Vance v. The State of New York Department of Corrections and Community Supervision et al Doc. 85 Att. 1

2002 WL 1891212
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United States District Court, S.D. New York.

James E. FLAHERTY, Plaintiff,
v.
ALL HAMPTON LIMOUSINE, INC., et al., Defendants.

No. 01 Civ.9939 SAS.
|
Aug. 16, 2002.

Synopsis
Plaintiff sued 12 defendants, raising labor-related claims. The District Court, Scheindlin, acting sua sponte, held that case would be transferred to Eastern District of New York, for convenience of parties and witnesses.

Case transferred.

West Headnotes (1)

[1] **Federal Courts**
Particular Determinations

Suit against twelve defendants, eight of which were located on Long Island, would be transferred to Eastern District of New York, for convenience of parties and witnesses. 28 U.S.C.A. § 1404(a).

9 Cases that cite this headnote

Attorneys and Law Firms

James E. Flaherty, Riverhead, New York, Plaintiff pro se.

Nora C. Marino, Great Neck, New York, for Defendants All Hampton Limousine, Inc., Matthew Galiadatto, Mary Neary, and Crystal Joyce.

Thomas J. Donovan, Bee, Eisman & Ready, LLP, Mineola, New York, for Defendant Rocky Point Taxi.

Joseph M. Glatstein, Williamson & Williamson, P.C., New York, New York, for Defendants Gates McDonald of New York and Barbara Swan.

James T. Reynolds, Reynolds Caronia Gianelli & Hagney, LLP, Hauppauge, New York, for Defendant Peter Collucci.

Mitchell D. Goldberg, Ochs & Goldberg, LLP, New York, New York, for Defendant John Tomitz.

Jones Hirsch Connors & Bull P.C., New York, New York, for Defendants David Morse & Associates, Inc. and Christopher Scheno.

Richard T. Radsch, New York, New York, for Defendant Reliance National Risk Specialists Inc..

MEMORANDUM OPINION AND ORDER

SCHEINDLIN, J.

***1** A review of plaintiff's Amended Complaint ("Am.Cmplt.") indicates that plaintiff resides in the Hamlet of Hampton Bays located in Long Island, New York. *See* Am. Cmplt. ¶ 19. Eight of the twelve defendants maintain offices or otherwise reside at addresses located within the Eastern District of New York (All Hampton Limousine, Inc.; Crystal Joyce; Mary Neary; Matthew Galiadatto; John Tomitz; Rocky Point Taxi Inc.; Peter Colucci; and David Morse & Associates, Inc.), two defendants maintain offices within the Northern District of New York (Gates McDonald of New York and Barbara Swan), one defendant maintains offices within the Southern District of New York and Pennsylvania (Reliance National Risk Specialists), and the residence of one individual defendant, Christopher Scheno, cannot be ascertained from the Amended Complaint. *See* Am. Cmplt. ¶¶ 9–18, 50 & Ex. Y.

Furthermore, a substantial portion of the events or omissions giving rise to plaintiff's claims occurred within the Eastern District. For example, plaintiff alleges that Rocky Point Taxi Inc. under-reported his 1999 wages to the Internal Revenue Service Center located at Riverhead, Long Island. *See id.* at ¶ 23. Plaintiff also alleges that All Hampton Limousine, Inc., conspiring with other defendants, sought to defraud him of New York State Workers Compensation benefits he was entitled to as a result of an on-the-job accident occurring in Hampton Bays, Long Island. *See id* . ¶ 24 and Ex. A.

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Section 1404(a) of Title 28 of the United States Code provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The purpose of section 1404(a) "is to prevent the 'waste of time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.' " *Eskofot A/S v. E.I. Du Pont De Nemours & Co.,* 872 F.Supp. 81, 94 (S.D.N.Y.1995) (quoting *Van Dusen v. Barrack,* 376 U.S. 612, 616, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964)).

Motions to transfer venue are governed by a two-part test: (1) whether the action to be transferred "might have been brought" in the transferee venue; and (2) whether the balance of convenience and justice favors transfer. *See American Alliance Ins. Co. v. Sunbeam Corp.,* No. 98 Civ. 4703, 1999 WL 38183, at *3 (S.D.N.Y. Jan.28, 1999); *Gerling American Ins. Co. v. FMC Corp.,* No. 97 Civ. 6473, 1998 WL 410898, at *2 (S.D.N.Y. July 22, 1998) ("Motions for transfer lie within the broad discretion of the courts and are determined upon notions of convenience and fairness."). Because this action could have been brought in the Eastern District of New York, transfer depends on the balance of convenience and justice.

In making this determination, a judge has "[c]onsiderable discretion in adjudicating a motion for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Bionx Implants, Inc. v. Biomet, Inc.,* No. 99 Civ. 740, 1999 WL 342306, at *3 (S.D.N.Y. May 27, 1999) (quoting *In re Cuyahoga Equip. Corp.,* 980 F.2d 110, 117 (2d Cir.1992)). A non-exclusive list of factors to consider includes:

> ***2** (1) the convenience of witnesses; (2) the convenience of the parties; (3) the location of relevant documents and the relative ease of access to those sources of proof; (4) the situs of the operative events in issue; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the comparative familiarity of each district with the governing law; (8) the weight accorded a plaintiff's choice of forum; and (9) judicial efficiency and the interests of justice.

Ayala–Branch v. Tad Telecom, Inc., 197 F.Supp.2d 13, 15 (S.D.N.Y.2002). No individual factor is determinative and a court has discretion to weigh each factor to reach a fair result. *See Pharmaceutical Resources, Inc. v. Alpharma USPD Inc.,* No. 02 Civ. 1015, 2002 WL 987299, at *5 (S.D.N.Y. May 13, 2002) (citing *Citigroup Inc. v. City Holding Co.,* 97 F.Supp.2d 549, 560 (S.D.N.Y.2000)).

