

[1] **Judges**
Standards, canons, or codes of conduct, in general

Judge's conduct, including acting impatiently, raising his voice, making demeaning and insulting remarks, striking witness testimony and dismissing petitions for insufficient proof as a result of counsel's reflexive use of the word "okay," and failing to afford litigants the right to be heard before imposing counsel fees, violated Rules of Judicial Conduct requiring judges to maintain and observe high standards of conduct, mandating judges to respect and comply with the law and act in a manner promoting public confidence, prohibiting judges from allowing any type of relationship to affect judicial conduct, obligating judges to be faithful to and competent in the law, and requiring judges to be patient, dignified, and courteous. N.Y. Code of Jud. Conduct, Canons 1, 2(A), 2(B), 3(B)(1), 3(B)(3).

Cases that cite this headnote

[2] **Judges**
⇐Grounds and sanctions

The Court of Appeals may accept or reject the sanction for judicial misconduct determined by the New York State Commission on Judicial Conduct, impose a different sanction, or impose no sanction at all.

Cases that cite this headnote

[3] **Judges**
⇐Grounds and sanctions

The actual levels of discipline to be imposed by the Court of Appeals for judicial misconduct are institutional and collective judgment calls, which rest on the Court's assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of the Court.

Cases that cite this headnote

[4] **Judges**
⇐Grounds and sanctions

The sanction of removal for judicial misconduct should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment; however, the standard that removal should be imposed only in the event of truly egregious circumstances is measured with due regard to the fact that judges must be held to a higher standard of conduct than the public at large.

Cases that cite this headnote

[5] **Judges**
⇐Grounds and sanctions

The severe sanction of removal is warranted where a jurist has exhibited a pattern of injudicious behavior, which cannot be viewed as acceptable conduct by one holding judicial office, or an abuse of the power of his office in a manner that has irredeemably damaged public confidence in the integrity of the judge's court.

Cases that cite this headnote

[6] **Judges**
⇐Grounds and sanctions

Whether a judge's behavior crosses

the line of what constitutes truly egregious conduct, thus warranting removal, is a fact-specific inquiry because judicial misconduct cases are, by their very nature, sui generis.

Cases that cite this headnote

[7] **Judges**
Grounds and sanctions

Removal from office was appropriate sanction for judge's conduct, which included acting impatiently, raising his voice, making demeaning and insulting remarks, striking witness testimony and dismissing petitions for insufficient proof as a result of counsel's reflexive use of the word "okay," and failing to afford litigants the right to be heard before imposing counsel fees, all of which was significantly compounded by his persistent failure to cooperate with the investigation by the New York State Commission on Judicial Conduct, and fact that misconduct began within one year of a prior censure.

Cases that cite this headnote

[8] **Judges**
Grounds and sanctions

The Court of Appeals will not overlook the entirety of a judge's behavior in a judicial disciplinary proceeding and the extent to which it qualifies in the aggregate to the level and quality of egregiousness that merits the ultimate discipline of removal.

Cases that cite this headnote

[9] **Judges**
Grounds and sanctions

When a judge fails to cooperate with an investigation of the New York State Commission on Judicial Conduct, which is vested with the statutory authority to require the appearance of the judge involved before it, that dereliction can be a significant aggravating factor in determining the appropriate sanction for misconduct. N.Y. Judiciary Law § 44(3); N.Y. Comp. Codes R. & Regs. tit. 22, § 7000.3.

Cases that cite this headnote

Attorneys and Law Firms

**319 ***142 Edelstein & Grossman, New York City (Jonathan I. Edelstein of counsel),

for petitioner.

Robert H. Tembeckjian, Commission on Judicial Conduct, Albany (Edward Lindner, Mark Levine, Brenda Correa and Daniel W. Davis of counsel), for respondent.

OPINION OF THE COURT

Per Curiam.

***124** In this proceeding, petitioner, a Judge of the Civil Court of the City of New York, **Queens** County, seeks review of a determination of the New York State Commission on Judicial Conduct, sustaining four charges of misconduct against him and concluding that he should be removed from office (see N.Y. Const, art VI, § 22; Judiciary Law § 44). Upon plenary review of the record, we conclude that the charges are sustained by the evidence, and that the sanction of removal is appropriate.

The Commission served petitioner with a formal written complaint, alleging that he: failed to cooperate with the Commission's investigation (Charge I); was discourteous to lawyers in two civil cases by striking testimony after those lawyers said "okay" in response to witness answers, and then failed to comply with the law by dismissing those cases (Charge II); ***125** made impatient, discourteous, and undignified remarks to lawyers appearing before him in three bench trials (Charge III); and sua sponte awarded or threatened to award "counsel fees" on multiple occasions without providing the parties the opportunity to be heard or setting forth the basis for the awards, in violation of established law (Charge IV). After petitioner filed an answer denying any wrongdoing, the Commission designated a Referee to report findings of fact and conclusions of law. Following a hearing, the Referee sustained all of the charges.

The Commission subsequently determined that petitioner violated the Rules Governing Judicial Conduct, including Rule 100.1 (requiring judges to maintain and observe high standards of conduct to preserve the integrity and independence of the judiciary), Rule 100.2(A) (mandating that judges respect and comply with the law and act in a manner promoting public confidence in judicial integrity), Rule 100.2(B) (instructing that judges should *****143 **320** not allow any type of relationship to affect judicial conduct), Rule 100.3(B)(1) (obligating judges to be faithful to, and competent in, the law), and Rule 100.3(B)(3) (requiring judges to be patient, dignified and courteous to those with whom the judge deals in an official capacity). The Commission concluded that, "[v]iewed in its entirety, [petitioner's] conduct, seriously exacerbated by his failure to cooperate, demonstrate[ed] his unfitness for judicial office and thus warrant[ed] the sanction of removal." Petitioner sought this Court's review.