Application of the above factors clearly indicates that the Eastern District of New York is the more convenient forum for this action. There is no question that this action could have been brought originally in the Eastern District of New York. Most of the witnesses reside within the Eastern District of New York. *See In re Eastern District Repetitive Stress Injury Litig.,* 850 F.Supp. 188, 194 (E.D.N.Y.1994) (stating that the "[c]onvenience of witnesses is the most powerful factor governing the decision to transfer a given case"). Furthermore, plaintiff's claims arise from acts taken within the Eastern District and the majority of relevant documents are located there. Similarly, the second factor favors transfer. Clearly, the Eastern District of New York is a more convenient forum for the *majority* of the parties. The fifth through seventh factors are neutral—witnesses can just as easily be compelled to appear before the Eastern or Southern District of New York, the means of the parties are not affected, and courts in the Eastern District are equally familiar with the governing law. While the eighth factor—plaintiff's choice of forum—favors retaining jurisdiction here, it is not dispositive. *See Ayala–Branch,* 197 F.Supp.2d at 15 (stating that plaintiff's choice of forum measurably diminishes "when the operative facts have few meaningful connections to the plaintiff's chosen forum"); *United States Surgical Corp. v. Imagyn Med. Techs., Inc.,* 25 F.Supp.2d 40, 46 (D.Conn.1998) (holding that plaintiff's "choice of forum is entitled to little deference because the events giving rise to this case did not occur in Connecticut"). Plaintiff has expressed concern about his travel distance to the Long Island courthouse. *See* August 2, 2002 Letter from Flaherty to defense counsel at 3. Plaintiff fails to recognize, however, that this case might be assigned to the Brooklyn courthouse. Finally, the last factor—trial efficiency and interests of justice—strongly supports a transfer of venue given this action's nexus to Long Island.

***3** In sum, in the interests of justice and for the convenience of the parties and witnesses, the above captioned case is

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hereby transferred, pursuant to 28 U.S.C. § 1404(a), to the Eastern District of New York. Although this transfer is being made *sua sponte, see Mattel, Inc. v. Adventure Apparel,* No. 00 Civ. 4085, 2001 WL 286728, at *5 (S.D.N.Y. Mar.22, 2001) (holding that a court can transfer venue *sua sponte* (citing *Lead Indus. Ass'n v. Occupational Safety & Health Admin.,* 610 F.2d 70, 79 n. 17 (2d Cir.1979)), I note that two defendants raised improper venue as an affirmative defense. *See* Answer of Rocky Point Taxi Inc. ¶ 6 and Answer of Peter Collucci ¶ 6.

The Clerk of the Court is directed to transfer this file to the Eastern District of New York forthwith. All pending motions will be addressed by the transferee court.

All Citations

Not Reported in F.Supp.2d, 2002 WL 1891212

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KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds Leung v. Nunes, Md., May 17, 1999

865 F.2d 513
United States Court of Appeals,
Second Circuit.

FILMLINE (**CROSS**–**COUNTRY**) PRODUCTIONS, INC. and Yellowbill Finance Limited, Plaintiffs–Appellees,

v.

UNITED ARTISTS CORPORATION, Defendant–Appellant.

No. 500, Docket 87–7647.
|
Argued Dec. 14, 1987.
|
Decided Jan. 12, **1989**.

Synopsis

Film producer and financer brought action against corporation for breach of contract to purchase and distribute film. The United States District Court for the Southern District of New York, 662 F.Supp. 798, John E. Sprizzo, J., rendered judgment for plaintiffs and corporation appealed. The Court of Appeals, Mahoney, Circuit Judge, held that: (1) corporation's failure to comply with termination provision of contract was a breach of that contract, and (2) damage award was proper.

Affirmed.

West Headnotes (3)

[1] Contracts
Acts or Omissions Constituting Breach in General

Under New York law, corporation's failure to comply with contractual provision regarding manner in which contract was to be terminated was itself a breach of the contract between it and film production and financing companies; corporation attempted to immediately terminate contract when contract specified that production company would have 30 days in which to cure any defects.

50 Cases that cite this headnote

[2] Damages
Defects in performance

After corporation breached contract with film production company, production company's damages were not required to be reduced by amount it would cost company to reshoot entire motion picture in strict conformity with a screenplay approved by corporation, but rather, under New York law, production company would only have to reduce damages for reshooting of certain scenes that varied from approved screenplay.

4 Cases that cite this headnote

[3] Federal Civil Procedure
Evidence

Federal Courts
Discretion of court

Corporation failed to establish that district court abused its discretion in denying its motion for change of venue as would entitle corporation to new trial in its venue of choice; mere fact that corporation had to rely on deposition testimony of one of its witnesses, rather than have witness testify live, was not sufficient to grant new trial.

219 Cases that cite this headnote

Attorneys and Law Firms

***514** Robert S. Smith, New York City (Pamela M. Parker, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, of counsel), for plaintiffs-appellees.

Martin I. Shelton, New York City (Fran M. Jacobs, Shea & Gould, New York City, of counsel), for defendant-appellant.

Before MESKILL, KEARSE and MAHONEY, Circuit Judges.

Opinion

MAHONEY, Circuit Judge:

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This is an action for damages resulting from an alleged breach of contract. Defendants appeal from a judgment entered in the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge,* awarding plaintiffs damages in the amount of $2,189,889 plus $869,900 in prejudgment interest after a trial without a jury. The opinion of the district court is reported at 662 F.Supp. 798 (S.D.N.Y.1987).

The subject matter of this suit is a letter agreement dated as of February 11, 1982 (the "Agreement"), as amended, between defendant **United Artists Corp**. ("UA") and plaintiffs **Filmline** (**Cross–Country**) Productions, Inc. ("**Filmline**") and Yellowbill Finance Limited ("Yellowbill") for the production of a film entitled "**Cross Country**" (the "Picture"). The Agreement called for **Filmline** to produce the Picture, with interim financing to be provided by Yellowbill, and obliged UA to purchase the Picture if **Filmline** produced it in accordance with the terms of the Agreement. Provision for the interim financing was made in a separate contract between **Filmline** and Yellowbill.

The Picture was produced, but UA acted to terminate the Agreement as production drew to a conclusion, asserting unacceptable variation from "an approved screenplay." The district court found that UA's stated reason for repudiating the contract was a pretext, the real reason being that UA sought to avoid a financial commitment to the picture. ***Filmline***, 662 F.Supp. at 804. The district court held that while UA had a right to terminate prior to filming, it waived that right by failing to exercise it in a timely fashion and by participating in the actual filming of the picture. Thus, UA's later repudiation of its obligation to purchase and distribute the picture was deemed to constitute a breach of the contract. We affirm.

Background

The basic events underlying this dispute are the formation of the Agreement between **Filmline**, UA and Yellowbill for the production of the Picture, an ensuing period during which the screenplay was revised, the actual filming of the Picture which began on May 11, 1982, and UA's repudiation of the Agreement on June 24, 1982 when the filming of the Picture was two days from completion. The Agreement provided that Yellowbill would finance the film, that **Filmline** would produce it, and that UA would purchase the Picture upon completion. Central to the case is UA's right of approval of the screenplay for the Picture under the Agreement.