[1]Petitioner does not challenge the Commission's finding that he failed to cooperate with its investigation. However, he argues that his behavior underlying the

other charges was justified by the circumstances, including the "rough and tumble" nature of landlord-tenant litigation. We disagree. To be sure, judges must insist upon order and decorum in the courtroom (see Rule 100.3[B][2]). Nevertheless, the need to maintain order must be counterbalanced against a judge's obligations to remain patient and to treat those appearing before the court with dignity and courtesy (see Rule 100.3[B][3]). As we have explained, "respect for the judiciary is better fostered by temperate conduct, not hot-headed reactions" (Matter of Cerbone, 61 N.Y.2d 93, 96, 472 N.Y.S.2d 76, 460 N.E.2d 217 [1984]).

Here, the record is replete with evidence supporting the Commission's determination that, on numerous occasions, ***126** petitioner acted impatiently, raised his voice, and made demeaning and insulting remarks, often in open court. In so doing, he violated his obligation to treat those appearing before him with dignity and respect. In addition, as the Commission concluded, petitioner "abuse[d] [his] judicial power" when he twice struck witness testimony and dismissed petitions for insufficient proof as a result of counsel's reflexive use of the word "okay."

We cannot agree that petitioner's transgressions constituted, at most, "harmless" legal errors that should not serve as grounds for misconduct charges. As a threshold matter, a judge must respect and comply with the law, be faithful to it, and competent in it (see Rules 100.2[A]; 100.3[B][1]). In Matter of Jung (State Commn. on Jud. Conduct), this Court reiterated that legal error and misconduct "are not necessarily mutually exclusive," and further explained that "a pattern of fundamental legal error may be 'serious misconduct' " (11 N.Y.3d 365, 373, 870 N.Y.S.2d 819, 899 N.E.2d 925 [2008], quoting Matter of Reeves, 63 N.Y.2d 105, 109, 480 N.Y.S.2d 463, 469 N.E.2d 1321 [1984]). As described above, such a pattern was established here. Moreover, petitioner's failure to afford litigants the right to be heard before imposing counsel fees implicates a fundamental right (see Matter of Jung, 11 N.Y.3d at 372–373, 870 N.Y.S.2d 819, 899 N.E.2d 925 ["(t)he right to be heard is fundamental to our system of justice"]; see also Rule 100.3[B][6] [judges must "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard"]).[1] In any event, Matter of Jung did not establish that errors of law—particularly when coupled *****144 **321** with circumstances evincing a willful disregard for the proper administration of justice, as in the present matter—can never rise to the level of misconduct so long as no fundamental right is impacted.

Petitioner's reliance on Matter of Richter, 409 N.Y.S.2d 1013 (1977) is unpersuasive. There, it was alleged that a City Court Judge was intemperate and exceeded his authority by sentencing a criminal defendant in the absence of counsel and without providing notice that the sentencing was to be held earlier than scheduled. However, later that day, the Judge recognized the error, vacated the sentence, and resentenced the defendant ***127** in proper fashion. The Court on the Judiciary of New York[2] declined to sustain a charge of misconduct, reasoning that the "error was one of sheer inadvertence" and

"was harmless" (id. at 1015). In contrast, petitioner's failure to observe and follow the law resulted in substantial and unjustifiable adverse consequences for the parties that went uncorrected—namely the dismissal of their petitions and the imposition of fee awards. On this record, we conclude that the charges against petitioner are sustained by the evidence.

[2] [3]Turning to petitioner's challenge to the sanction of removal, this Court may "accept or reject the sanction determined by the commission, impose a different sanction, or impose no sanction at all" (Matter of Cunningham, 57 N.Y.2d 270, 274, 456 N.Y.S.2d 36, 442 N.E.2d 434 [1982]; see N.Y. Const, art VI, § 22[d]; Judiciary Law § 44[7]; see also Matter of Marshall, 8 N.Y.3d 741, 743, 840 N.Y.S.2d 561, 872 N.E.2d 247 [2007]). We have explained that "[t]he purpose of judicial disciplinary proceedings is not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents" (Matter of Duckman, 92 N.Y.2d 141, 152, 677 N.Y.S.2d 248, 699 N.E.2d 872 [1998] [internal quotation omitted]). "The actual levels of discipline to be imposed by the Court for judicial misconduct are, in the end, institutional and collective judgment calls," which "rest on [the Court's] assessment of the individual facts of each case, as measured against the Code and Rules of Judicial Conduct and the prior precedents of this Court" (id. [internal quotation omitted]; see Matter of Simon [State Commn. on Jud. Conduct], 28 N.Y.3d 35, 37, 41 N.Y.S.3d 192, 63 N.E.3d 1136 [2016]).

[4] [5] [6]This Court has long emphasized that "[r]emoval is an extreme sanction and should be imposed only in the event of truly egregious circumstances" (Matter of Cunningham, 57 N.Y.2d at 275, 456 N.Y.S.2d 36, 442 N.E.2d 434). The sanction of removal "should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment" (id.). However, "the truly egregious standard is measured with due regard to the fact that judges must be held to a higher standard of conduct than the public at large" (Matter of Going, 97 N.Y.2d at 127, 735 N.Y.S.2d 893, 761 N.E.2d 585 [internal quotation omitted]; see Matter of Ayres [New York State Commn. on Jud. Conduct], 30 N.Y.3d 59, 64, 63 N.Y.S.3d 737, 85 N.E.3d 1011 [2017]). Thus,

> "the severe sanction of removal is warranted where a jurist has exhibited a pattern of injudicious ***128** behavior ... which cannot be viewed as acceptable conduct by one holding judicial office or an abuse of the power of his office in a manner that ... has irredeemably damaged *****145 **322** public confidence in the integrity of [the judge's] court" (Matter of Jung, 11 N.Y.3d at 374, 870 N.Y.S.2d 819, 899 N.E.2d 925 [internal quotation marks omitted]).