Section 5 of the Agreement states that "UA shall have the following approvals with respect to the production of the Picture," specifying the director of the Picture, the screenplay writer, lead actors and actresses, the director of photography, the production designer and the film editor, but not the screenplay itself. [1] Section 2 of the ***515** Agreement, which deals with development of the screenplay, provides:

> UA shall read and submit to [**Filmline**] such comments, if any, as it may have with respect to each draft of the screenplay. [**Filmline**] shall cause each draft of the screenplay to be rewritten in accordance with UA's suggested changes. The foregoing procedure shall be repeated until such time as UA and [**Filmline**] are satisfied with the final screenplay to be utilized for the production of the picture. UA and [**Filmline**] agree to accomplish the foregoing as promptly as reasonably possible so as not to frustrate the timely production of the Picture.

Section 15 of the Agreement states **Filmline's** obligation to produce the picture in conformity with the approved screenplay, and UA's resulting obligation to purchase, in the following terms:

> Provided that the Picture shall be produced in strict conformity with the approved screenplay and story board (except only for such minor changes as may be required by the exigencies of production), and provided further that [**Filmline**] has performed all of its obligations hereunder and is not in breach of any representation, warranty, covenants or agreements hereunder, UA agrees to pay to [**Filmline**] upon full delivery of the Picture ... a sum ... in an amount equal to the final certified negative cost of the Picture ... up to the sum of Two Million Five Hundred Thousand Dollars ($2,500,000)....

Similarly, Section 3(b) of the financing agreement between **Filmline** and Yellowbill provides that "the Film shall be based on the Script, as approved pursuant to the UA Agreement, except for minor deviations of the kind usual in the course of production of a film."

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Section 4.01 of UA's "Standard Terms and Conditions" (the "Terms") provides in part:

> In the event [**Filmline**] shall breach or become in default of performance of any material term, condition or covenant contained in this Agreement, or shall breach any representation or warranty contained in this Agreement, and shall fail to cure, correct or remedy such breach or default *within thirty (30) days after service of written notice specifying same,* ... United may:
>
> (1) terminate this Agreement in its entirety and be relieved of any obligations to advance or cause to be advanced any further monies or to pay the Purchase Price for the Picture or any part thereof....
>
> All rights and remedies to United under this agreement are cumulative and the exercise of one shall not limit or affect its right concurrently or subsequently to exercise any other rights or remedies as it may have at law, in equity, under this Agreement or otherwise.

Emphasis added.

Section 8.04 of the Terms states that "[t]his Agreement shall be construed and interpreted under the laws of the State of New York governing agreements which are wholly executed and performed therein."

UA entered into the Agreement based upon its evaluation of an initial draft of the screenplay. UA's agent in these activities was Charles Lippincott, vice president of acquisitions, who reviewed the initial screenplay and subsequent alterations. After reviewing the initial draft of the screenplay, Lippincott requested a number of alterations. On April 17, 1982, Lippincott met with Pieter Kroonenberg, one of the principals of **Filmline**, to discuss a revised draft of the screenplay dated April 13, 1982. Lippincott expressed his dissatisfaction with the April 13th screenplay and repeated requests for certain modifications. On April 19, 1982, UA (for whom Lippincott acted), **Filmline** and Yellowbill entered into an amendment (the "April Amendment") to the Agreement which provides in part:

> This will confirm the approval by UA of the following elements:
>
> (a) The April 13, 1982 revised screenplay, as further revised in accordance with the changes agreed to by UA and ***516** **Filmline** on April 17, 1982, provided that it is acknowledged that UA reserves the right to request minor changes to said screenplay prior to the confirmed May 11, 1982 start date of principal photography....

The April Amendment also included approvals of the casting as to four characters, the "story board as to Scenes 1B through 35C," the director of photography, the production designer and the film editor (subject to the later enlistment of a supervisory film editor "at UA's request and subject to UA's approval").

Some revisions were made to the April 13 screenplay, resulting in a final screenplay, to be used for filming, dated May 7, 1982. Lippincott reviewed this final screenplay on May 11, 1982, which was also the date for commencement of filming. The district court determined that the May 7th screenplay did not make the orally agreed changes required by the April Amendment. Thus, after Lippincott's May 11th review, UA had the right to terminate the contract, subject to a thirty day right of cure by **Filmline**. Lippincott chose, however, not to give notice of termination. Instead, Lippincott actively participated in the filming, reviewing further revisions of the screenplay and appearing on the scene of shooting from May 11 to May 16 and June 1 to June 4. On several occasions, Lippincott assured plaintiffs that production was proceeding acceptably. Only on June 20, 1982, did Lippincott complain to plaintiffs that he did not believe that the picture was working out as he had hoped.

On June 24, 1982, independent developments within UA precipitated the termination. UA's senior management had evidently been misinformed as to the existence of a UA commitment to purchase the Picture. Discovery of the commitment by Lippincott's superiors was followed by a telephone conversation with Lippincott in which he apprised senior management of his growing pessimism about the commercial prospects for the film. Immediately thereafter, UA transmitted a termination notice to **Filmline** which stated in part:

> It has come to our attention that (A) the Picture is not being produced *in strict conformity with the approved screenplay* and storyboard, (B) you have failed to perform certain of your obligations under the Agreement (including, without limitation, your obligation to obtain UA's approval as to certain production and creative elements and to fully and in good faith consult with UA as to certain other creative elements), and (C) you have breached certain of your representations, warranties, covenants and agreements contained in the Agreement (including, without limitation, the covenants relating to (A) and (B) above).

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> Based on the foregoing, this is to advise you that UA's obligations under the Agreement are hereby terminated and that US [sic] will not accept delivery of the Picture if and when completed. Nor will UA pay you the Cash Purchase Price (as defined in paragraph 15 of the Agreement) for the Picture in the event you attempt to tender delivery of the completed Picture to UA.

Emphasis added.

UA's purported notice of termination included no provision for **Filmline** to cure, correct or remedy its asserted defaults. **Filmline's** counsel responded promptly in writing, denying any breach on **Filmline's** part and contending that UA's purported notice of termination was itself an anticipatory breach of the Agreement.

Filmline and Yellowbill subsequently arranged for alternate distribution, but the Picture was a commercial failure. On January 26, 1983, **Filmline** and Yellowbill commenced the instant litigation. Prior to the trial of the case, the district court denied a motion by UA to dismiss or stay the action in favor of a California state court action initiated by UA, or alternatively for a transfer of the action to the United States District Court for the Central District of California pursuant to 28 U.S.C. § 1404(a) (1982). After trial, the district court ruled that UA had waived its right to terminate for failure of the screenplay to conform with the provisions of the April Amendment, determined the various damages issues ***517** tendered by the parties, and concluded that UA was liable to **Filmline** and Yellowbill in the amount of $2,189,889, plus pre-judgment interest on that amount from January 26, 1983. This appeal followed.

Discussion

It is undisputed that this diversity action is governed by New York law. Indeed, as noted earlier, Section 8.04 of the Terms explicitly so provides.

A. *Breach of Contract.*

UA's purported notice of termination specified that the Picture was "not being produced in strict conformity with the approved screenplay and storyboard...." Both at trial, see ***Filmline***, 662 F.Supp. at 804, and on appeal, however, UA contended that there was never an approved screenplay, because the requirement stated in the April Amendment that the screenplay be "further revised in accordance with the changes agreed to by UA and **Filmline** on April 17, 1982" had never been fulfilled. UA contends that it allowed **Filmline** to go forward with screening of the Picture and attempt to bring it into conformity with "the changes agreed to by UA and **Filmline** on April 17, 1982," and legitimately terminated the Agreement and UA's responsibilities thereunder when **Filmline** failed in that attempt. The district court rejected that position, concluding that New York law required an election by UA either to terminate on May 11, 1982, prior to the inception of filming, or to waive the breach that had by then become manifest and continue performance under the contract. *See* ***Filmline***, 662 F.Supp. at 804–05 (citing *Emigrant Indus. Savings Bank v. Willow Builders, Inc.*, 290 N.Y. 133, 145, 48 N.E.2d 293, 299 (1943); 5 Williston on Contracts § 683, at 270 (3d ed. 1961); and *Apex Pool Equip. **Corp**. v. Lee*, 419 **F**.**2d** 556, 562 (**2d** **Cir**.1969)).

We concur in the district court's general view of New York law. UA, however, cites to us New York authorities which mitigate the rigor of this rule. *Lenkay Sani Products **Corp**. v. Benitez*, 47 A.D.2d 524, 362 N.Y.S.2d 572 (2d Dep't 1975), is typical. In *Lenkay,* machines were delivered which did not function properly, and the buyer offered the manufacturer an opportunity to remedy the defects. When this effort failed, the buyer sued to recover the partial payments it had made for the machinery, and the manufacturer counterclaimed for the balance of the purchase price, claiming acceptance by the buyer and waiver of the defects. The Appellate Division rejected this contention, stating:

> Where a buyer has knowledge that the goods do not conform to the contract specifications, but nevertheless accepts them, he may revoke his acceptance and rescind the contract if the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured, but cure was not effected. ([Uniform Commercial Code], § 2–608, subd. [1], par. [a]).

47 A.D.2d at 525, 362 N.Y.S.2d at 573.

Although this decision was premised upon a specific provision of the Uniform Commercial Code, other New York

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cases apply the principle more broadly. *See, e.g., Richard v. Credit Suisse,* 242 N.Y. 346, 352, 152 N.E. 110, 111–12 (1926) ("[r]escission is not barred because indulgence has been shown"); *Schenck v. State Line Tel. Co.,* 238 N.Y. 308, 312–13, 144 N.E. 592, 593–94 (1924) (bringing of action to recover damages which was barred by limitations did not constitute an election barring later action for rescission); *City School Dist. v. McLane Constr. Co.,* 85 A.D.2d 749, 751, 445 N.Y.S.2d 258, 261 (3d Dep't 1981) (acceptance of defective beams upon assurance that defects would be cured not a waiver; no mention or citation of Uniform Commercial Code).

We applied this rule in *S.D. Hicks & Son Co. v. J.T. Baker Chemical Co.,* 307 **F.2d** 750 (**2d Cir.**1962), a diversity case governed by New York law. In that case, defendant undertook to construct a chemical processing plant and guaranteed its performance. Defendant then sought additional compensation for bringing the finished plant into compliance with the guarantee, contending that the buyer's initial acceptance of the ***518** plant constituted a waiver of the guarantee. We rejected that contention, stating:

> [T]here is no warrant for the position that a party to a contract waives his rights under the contract by failing to insist upon performance at the due date and by urging and encouraging the other party to perform thereafter.

Id. at 752 (citations omitted).

[1] We would have some difficulty in applying the rule for which UA contends to the facts of this case, given the equivocal conduct of the parties at the inception of the shooting of the Picture, and the foreknowledge of all parties that **Filmline** would incur the bulk of its expense in performing the Agreement by shooting the Picture. We deem the inquiry mooted, however, because even on the assumption that **Filmline** was in breach and UA was entitled to terminate when it purported to do so on June 24, 1982, it is clear that UA's notice of termination did not conform to the Agreement and was therefore ineffective under New York law.

Specifically, UA's purported notice of termination made no effort to comply with the explicit requirement, stated in section 4.01 of the Terms, that **Filmline** was to be accorded an opportunity "to cure, correct or remedy such breach or default within thirty days of written notice specifying same...."[2] Under New York law, that defect is fatal to UA's position.

In *General Supply and Constr. Co. v. Goelet,* 241 N.Y. 28, 148 N.E. 778 (1925), *remittitur amended,* 241 N.Y. 507, 150 N.E. 532 (1925), the defendant purported to terminate a contract for the construction of a building. As the court described it, the contract provided "that the owner might terminate the contract at any time upon certificate of the architect that the work was being unreasonably delayed and that such delay was sufficient ground for termination of the contract." 241 N.Y. at 34, 148 N.E. at 779. Rejecting the owner's purported termination of the contract without obtaining the contractually required certificate, the Court of Appeals stated:

> Though [the owner] may have been justified ... in his belief that the contractor would not thereafter mend his ways and finish the work within a reasonable time, yet where such delay did not amount to abandonment [the owner] could not rescind the contract for that reason, *except according to its terms*.... Having indicated purpose to keep the contract alive in spite of delays on the part of the contractor, the owner could not suddenly abandon the purpose and treat as essential an element of the contract which he had previously waived, as ground for termination. The termination of the contract in this case without the required previous notice and without a certificate from the architect *in accordance with the terms of the contract* was wrongful.

241 N.Y. at 24, 148 N.E. at 779 (emphasis added) (citations omitted); *accord: Scordley v. Olsher,* 18 Misc.2d 424, 186 N.Y.S.2d 883 (App.Term 1959).

The rule of *General Supply* was applied in *Consumers **Prod**. Co. v. Nuclear Fuel Services, Inc.,* 509 F.Supp. 201 (W.D.N.Y.1981), where the contract between the parties required that prior to termination, "the parties shall attempt to agree on an equitable [price] adjustment," but could terminate

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if the effort did not succeed "within sixty days." *Id.* at 211. The court invalidated an attempt to terminate without undertaking adjustment negotiations, stating:

> Under New York law, ... [w]here the contract specifies conditions precedent to the right of cancellation, the conditions must be complied with. *General Supply and Construction Co. v. Goelet,* 241 N.Y. 28, 148 N.E. 778 (1925).