"Whether a judge's behavior crosses the line of what constitutes 'truly egregious' conduct is a fact-specific inquiry because '[j]udicial misconduct cases are, by their very nature, sui generis' " (Matter of Ayres, 30 N.Y.3d at 64, 63 N.Y.S.3d 737, 85 N.E.3d 1011, quoting Matter of Blackburne [State Commn. on Jud. Conduct], 7 N.Y.3d 213, 219–220, 818 N.Y.S.2d 824, 851 N.E.2d 1175 [2006]).

[7] [8] [9]Here, petitioner's comments in open court were intemperate and inconsistent with appropriate judicial demeanor. In addition, his sustained pattern of inappropriate behavior evinced a lack of understanding of his role as a judge—most notably by disregarding the law and impinging on the fundamental right to be heard—thus eroding the public's trust and confidence in the integrity of the judiciary. Critically, petitioner's "misconduct was significantly compounded by [his] persistent failure to cooperate with the Commission investigation" (Matter of Mason [State Commn. on Jud. Conduct], 100 N.Y.2d 56, 60, 760 N.Y.S.2d 394, 790 N.E.2d 769 [2003]; see Matter of Cooley, 53 N.Y.2d 64, 66, 440 N.Y.S.2d 169, 422 N.E.2d 814 [1981]).[3] In that regard, petitioner maintains that his underlying conduct, standing alone, would ordinarily result in no more than a censure, and that his failure to cooperate fully with the Commission's investigation should not elevate the sanction to removal. We reject this argument. This Court will not overlook the entirety of a judge's behavior and the extent to which it "qualif[ies] ***129** in the aggregate to the level and quality of egregiousness that merit[s] the ultimate discipline of removal" (Matter of Roberts, 91 N.Y.2d 93, 95, 666 N.Y.S.2d 1017, 689 N.E.2d 911 [1997] [emphasis added]). The power of the Commission to investigate allegations of misconduct lodged against judges is derived from the State Constitution and statute (see N.Y. Const, art VI, § 22; Judiciary Law, article 2–A). Indeed, it is well settled that, when a judge fails to cooperate with an investigation of the Commission—which is vested with the statutory authority to "require the appearance of the judge involved before it" (Judiciary Law 44[3]; see 22 NYCRR 7000.3[e])—that dereliction can be a significant aggravating factor in determining the appropriate sanction for misconduct (see Matter of Mason, 100 N.Y.2d at 60, 760 N.Y.S.2d 394, 790 N.E.2d 769; see Matter of Cooley, 53 N.Y.2d at 66, 440 N.Y.S.2d 169, 422 N.E.2d 814).

The Rules provide that a judge "should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved" (Rule 100.1). Judges are also charged with promoting public confidence in the integrity of the judiciary through their own respect for *****146 **323** the law (Rule 100.2[A]). Public confidence in the integrity of the judiciary has long been recognized as essential to its vitality as well as our overall system of government (see generally United States v. Lee, 106 U.S. 196, 223, 1 S.Ct. 240, 27 L.Ed. 171 [1882]). If the public trust in the judiciary is to be maintained, as it must, those who don the robe and assume the role of arbiter of what is fair and just must do so with an acute appreciation both of their judicial obligations and of the Commission's constitutional and statutory duties to investigate allegations of misconduct (see N.Y. Const, art VI, § 22; Judiciary Law, article 2–A). In short, willingness to cooperate with the Commission's investigations and proceedings is not only required—it is essential. Here, in addition to a sustained pattern of inappropriate behavior in the courtroom, petitioner repeatedly failed to appear before the Commission, and engaged in other conduct demonstrating his

unwillingness to cooperate fully with the investigation. Under all of the relevant circumstances, and considering petitioner's conduct as a whole, we conclude that the determined sanction of removal is warranted. Petitioner's remaining contentions lack merit.

Accordingly, the determined sanction should be accepted, without costs, and **Terrence** C. **O'Connor** removed from the office of Judge of the Civil Court of the City of New York, **Queens** County.

Chief Judge DiFiore and Judges Rivera, Stein, Fahey, Garcia, Wilson and Feinman concur.

***130** Determined sanction accepted, without costs, and **Terrence** C. **O'Connor** removed from the office of Judge of the Civil Court of the City of New York, **Queens** County.

All Citations

32 N.Y.3d 121, 112 N.E.3d 317, 87 N.Y.S.3d 140, 2018 N.Y. Slip Op. 06852

Footnotes

1 Upon our independent review of the record, and according due deference to the credibility determinations of the Commission (see Matter of Going, 97 N.Y.2d 121, 124, 735 N.Y.S.2d 893, 761 N.E.2d 585 [2001]), we conclude that the record amply supports the Commission's determination that petitioner did, in fact, award counsel fees without providing the party ordered to pay those fees an opportunity to be heard, which practice contravened the applicable rules governing the award of costs and sanctions (see 22 NYCRR 130–1.1[a], [d]).

2 The Court on the Judiciary was an ad hoc judicial disciplinary body that was abolished, pending resolution of those cases which had already been commenced before it, when the present Commission was created (see N.Y. Const, art VI, § 22[j]).