Id.

We note that we are at variance with the district court in ruling that UA's failure to give **Filmline** an opportunity to cure was a fatal defect under New York law. The district court stated that:

> [O]n June 24 **Filmline** did not ... have the **artistic** or financial capacity to properly ***519** revise the screenplay as requested by UA within thirty days. Therefore, UA's failure to give an opportunity to cure is of no consequence here. *Cf. Allbrand Discount Liquors v. Times Square Stores* ***Corp.,*** 60 A.D.2d 568, 399 N.Y.S.2d 700 (2d Dep't 1977).

Filmline, 662 F.Supp. at 804 n. 6.

Allbrand held only that a lessee who intended to operate a liquor store on the leased premises need not undertake the "futile" act of applying for a liquor license when the lessor had advised the lessee that it would in no event be allowed to take possession. Here, on the contrary, deposition testimony of Lippincott which was in evidence indicates that it might have been far from futile to have required **Filmline** to adapt the screenplay within thirty days. Lippincott testified:

> Q. Had you stated your objections to the film assemblage that you saw on June 22nd, would it have been possible for any changes to have been made?
>
> THE WITNESS: It would have been pretty difficult.
>
> Q. Why is that?
>
> A. Because it would have meant rewriting and reshooting the film.
>
> Q. How much work would that have entailed?
>
> A. A great deal of work.
>
> Q. Can you give me an estimate in terms of time?
>
> A. *I would say including writing and reshooting three to four weeks.*

Emphasis added.

We conclude that on this record, New York courts would apply the clear New York rule requiring termination of a contract in accordance with its terms, rather than the quite limited *Allbrand* exception to which the district court deferred. Accordingly, since UA's purported termination was in violation of the terms of the Agreement, it was inoperative and plaintiffs are entitled to recover for breach of contract.

The district court reached this result by a different route, concluding that by allowing the filming of the Picture to proceed on May 11, 1982, UA waived **Filmline's** failure to conform the Picture to the requirements of the April Amendment.[3] As indicated earlier, we do not deem it necessary to resolve the waiver issue. That is, we conclude that whether or not UA waived **Filmline's** failure to conform the screenplay to the requirements of the April Amendment, UA's purported notice of termination dated June 24, 1982 was in any event ineffective under New York law because it did not comply with the Agreement. It is settled that we may affirm on any basis that is supported by the record, regardless of the ground upon which the trial court relied. *See Helvering v. Gowran,* 302 U.S. 238, 245, 58 S.Ct. 154, 157, 82 L.Ed. 224 (1937); *United States v. Lieberman,* 637 **F.2d** 95, 103 n. 11 (**2d Cir.**1980).

B. *Damages.*

[2] UA contends that the district court vastly overstated the damages properly recoverable, assuming a breach of contract. Specifically, UA argues that the district court erroneously

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rejected UA's contention that "the plaintiffs' damages must be reduced by the amount it would cost plaintiffs to reshoot the entire Picture in strict conformity with the May 7 screenplay." ***Filmline***, 662 F.Supp. at 811. The district court concluded that "[h]ad UA not wrongfully terminated the contract, UA would have and in good faith could have only required **Filmline** to conform to the May 7 screenplay the eleven scenes which [UA] actually preferred in the May 7 version," ***520** *id.* at 815, at a cost of $20,901. These determinations are not clearly erroneous, and are accordingly affirmed.

We also concur in the district court's detailed consideration of the numerous other damage issues which were proferred by the parties, *see id.* at 806–14, and in its conclusion (not specifically challenged by UA) that prejudgment interest should be awarded as of the date of the commencement of this action, January 26, 1983, pursuant to N.Y.Civ.Prac.L. & R. 5001 (McKinney 1963). ***Filmline***, 662 F.Supp. at 815 (citing *Morse v. Swank, Inc.*, 520 F.Supp. 829, 829–30 (S.D.N.Y.1981), *aff'd sub nom. Morse v. S.A.R.L. DeGestion Pierre Cardin,* 688 **F.2d** 816 (**2d Cir**.1982)).

C. *Change of Venue.*

UA also claims that the district court's denial of UA's motion to transfer the action to the Central District of California was an abuse of discretion. Change of venue is governed by 28 U.S.C. § 1404(a) (1982), which provides: "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The determination whether to grant a change of venue requires a balancing of conveniences, which is left to the sound discretion of the district court. *Carlenstolpe v. Merck & Co., Inc.,* 819 **F.2d** 33, 35 (**2d Cir**.1987) (forum non conveniens); *Factors Etc., Inc. v. Pro Arts, Inc.,* 579 **F.2d** 215, 218–19 (**2d Cir**.1978), *cert. denied,* 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979). That discretion will not be disturbed upon appeal without a clear showing of abuse. *A. Olnick & Sons v. Dempster Bros. Inc.,* 365 **F.2d** 439, 443–44 (**2d Cir**.1966).

A challenge to a venue determination, furthermore, is usually made by a pretrial request for mandamus. *See Carlenstolpe,* 819 **F.2d** at 34–35; *Olnick,* 365 **F.2d** at 442–43. Here, on the contrary, UA made no effort to obtain pretrial review, but now seeks a new trial because of an allegedly improper refusal to grant a change of venue. As we have said, however, such a ruling "is almost impossible to correct by review after trial." *Olnick,* 365 **F.2d** at 444; *see Kasey v. Molybdenum* ***Corp.*** *of Am.,* 408 **F.2d** 16, 20 (9th Cir.1969); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3855, at 473–74 (1986). Rather, as we stated in *Ford Motor Co. v. Ryan,* 182 **F.2d** 329, 330 (**2d Cir**.), *cert. denied,* 340 U.S. 851, 71 S.Ct. 79, 95 L.Ed. 624 (1950), "should [the movant] ... finally lose on the merits below, any error in the interlocutory order [denying a change of venue] would probably be incorrectible on appeal, for [the movant] could hardly show that a different result would have been reached had the suit been transferred."

[3] In any event, wholly aside from the procedural posture of this case, no showing has been made that the district court abused its discretion in denying UA's motion for a change of venue. UA's claim is that Lippincott was susceptible to subpoena in the Central District of California, to which transfer was sought, but not in New York, and UA was therefore required to rely upon the deposition testimony of a crucial witness at trial. UA stresses that the convenience of witnesses is an expressly stated consideration in section 1404(a), and that this is "[p]robably the most important factor" in deciding an application under that section. 15 C. Wright, A. Miller & E. Cooper § 3851, at 415 (1986).

No particular prominence was accorded to Lippincott, however, in UA's motion papers seeking a change of venue; he was simply listed twice as one of a number of California witnesses whose convenience would be served by a California trial. **Filmline** and Yellowbill made similar assertions as to New York being a more convenient locale for their witnesses. Furthermore, the district court was entitled to give some weight to the fact that the Agreement called for its construction and interpretation in accordance with New York law. *See id.* § 3854, at 466–68; *see also Van Dusen v. Barrack,* 376 U.S. 612, 645, 84 S.Ct. 805, 824, 11 L.Ed.2d 945 (1964) (trial in state in which "federal judges are more familiar with the governing laws" a factor to be considered in determining motion for a change of venue).

We conclude that the district court did not abuse its discretion, and certainly committed ***521** no error reversible at this juncture in the litigation, by denying UA's motion for a change of venue. On the contrary, the district court was entitled to conclude that UA had failed to carry its "burden of making out a strong case for a transfer." *Ford Motor Co. v. Ryan,* 182 **F.2d** at 330.

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Conclusion

The judgment of the district court is affirmed.

All Citations

865 F.2d 513

Footnotes

1 The Agreement incorporates UA's “Standard Terms and Conditions”, Section 1.02(b) of which provides that: “No item subject to United's approval hereunder shall be deemed to have been approved by United unless United shall have specifically approved the same in writing.”

2 UA contends that this explicit requirement, stated in a document drafted by UA, was rendered nugatory by the further provision in Section 4.01 that UA's rights and remedies under the Agreement are cumulative. The contention is, at best, frivolous.

3 The district court also found that UA's purported notice of termination was pretextual, although not relying upon that finding for its conclusion as to liability. This finding was amply supported by the record, especially by testimony from an arbitration to which UA was a party, introduced into evidence at the trial below, which demonstrated that UA's notice of termination was motivated by a desire to extricate UA from its obligations under the Agreement when UA's senior management belatedly learned its provisions on or about June 24, 1982. Again, in view of the failure of UA's purported notice of termination to comply with the requirements of the Agreement, we need not reach the question whether a pretextual motivation might in some circumstances invalidate an otherwise effective termination.

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961 F.Supp. 406
United States District Court,
N.D. New York.

George **JEMZURA**, Plaintiff,
v.
PUBLIC SERVICE COMMISSION, New York State Electric & Gas and Employees, Governor George Pataki, John O'Mara, individually, Catherine Dudley, individually, Eugene Connell, individually, Cheryl Callahan, individually, John Draghi, individually, Diane Simpson, individually, Dennis Vacco, individually, Defendants.

No. 3:97–CV–39.
|
April 14, **1997**.

Synopsis

Business partner brought § 1983 action against New York Public Service Commission (PSC), electric utility, governor, state Attorney General, and other individual defendants, alleging denial of equal protection and procedural due process, arising from utility's refusal to provide electrical line extension, alleging that denial of electrical service deprived partners of farming and business opportunities. Partner moved for recusal of judge, governor and Attorney General moved to dismiss complaint as against them, and partner cross-moved for leave to replead complaint. The District Court, McAvoy, Chief Judge, held that: (1) partner failed to make requisite showing that judge displayed deep-seated favoritism or antagonism that would make fair judgment impossible and failed to show any basis on which reasonable person could conclude that judge's impartiality could reasonably be questioned so as to require judge to recuse himself; (2) sovereign immunity under Eleventh Amendment barred partner's § 1983 claim against governor and state Attorney General in their official capacities; (3) partner failed to allege personal involvement in alleged constitutional violations as required to state § 1983 claims against governor and Attorney General in their individual capacity; (4) partner failed to state § 1983 claims against governor and Attorney General; (5) it would not grant partner leave to replead complaint to include governor and Attorney General as defendants; and (6) fine of $250 against partner was appropriate Rule 11 sanction for partner continuing to bring feckless and frivolous litigation connected to utility's decision not to extend electrical service.

Motion for recusal denied, motion to dismiss granted.

West Headnotes (23)

[1] Judges
Bias and Prejudice

Statutory section requiring district court judge to recuse himself upon plaintiff's motion when judge has personal bias or prejudice against plaintiff or for adverse party and statutory section requiring district court judge to recuse himself in any proceeding in which his impartiality might reasonably be questioned are complementary, even when sole ground alleged for recusal is bias or prejudice. 28 U.S.C.A. §§ 144, 455(a).

7 Cases that cite this headnote

[2] Judges
Bias and Prejudice

For purposes of determining whether district court judge should recuse himself, substantive inquiry to determine bias or prejudice is whether reasonable person, knowing all the facts, would conclude that judge's impartiality could reasonably be questioned. 28 U.S.C.A. §§ 144, 455(a).

3 Cases that cite this headnote

[3] Judges
Determination of objections

For purposes of determining whether district court judge should recuse himself, burden is on party moving for recusal to demonstrate objectively reasonable basis for questioning judge's impartiality. 28 U.S.C.A. §§ 144, 455(a).

7 Cases that cite this headnote

[4] Judges
Bias and Prejudice

For purposes of determining whether district court judge should recuse himself due to bias or prejudice, test is not subjective feelings of party

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as to court's alleged bias but, rather, whether facts have been presented, assuming their truth, that would lead reasonable person to infer that bias or prejudice existed, thereby foreclosing impartial judgment. 28 U.S.C.A. §§ 144, 455(a).

1 Cases that cite this headnote

[5] **Judges**
Bias and Prejudice

Business partner failed to make requisite showing that district court judge displayed deep-seated favoritism or antagonism that would make fair judgment impossible and failed to show any basis on which reasonable person could conclude that judge's impartiality could reasonably be questioned so as to require judge to recuse himself in partner's action against New York Public Service Commission (PSC), electric utility, governor, state Attorney General, and other individual defendants; partner's recusal motion was motivated by court's prior decisions in actions brought by other partner, and there were no facts even remotely suggesting bias by judge. 28 U.S.C.A. §§ 144, 455(a).

3 Cases that cite this headnote

[6] **Judges**
Bias and Prejudice

Bias or prejudice that results in recusal of district court judge must be extrajudicial and not based upon in-court rulings; this requires evidence that judge formed opinion on the merits on some basis other than what judge learned from his participation in case. 28 U.S.C.A. §§ 144, 455(a).

Cases that cite this headnote

[7] **Judges**
Bias and Prejudice

General rule is that recusal of district court judge is not appropriate merely because party has sued or threatens to sue judge, who is presiding over that party's litigation. 28 U.S.C.A. §§ 144, 455(a).