3 Petitioner's "prior censure further supports the finding that [his] future retention of office is inconsistent with the fair and proper administration of justice" (Matter of Kuehnel v. State Commn. on Jud. Conduct, 49 N.Y.2d 465, 470, 426 N.Y.S.2d 461, 403 N.E.2d 167 [1980]). Notably, the misconduct underlying this proceeding began within one year of the prior censure. While petitioner discounts the significance of that censure on the basis that it involved dissimilar conduct, this Court has explained that "[t]he mere existence of a prior censure would be noteworthy regardless of whether it was related to the instant misconduct" and "a heightened awareness of and sensitivity to any and all ethical obligations would be expected of any judge after receiving a public censure" (Matter of Doyle [State Commn. on Jud. Conduct], 23 N.Y.3d 656, 662, 993 N.Y.S.2d 531, 17 N.E.3d 1127 [2014]). "Petitioner's failure to exercise that vigilance within just a year of h[is] prior discipline is persuasive evidence that [ ]he lacks the judgment necessary to h[is] position" (id.).

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2019 WL 1442744
Supreme Court, Appellate Division, First Department, New York.

In the MATTER OF Adam L. BAILEY, (Admitted as Adam Baily), an Attorney and Counselor-at-Law: Attorney Grievance Committee for the First Judicial Department, Petitioner,
v.
Adam L. Bailey, (OCA Atty. Reg. No. 2754216) Respondent.

M–6219
|
CM-293
|
April 02, 2019

Synopsis
Background: Disciplinary proceedings were brought against attorney.

[Holding:] The Supreme Court, Appellate Division, held that four-month suspension and a referral for counseling was appropriate sanction.

Suspension ordered.

West Headnotes (1)

[1] Attorney and Client

Four-month suspension and a referral for counseling was appropriate sanction for attorney who violated professional rules by engaging in undignified or discourteous conduct before a tribunal, conduct prejudicial to the administration of justice, conduct that adversely reflected on his fitness as a lawyer, and who threatened criminal charges solely to obtain an advantage in a civil matter, by entering arbitration hearing being held in his law firm during witness's testimony, taking photographs, and stating the photos would be in the newspaper "after we kick your asses," and in threatening resident of building owned by a client with defamation suit and a purported criminal complaint; attorney has twice been admonished for inappropriate litigation behavior, and he did not take full responsibility for his conduct. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0.

Cases that cite this headnote

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, Adam L. Bailey, was admitted to the Bar of the State

of New York at a Term of the Appellate Division of the Supreme Court for the First Judicial Department on May 6, 1996.

Attorneys and Law Firms

Jorge Dopico, Chief Attorney, Attorney Grievance Committee, New York, (Remi E. Shea, of counsel), for petitioner.

Michael S. Ross, Esq., for respondent.

Hon. Dianne T. Renwick, Justice Presiding, Rosalyn H. Richter, Sallie Manzanet–Daniels, Troy K. Webber, Ellen Gesmer, Justices.

Opinion

PER CURIAM

***1** Respondent Adam L. Bailey was admitted to the practice of law in the State of New York by the First Judicial Department on May 6, 1996, under the name Adam Bailey, and has maintained an office for the practice of law within the First Judicial Department at all relevant times.

He is the sole equity partner and founding owner of the law firm **Adam Leitman Bailey**, PC, which focuses on the practice of real estate law. The firm employs 26 attorneys and 24 legal support staff.

In 2017, the Attorney Grievance Committee (AGC) commenced this proceeding by filing a petition alleging that respondent had violated the following New York Rules of Professional Conduct (22 NYCRR 1200.0):(1) rule 3.3(f)(2) (undignified or discourteous conduct before a tribunal), (2) rule 3.3(f)(4) (conduct intended to disrupt a tribunal), (3) rule 8.4(d) (conduct prejudicial to the administration of justice), (4) rule 3.4(e) (threatening criminal charges solely to obtain an advantage in a civil matter), and (5) rule 8.4(h) (conduct that adversely reflects on counsel's fitness as a lawyer).

In April 2018, respondent submitted an answer in which he admitted to all of the charges but contested whether some of the alleged misconduct was intentional. The parties then submitted a joint stipulation of disputed and undisputed facts. By unpublished order dated June 27, 2018, this Court accepted the parties' stipulation and appointed a referee to conduct a sanction hearing.

The allegations in the petition concerned respondent's conduct in two different matters. The first occurred in November 2016, when the second day of an arbitration hearing was being conducted in a conference room at respondent's law firm, which represented one of the parties. Respondent, who was not handling the arbitration, entered the conference room in the middle of a witness's testimony, started taking photographs with his phone, and stated:

> "This will be in the newspaper when I put this in there after we kick your asses. You should be ashamed of yourselves for kicking people out of a building and you have to live with yourself."

The petition alleged that respondent's conduct violated Rules 3.3(f)(2), 3.3(f)(4), and 8.4(d).[1]

*2 In the second matter, respondent's firm represented the owner of several residential buildings. A resident of one of these buildings, James Dawson, allegedly made postings to a website accusing the owner of overcharging tenants. Respondent sent a letter to Dawson dated September 7, 2016, accusing him of creating a false and defamatory website and demanding that he take it down or face a lawsuit. Respondent received no response to this letter.

On September 13, 2016, respondent sent Dawson a text message which read, in relevant part:

> "We are filing a lawsuit against you for millions of dollars of damages you have caused as a result of your defamatory website.... We are also in contact with the location [sic] police station and we have a copy of the complaint your ex-girlfriend filed against you and we will be using all means necessary to protect our clients."[2]

Later on the same day, respondent telephoned Dawson, who recorded the conversation. Respondent told Dawson, inter alia, that Dawson was "not that bright," and that, if he did not take the website down, he would "be bankrupt soon." Respondent told Dawson that he "should commit suicide .... [y]ou're one of those people in the world that really should just kill themselves because you're worthless." While still on the phone with Dawson, respondent said to a person in his office about Dawson "start the lawsuit.... I need him arrested.... I gotta get this guy. He's gotta be arrested." Respondent told Dawson that respondent's employee who would be "running the investigation" of Dawson "used to run the district attorney's office," and claimed that respondent's office was "in contact" with the District Attorney's office. He told Dawson, "[y]ou have no idea what you stepped into.... Welcome to my world. Now you're my bitch .... you're gonna be paying for this heavily for the rest of your life."[3]

The petition alleged that this conduct violated rules 3.4(e) and 8.4(h).