3 Cases that cite this headnote

[8] **Judges**
Bias and Prejudice

Logic behind general rule, that recusal is not appropriate merely because party has sued or threatens to sue judge who is presiding over that party's litigation, is to prevent "judge-shopping" by litigants. 28 U.S.C.A. §§ 144, 455(a).

5 Cases that cite this headnote

[9] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment provides sovereign immunity to unconsenting states sued in federal court. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[10] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Sovereign immunity under Eleventh Amendment to suit in federal court applies to unconsenting states in suits brought in federal courts by her own citizens as well as by citizens of another state. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[11] **Federal Courts**
Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts
Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine

Bar of sovereign immunity provided by Eleventh Amendment to unconsenting states sued in federal court exists regardless of whether relief sought is legal or equitable. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[12] **Federal Courts**
Waiver by State; Consent

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Federal Courts

Agencies, officers, and public employees

Federal Courts

Prosecutors and attorneys general

Sovereign immunity under Eleventh Amendment barred business partner's § 1983 claim in federal court against governor and state Attorney General in their official capacities, in action alleging denial of equal protection and procedural due process, arising from electric utility's refusal to provide electrical line extension, in which partner sought order directing governor to remove employees of New York Public Service Commission (PSC) and directing Attorney General to investigate complaint, where there had been no showing that state waived its immunity to suit, Congress had not enacted legislation specifically overriding state's immunity, partner failed to set forth facts that, even if taken as true, would establish violation of federal law, and partner failed to assert any constitutional or federal statutory requirement which compelled state officials to meet obligations which would only arise under state law. U.S.C.A. Const.Amends. 11, 14; 42 U.S.C.A. § 1983; N.Y.McKinney's Public Service Law §§ 4 subd. 1, 4–b.

Cases that cite this headnote

[13] Federal Courts

Agencies, officers, and public employees

Sovereign immunity under Eleventh Amendment from suit in federal court without consent is granted to state officers who are sued in their official capacity, since suit brought against state official in his official capacity is not suit against official but, rather, suit against official's office. U.S.C.A. Const.Amend. 11,

1 Cases that cite this headnote

[14] Public Employment

Authority to impose adverse action; manner and mode of imposition

Public Utilities

Appointment or election, and qualification and tenure

Under New York law, governor's duty to remove Public Service Commission (PSC) officials is discretionary. N.Y.McKinney's Public Service Law §§ 4 subd. 1, 4–b.

Cases that cite this headnote

[15] Civil Rights

Particular Causes of Action

Business partner failed to allege personal involvement of governor and state Attorney General in alleged constitutional violations as required to state § 1983 claims against Governor and Attorney General in their individual capacity, in partner's action alleging denial of equal protection and procedural due process, arising from electric utility's refusal to provide electrical line extension; partner did not set forth facts showing that governor or Attorney General were personally involved in utility's denial of electrical service extension, there were no facts that governor knew of private dispute between partner, utility, and New York Public Service Commission (PSC), and there were no facts that either governor or Attorney General directly participated in relevant matter, or established policy permitting unlawful practices to continue. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[16] Civil Rights

Persons Liable in General

Defendant's personal involvement in alleged constitutional violation is prerequisite to imposition of damages in § 1983 claim. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[17] Civil Rights

Vicarious liability and respondeat superior in general; supervisory liability in general

There are four ways in which supervisory official may be personally involved in alleged constitutional violation as required for imposition of damages in § 1983 claim against official: directly participating in infraction or

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being directly involved through ordering that action be taken, failing to remedy wrong after learning of violation, creating or allowing policy to continue under which violation occurred, or being grossly negligent in managing subordinates who caused violation. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[18] Conspiracy
Pleading

Business partner failed to state § 1983 claims against governor and state Attorney General, in partner's action alleging denial of equal protection and procedural due process, arising from electric utility's refusal to provide electrical line extension, given cursory and conclusory allegations in complaint; partner pled legal theory of conspiracy without offering any proof of governor's and Attorney General's personal involvement in or connection to relevant matter, failed to state purpose of or any overt acts perpetrated by them which reasonably related to claimed conspiracy, and failed to allege violation of his federally protected rights. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 8(a), 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

[19] Federal Civil Procedure
Civil rights proceedings in general

Even pro se § 1983 complaint must be dismissed if it contains only conclusory, vague, or general allegations of conspiracy to deprive person of constitutional rights. 42 U.S.C.A. § 1983.

12 Cases that cite this headnote

[20] Conspiracy
Pleading

Even under liberal pleading standard of procedural rule governing pleading claims for relief, plaintiff in § 1983 action alleging conspiracies to deprive person of constitutional rights must state, at a minimum, purpose of or any overt acts perpetrated by defendants which reasonably relate to claimed conspiracies. 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

Cases that cite this headnote

[21] Federal Civil Procedure
Pleading over

General procedure is that, when complaint is dismissed for failure to state claim and plaintiff requests permission to file amended complaint, that request should ordinarily be granted. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

1 Cases that cite this headnote

[22] Federal Civil Procedure
Pleading over

District court would not grant business partner leave to replead his complaint to include governor and state Attorney General as defendants after court dismissed complaint as against those defendants for failure to state claim, as it appeared beyond doubt that partner could not prove facts to support any claim against governor and Attorney General either in their official or individual capacity, in partner's § 1983 action alleging denial of equal protection and procedural due process, arising from electric utility's refusal to provide electrical line extension. U.S.C.A. Const.Amends. 11, 14; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

1 Cases that cite this headnote

[23] Federal Civil Procedure
Civil rights cases

Federal Civil Procedure
Awards against parties

Fine of $250 against business partner, who was proceeding pro se, was appropriate Rule 11 sanction for partner continuing to bring feckless and frivolous litigation connected to electric utility's decision not to extend electrical service for partner, in partner's § 1983 action

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against, inter alia, governor and state Attorney General, alleging denial of equal protection and procedural due process; partner and other partner had pursued numerous claims connected to utility's failure to provide sought relief, all of which had been denied, and, based on repeated baseless litigation by partners relating to matter complained of, particularly in face of judicial warnings that continuing such conduct would result in sanctions, warnings would not suffice. U.S.C.A. Const.Amends. 11, 14; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 11(b), (b)(2), 28 U.S.C.A.

4 Cases that cite this headnote

Attorneys and Law Firms

***409** George **Jemzura**, Sherburne, pro se.

Dennis C. Vacco, Office of the Attorney General, Department of Law, Albany (James B. McGowan, Assistant Attorney General, of counsel), for State Defendants.