Following the disciplinary hearing, the Referee recommended a three-month suspension. The Referee noted that respondent and his law firm have previously been admonished by the AGC in 2011 and 2014, respectively, and that in those matters, as in the instant one, respondent "engaged in excessively aggressive behavior while representing a client .... [,] failed to conduct himself within the bounds of propriety, and ... violated one or another Rule." The Referee found that respondent had never apologized to the arbitrator, the witness whose testimony respondent interrupted, or to Mr. Dawson. He further found that respondent:

> "showed remorse, and is unquestionably very sorry [ ] that his actions have caused his present problems. However, he refuse[d] to take full responsibility for his actions, which would include admitting he knew that he was interrupting an arbitration, properly apologizing, and recognizing that his aggressive litigation tactics must be controlled."

Finally, the Referee acknowledged respondent's testimony about what he asserted were mitigating factors, including difficulties he was experiencing as the parent of a newborn, but noted that "lawyers

are required to control their emotions, and his problems are unrelated to his misbehavior."

*3 The AGC now moves to confirm the Referee's report, and seeks imposition of the recommended sanction of three months' suspension. Respondent opposes the AGC's motion and cross-moves for a sanction of public censure.

This Court has sometimes interposed public censure as a sanction for comparable behavior (*see Matter of Delio,* 290 A.D.2d 61, 731 N.Y.S.2d 171 [1st Dept. 2001]; *Matter of Schiff,* 190 A.D.2d 293, 599 N.Y.S.2d 242 [1st Dept. 1993]; *Matter of Golub,* 190 A.D.2d 110, 597 N.Y.S.2d 370 [1st Dept. 1993]). However, in such cases, the respondent has generally acknowledged the scope of his wrongdoing and apologized to those affected. In addition, there are generally other mitigating circumstances, such as an unblemished prior history. Neither of those factors is present here. Accordingly, respondent's cross motion seeking a sanction of public censure should be denied.

This Court has **suspended** attorneys for similar behavior for between three and six months (*see Matter of Giorgini,* 166 A.D.3d 43, 84 N.Y.S.3d 153 [1st Dept. 2018], *appeal dismissed* 32 N.Y.3d 1134, 92 N.Y.S.3d 170, 116 N.E.3d 654 [2019]; *Matter of Teague,* 131 A.D.3d 268, 15 N.Y.S.3d 312 [1st Dept. 2015], *appeal dismissed* 26 N.Y.3d 959, 17 N.Y.S.3d 76, 38 N.E.3d 821 [2015], *lv denied* 26 NY3d 912, 43 N.E.3d 374 [2015]; *Matter of Sondel,* 111 A.D.3d 168, 974 N.Y.S.2d 15 [1st Dept. 2013]; *Matter of Kahn,* 16 A.D.3d 7, 791 N.Y.S.2d 36 [1st Dept. 2005]).

Here, the conduct with which respondent has been charged did not occur over many years and affect numerous persons like the conduct described in *Matter of Kahn.* In addition, unlike the respondent in *Matter of Sondel,* respondent here has not been held in contempt of court for the conduct with which he was charged. However, he has twice previously been admonished by the AGC for inappropriate litigation behavior. Given this and his failure to take full responsibility for the conduct that led to the instant proceeding, we find that a four-month suspension and a referral to the New York City Bar Association's Lawyer Assistance Program for counseling is an appropriate sanction in this case.

Accordingly, the AGC's motion should be granted to the extent of confirming the Referee's finding of facts and conclusions of law, the sanction recommendation disaffirmed, respondent is **suspended** from the practice of law for a period of four months, and until further order of this Court, and respondent is directed to engage in counseling for a period of up to one year, as determined and monitored by the New York City Bar Association's Lawyer Assistance Program. Respondent's cross motion should be denied.

All concur.

The Committee's motion (M–6219, —— A.D.3d ——, —— N.Y.S.3d ——) is granted

to the extent of confirming the referee's findings of fact and conclusions of law. The sanction recommendation is disaffirmed, and respondent is **suspended** from the practice of law in the State of New York for a period of four months, effective May 3, 2019, and until further order of this Court. Respondent is directed to engage in counseling for a period of up to one year, as determined and monitored by the New York City Bar Association's Lawyer Assistance Program. The cross motion (CM–293, —— A.D.3d ——, —— N.Y.S.3d ——) is denied.

All Citations

--- N.Y.S.3d ----, 2019 WL 1442744, 2019 N.Y. Slip Op. 02487

Footnotes

1 Respondent claimed at the hearing of this disciplinary matter that he believed the parties were engaging in a settlement conference, not a hearing, when he entered the conference room, but did not otherwise deny the charges in the petition. The Referee did not credit respondent's testimony, noting that the hearing was in its second day, and that respondent could see that a formal proceeding was under way through the clear glass wall.

2 Respondent did not present a copy of any complaint filed against Dawson by his ex-girlfriend at the hearing of this disciplinary matter.

3 Respondent presented no evidence at the disciplinary hearing that his firm ever filed suit against Mr. Dawson.

54 Misc.3d 1222(A)
Unreported Disposition
(The decision is referenced in the New York Supplement.)
Supreme Court, Suffolk County, New York.

Thomas BARR, IV, Petitioner,
v.
The ATTORNEY GENERAL OF the STATE OF NEW YORK; Sills, Cummis & Gross, P.C.; Bentley Motors Limited; Bentley Motors Inc.; EAC Inc. d/b/a EAC Network–Long Island Dispute Resolution Centers; and Barry Cohen, Esq., Respondents.

No. 20747/2015.
|
March 2, 2017.

Attorneys and Law Firms

Herbert A. Smith, Jr., Esq., Huntington, for Petitioner.

Eric Schneiderman, Attorney General of the State of New York by, Rachael C. Anello, Assistant Attorney General of the State of New York, Hauppauge.

William R. Tellado, Esq., Joseph Buckley, Esq., Sills Cummis & Gross, PC, Newark, NJ, Attorneys for Defendants.

David A. Goldsmith, Esq., Sills Cummis & Gross, PC, New York.

Thomas Barr, IV, Esq., Sag Harbor, pro se.

Barry Cohen, Esq., Hauppauge, pro se.

Opinion

JAMES HUDSON, J.

***1** Upon the following papers numbered *1 to 36* on this Motion/Order to Show Cause for CPLR Article 78 (motion sequence 001); Notice of Motion/Order to Show Cause and supporting papers *1–15;* Notice of Cross motions (sequence 002) for an *Order Dismissing the Proceeding,* motion and supporting papers *16,* (motion sequence 003) for Dismissal motion and support papers 17; Answering Affidavits and supporting papers 18–33, 34–35; Replying Affidavits and supporting papers 0; Other Memorandum of Law 36; (and after hearing counsel in support and opposed to the motion), it is

ORDERED, that Petitioner's application for the Court to recuse itself from hearing this case is denied; and it is further

ORDERED, that Petitioner's application to disqualify the law firm of Sills, Cummis & Gross, P.C. from representing Respondents, Bentley Motors Limited and Bentley Motors, Inc, is denied; and it is further

ORDERED, that the motion of Respondent, the New York State Attorney General, to dismiss the Article 78 proceeding as to him is granted (CPLR Rule 3211); and it is further

ORDERED, that the motion of Respondent, Bentley Motors Limited, to dismiss the Article 78 proceeding as to it is also granted (CPLR Rule 3211); and it is further

ORDERED, that the stay imposed by Order of this Court dated December 10, 2015 (Tarantino, J.) upon the arbitration proceeding identified as NC–1215638 is hereby vacated; and it is further

ORDERED, that the parties shall appear at **The New York State Supreme Court of Suffolk County, One Court Street, Part XL, on Tuesday, April 11, 2017 at 11:00 am,** for the purpose of conducting a hearing on the issue of **sanctions** to be levied against Petitioner, **Thomas Barr** IV, Esq. (22 NYCRR § 130–1.1).

Petitioner, **Thomas Barr** IV, Esq., through his attorney, Herbert A. Smith, Jr., Esq., brings this proceeding pursuant to CPLR Article 78 (motion sequence 001) against the New York State Attorney General (hereinafter referred to as the "Attorney General" or "Mr. Schneiderman"), Bentley Motors Limited, Bentley Motors, Inc., the law firm which represents the Bentley corporations, Sills, Cummis & Gross, P.C. (hereinafter referred to as 'SCG'), EAC, Inc., d/b/a EAC Network—Long Island Dispute Resolution Centers and Barry Cohen, Esq. Petitioner seeks the relief of *mandamus* against Respondents, requesting that the Court compel New York's Attorney General to join Respondent, Bentley Motors Limited, to an arbitration proceeding under New York General Business Law § 198–a which has been previously brought by Petitioner and which has been temporarily stayed. The subject matter of the arbitration is a 2013 Bentley automobile which Petitioner purchased at an authorized dealership in New York City and had serviced at a second authorized dealership on Long Island. Petitioner further seeks an order from the Court disqualifying Respondents' attorneys from representing the Bentley Motors corporations in the arbitration proceeding.

***2** The Attorney General moves (motion sequence 002) for an order dismissing the proceeding pursuant to CPLR Rule 3211(a)(7) for the failure on the part of Petitioner to state a cause of action against him. Respondent, Bentley Motors Limited, moves (motion sequence 003) for dismissal pursuant to CPLR Rule 3211(a)(8) for lack of personal jurisdiction. Respondent, SCG, opposes Petitioner's application to have it disqualified. The remaining Respondents have not filed papers. The Court considers all three motion sequences together here in the interest of judicial economy.

Prior to addressing the respective applications, the Court must consider a motion by Mr. Barr for the Court to recuse itself. Counsel for SCG opposes the motion for recusal.

The gravamen of the motion for recusal is that the incendiary nature of the language contained in correspondence between the parties will predispose the Court against Mr. Barr and prevent a fair adjudication of his claims. For the reasons discussed herein, the Court disagrees.

There is no basis for recusal under Judiciary Law § 14 nor under the common law (*Caperton v. A.T. Massey Coal Co.*, 556

U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 [2009]). Thus the Court must look to the provisions of the Rules of Judicial Conduct and case law to determine if recusal is warranted.

None of the specific subdivisions found in 22 NYCRR § 100.3[E] which require disqualification are present in the case before the Court. Mr. Barr's argument, therefore, comes under the purview of 22 NYCRR § 100.3[E][1] which reads "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Additionally, it could be argued that our deciding these applications creates an appearance of impropriety in violation of 22 NYCRR § 100.2.

We must consider that the reason for Mr. Barr's request concerns the negative impression this Court may hold based upon language used in his correspondence. This argument can be brought to bear on any jurist hearing these applications. If the Court were to recuse on the basis offered, the same circumstances could easily be repeated and my colleagues placed in a similar dilemma. Regardless of the outcome, any jurist could have their impartiality questioned under these circumstances. This Court asserts that a claim of lack of impartiality would be as unreasonable in being directed towards this Court as any other. The Court cannot embrace a position which would allow litigants "... a license under which the judge would serve at their will" (*Spremo v. Babchik,* 155 Misc.2d 796, 799–800, 589 N.Y.S.2d 1019, 1022 [Sup.Ct. Queens Co.1992], aff'd as modified, 216 A.D.2d 382, 628 N.Y.S.2d 167 [2nd Dept.1995] citing *Davis v. Board of School Commrs.,* 517 F.2d 1044 [5th Cir.1975], cited in *People v. Diaz,* 130 Misc.2d 1024, 498 N.Y.S.2d 698; *U .S. v. Grismore,* 564 F.2d 929 [10th Cir.1977]).

Under these circumstances it is up to the conscience and discretion of the Court to determine if we should disqualify ourselves (*People v. Harris,* 133 AD3d 880, 22 N.Y.S.3d 62 [2nd Dept.2015], leave to appeal denied, 26 NY3d 1145 [2016]). The Court, having searched its conscience, is comfortable in assuring the parties that it can be fair and impartial in this case (*Silber v. Silber,* 84 AD3d 931, 923 N.Y.S.2d 131 [2nd Dept.2011]). Therefore, the motion for the Court to recuse is denied.

***3** We now address the question of the disqualification of Respondent law firm, Sills, Cummis & Gross, P.C. from handling the arbitration. It is beyond cavil that "... a movant seeking disqualification of an opponent's counsel bears a heavy burden" (*Mayers v. Stone Castle Partners, LLC,* 126 AD3d 1 [1st Dept 2015]).

Petitioner avers that SCG must be disqualified from representing the Bentley Motors Respondents as Counsel, Joseph L. Buckley, Esq. (who is referred to in Petitioner's papers as 'William Buckley'), will necessarily be called as a witness based upon representations made in communications with Petitioner. Petitioner relies for his argument on a body of case law which stands for the proposition that when an attorney will necessarily be called as a witness in the litigation, that attorney must withdraw from representing a party in the action (*Mondello v. Mondello,* 118 A.D.2d

549 [2nd Dept 1986]; *Schmidt v. Magnetic Head Corporation,* 101 A.D.2d 268 [2nd Dept 1984]; *Guterman v. Meehan,* 78 A.D.2d 618 [1st Dept 1980]). These cases, however, involve instances where the attorney had a clear conflict arising from the representation. In *Mondello, supra,* the attorney in question in this matrimonial action for divorce of a marriage, was conflicted in his representation of defendant husband where he had represented the couple on the purchase of their marital home. In *Schmidt v. Magnetic Head, supra,* the issue of disqualification arose out of the attorneys representing the parties in separate shareholders derivative suits and conflicts arising out of ownership interests in those corporations and the corporate parties. As such, these cases can clearly be distinguished from the instant one. In *Guterman v. Meehan, supra,* the First Department did not discuss the underlying facts which made it "... obvious that a member of the firm would likely be called as a witness." While the facts in that case may have made the attorney's necessity to testify as a witness obvious, the facts in the present case do not rise to this level. Petitioner avers that his communications with Mr. Buckley make it necessary to call him as a witness in the arbitration. Respondents argue that the attorneys for the Bentley Respondents merely relayed their clients' positions and policies to Petitioner. The same information which Mr. Buckley disseminated to Petitioner is available through the parties or third party witnesses, such as experts. The Court agrees with Respondents contentions. Petitioner has not shown conclusively that Respondent law firm nor any of its associates or partners may be required to testify. The subject matter relevant to the arbitration will be given in the form of testimony by corporate representatives, not counsel, whose testimony is neither necessary nor relevant to Respondents' proofs in this matter. This Court is well within its discretion in denying Petitioner's application (*see, S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.,* 69 N.Y.2d 43 [1987]). The Court is obliged to deny the application.

*4 Turning to the question of dismissal as against the Attorney General, Ms. Anello asserts that Mr. Schneiderman is neither a proper party to the Article 78 proceeding nor to the arbitration. Pursuant to CPLR Art. 75, the proper parties to an arbitration brought by way of N.Y. Gen Bus Law § 198–a, the "Lemon Law," are the consumer and the manufacturer or its representative. New York's New Car Lemon Law provides consumers who allege that their vehicle does not conform to its warranty and qualifies for New Car Lemon Law relief, with the option of either commencing a legal action within four years of the date of delivery of the car to the consumer, or submitting their dispute to binding arbitration pursuant to a program established by the Attorney General. The program is administered by an independent arbitration firm appointed by Mr. Schneiderman and receives its authority through 13 NYCRR § 300.3. The Attorney General is responsible for establishing the regulations pursuant to which the program is conducted, Gen Bus Law § 198–1(k); 13 NYCRR Part 300. The Attorney General reviews and screens all application forms for arbitration to determine if they qualify facially for arbitration and accepts or rejects them. Those application forms that are accepted because they allege sufficient facts

to qualify for relief under the New Car Lemon Law are referred to the Administrator for processing and arbitration, 13 NYCRR § 300.3, 300.6, 300.7. The Administrator is the New York State Dispute Resolution Association (hereinafter referred to as 'NYSDRA'). NYSDRA forwards the matter for arbitration to a local dispute resolution center, which in this case is Respondent EAC, Inc. and its agent Barry Cohen, Esq. The New York Lemon Law Arbitration program was established to provide an alternative arbitration mechanism "... to promote the independent, speedy, efficient and fair disposition of disputes" arising under the new and used car lemon laws, 13 NYCRR § 300.1(b). As pointed out by AAG Ms. Anello, her office serves only in an administrative role in the process to provide the true parties with a fair and just forum within which to conduct the arbitration and resolve the arbitration and resolve their dispute in a fair and expeditious manner. The Attorney General is not a necessary nor a proper party to the arbitration proceeding and his motion to dismiss is granted, CPLR Rule 3211(a)(7).

The Court next considers the motion of Bentley Motors Limited for an order of dismissal. Bentley Motors, Inc. is a corporate entity which is registered to do business in New York. It is the U.S. distributor and importer of Bentley automobiles. It is also the company which issued the warranty for Petitioner's vehicle. NY Gen Bus Law § 198–a is a warranty law and is only applicable if the vehicle does not conform to the warranty. There is no requirement that a manufacturer provide its own express warranty. NY Gen Bus Law § 198–a does not preclude a manufacturer from delegating the issuance of an express warranty for its vehicle to another entity. In the instant case, the manufacturer is a foreign entity, Bentley Motors Limited (hereinafter referred to as 'BML') with its offices in England.

*5 BML has delegated a domestic corporation, Bentley Motors Inc. (hereinafter referred to as 'BMI'), to issue a warranty on its behalf for its vehicles sold in this Country. In this case, BMI is the entity that stands behind the product. Because BMI issued the warranty for Petitioner's vehicle, is authorized to do business in New York and since BML is a foreign corporation, BMI is the proper party to the underlying Lemon Law arbitration. BML's application to dismiss this proceeding as against it is granted pursuant to CPLR Rule 3211(7).

Finally, the Court finds it necessary to turn its attention to very disturbing language contained in correspondence between counsel and the Court. Messrs. Buckley, and Tellado, representing the Respondent, SCG, have brought before the Court certain emails and faxes received from Mr. Barr. Mr. Tellado has attached Mr. Barr's correspondence as exhibits to his papers. The Court has also received (via fax) communications from Mr. Barr.

"O tempora o mores!"[1] The Court is saddened that the exclamation of the immortal Cicero in his first oration against Cataline should find employment in the case before us. It is with great consternation that the Court recounts what was received from a person purporting to be an attorney and hence, a gentleman.

A series of communications containing grievously insulting language, often of a racial nature was received by defense counsel. In one communication a cover illustration was included from a 19th Century novel or musical broadsheet. It depicts a demeaning racial stereotype of those times. In a letter to the Court requesting recusal, an inquiry is made as to my race. A female attorney is referenced in a particularly graphic and clinical manner. There is what appears to be a threat against the Court in the event that I do not grant his request for recusal:

> "Hudson—soon as I get finished with the racists business ... what with the appeals which will now include first amendment stuff that I will be forced to charge him with—that the PTBS[2] has drug him into—he's going to take recusal out like a shot and thank me for the opportunity ... And if he does not take the easy way out—which you boys better pray he does—than I will drop the smoking gun on him ..." (letter of Mr. Tellado dated February 10th, 2017, Exhibit "A").

Additionally, correspondence sent directly to this Court has included language which could only be interpreted as racist and inflammatory, utilizing the slang of the "Uncle Remus" stories as well as utter vulgarities to emphasize his points. Decorum prevents the Court from further reciting, in detail what is included in the letters. Suffice to say that it is offensive by any reasonable analysis.

22 NYCRR § 130–1.1 provides that:

> "a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from **frivolous** conduct as defined in this Part."

***6** The rule further states at subdivision [c] that "... conduct is **frivolous** if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."

22 NYCRR 130.1–1(d) and attendant case law state that the person against whom the Court is considering **sanctions** must be afforded "... a reasonable opportunity to be heard" and that the "form of the hearing shall depend upon the nature and conduct and circumstances of the case" (*see, Wagner v. Goldberg,* 293 A.D.2d 527, 528, 739 N.Y.S.2d 850, 851 [2nd Dept. July 24, 2002]; *Cangro v. Cangro,* 272 A.D.2d 286, 707 N.Y.S.2d 895 [2nd Dept.2000]).

It must be proven that Mr. Barr is indeed the author of these missives. In these days of identity theft, the Court is mindful that these

communications were via fax and the medium of email. The Court would prefer to believe that these statements are not the words of an admitted attorney, but instead that all parties and the Court have been the victim of some elaborate hoax of which Mr. Barr is also an unwitting victim. As the Bard of Avon observed "The truth will out."

Since one of the communications made reference to "... first amendment stuff," (sic) the Court wishes to place the parties on notice that any claim of the aforementioned communications being protected by the First Amendment is rejected by this Court as utterly specious. In regards to a free speech argument in a **sanctions** proceeding, it is well settled law that "[e]nforcement of the **sanctions** rule is essential to deter conduct that wastes judicial resources and inhibits the proper administration of the court system. Any effect it may have on substantive rights ... is merely incidental and not prohibited" (*Gordon v. Marrone,* 202 A.D.2d 104, 111, 616 N.Y.S.2d 98, 102 [2nd Dept.1994]).

The hearing shall be conducted in the following manner: The offending communications will be marked as Court exhibits and the Court will hear evidence from the defense on the question of the authorship of same. Mr. Barr will be given the opportunity to be heard on the issue of the authorship of the communications and the propriety of **sanctions** relating thereto. The Court will not hear evidence or argument relating to Mr. Barr's claims concerning his automobile or the motions which are otherwise the subject of this decision.

The Respondents Bentley Motors Limited and Bentley Motors, Inc., are directed to serve a copy of this Order personally on Mr. Barr within fourteen days from the issuance of this decision.

The foregoing constitutes the decision and Order of the Court.

All Citations

54 Misc.3d 1222(A), 54 N.Y.S.3d 609 (Table), 2017 WL 887217, 2017 N.Y. Slip Op. 50271(U)

Footnotes

1 "Alas the times and the manners."

2 PTBS is an acronym for an insulting nickname that The Mr. Barr allegedly applies to one of his adversaries.

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