MEMORANDUM–DECISION AND ORDER

McAVOY, Chief Judge.

I. BACKGROUND

The plaintiff, George **Jemzura**, has filed an action concerning New York State Electric & Gas Corp.'s ("NYSEG") refusal to provide an electrical line extension on land adjacent to property owned by his brother. The plaintiff claims that NYSEG's denial of electrical service deprived him, and his brother, farming ***410** and business opportunities including a multi-million dollar spring water enterprise. [1] This action is the latest in the last 20 years of *pro se* actions and proceedings brought by the plaintiff, his brother, or both before administrative, state, and federal courts upon the same underlying facts and issues. [2] The plaintiff filed this § 1983 claim asserting nine separate claims alleging that the defendants denied the plaintiff equal protection and procedural due process under the Fourteenth Amendment. Therefore, the plaintiff seeks relief in the form of monetary damages, court orders directing Governor Pataki and Attorney General Vacco to enforce the law, and punitive damages in the amount of $1,000,000. Finally, the plaintiff filed a motion that the undersigned recuse himself because of alleged prejudice in this case.

Before the Court is the motion filed on behalf of defendants Pataki and Vacco to dismiss this Complaint in its entirety as against them. The plaintiff has filed a "cross-motion" asserting that he is suing defendants Pataki and Vacco in their individual capacity and not their official capacity, and requesting leave of Court to replead his Complaint, as of right, after plaintiff has an opportunity for discovery.

H. DISCUSSION

A. Motion for Recusal

[1] The plaintiff moves for recusal under 28 U.S.C. §§ 144 and 455. Under § 144, a district court judge shall recuse himself when the judge "has personal bias or prejudice either against him or in favor of any adverse party...." Under 28 U.S.C. § 455(a), a district court judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned." The two sections are complementary, even when the only ground for recusal alleged is bias or prejudice. *See United States v. Sibla,* 624 F.2d 864, 867 (9th Cir.1980). The Second Circuit has determined that the grounds for disqualification are the same under both statutes. *See Apple v. Jewish Hosp. & Medical Ctr.,* 829 F.2d 326, 333 (2d Cir.1987).

[2] **[3]** **[4]** The substantive inquiry to determine bias or prejudice is whether "a reasonable person, knowing all the facts, [would] conclude that the trial judge's impartiality could reasonably be questioned." *United States v. Lovaglia,* 954 F.2d 811 (2d Cir.1992). The burden is on the moving party to demonstrate an "objectively reasonable basis for questioning a judge's impartiality." *In re I.B.M. Corp.,* 45 F.3d 641, 644 (2d Cir.1995). This Circuit has explained that, under 28 U.S.C. § 455(a), recusal is appropriate only when the "opinions formed by a district judge ... display a 'deep-seated favoritism or antagonism that would make fair judgment impossible.' " *Groden v. Random House, Inc.,* 61 F.3d 1045, 1053 (2d Cir.1995), *quoting Liteky v. U.S.,* 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Importantly, "the test here is not the subjective feelings of the defendant as to the court's alleged bias, but whether facts have been presented, assuming their truth, that would lead a reasonable person to infer that bias or prejudice existed, thereby foreclosing impartial judgment." *Markus v. United States,* 545 F.Supp. 998, 1000 (S.D.N.Y.1982), *aff'd* 742 F.2d 1444 (2d Cir.1983).

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[5] **[6]** The plaintiff argues that the undersigned must recuse himself because of past decisions made against the plaintiff and his ***411** brother which allegedly suggest bias.[3] The law is clear the bias or prejudice that results in recusal "must be extrajudicial and not based upon in-court rulings." *In re I.B.M. Corp.,* 618 F.2d 923, 929 (2d Cir.1980). This requires evidence that the judge formed "an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.,* 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). In relation to the motion before the Court, it is clear that the plaintiff's recusal motion is motivated by this Court's prior decisions in actions brought by the plaintiff's brother, Raymond. There is no case law to support recusal in such a situation.[4] In addition, there are no facts even remotely suggesting bias by the undersigned. If the fact that a judicial officer ruled against a party, or a party's relative, is grounds for recusal, then, at least with respect to highly litigious individuals, there could soon be no judges with jurisdiction to hear subsequent proceedings.

Accordingly, this Court finds that the plaintiff has failed to make the requisite showing that the undersigned displays a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Groden v. Random House, Inc.,* 61 F.3d 1045, 1053 (2d Cir.1995), *quoting Liteky,* 510 U.S. at 540, 114 S.Ct. at 1149–50. The plaintiff has failed to show any basis on which a reasonable person could conclude that the undersigned's impartiality could reasonably be questioned. *See Lovaglia,* 954 F.2d at 815.

[7] **[8]** One further development merits discussion. Following the filing of this action, the plaintiff filed a notice of appeal from a prior decision by this Court.[5] As part of that notice, the plaintiff sent a letter to the undersigned demanding $50 to reimburse him for filing papers, threatening to sue the undersigned and his law clerks, and notifying the undersigned that the plaintiff was pursuing judicial misconduct proceedings against the undersigned. The Court notes that the general rule is that recusal is not appropriate merely because a party has sued or threatens to sue the judge presiding over that party's litigation. *See United States v. Taylor,* 569 F.2d 448, 450 (7th Cir.1978); *United States v. Grismore,* 564 F.2d 929, 933 (10th Cir.1977).[6] The logic behind the rule is to prevent "judge-shopping" by litigants. Therefore, the undersigned denies the motion for recusal, and now addresses the motion to dismiss defendants Pataki and Vacco.

B. Motion to Dismiss Parties

Defendants Pataki and Vacco move to dismiss themselves from this action based on sovereign immunity and the plaintiffs failure to state a claim underfed. Fed.R.Civ.P. 12(b)(6).

1. Eleventh Amendment Sovereign Immunity

[9] **[10]** **[11]** The Eleventh Amendment provides sovereign immunity to unconsenting states sued in federal court. *See Quern v. Jordan,* 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). The Amendment itself states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. This immunity applies to unconsenting States in suits "brought in federal courts by her own citizens as well as by citizens of another State." ***412** *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993). This bar exists whether the relief sought is legal or equitable. *See Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984).

[12] **[13]** Sovereign immunity is also granted to State officers who are sued in their official capacity since a suit brought against "a state official in his official capacity is not a suit against the official but rather a suit against the official's office." *Gonzales v. Wing,* 167 F.R.D. 352, 355 (1996), *quoting, Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). Thus, as discussed below, sovereign immunity would bar this suit against defendants Pataki and Vacco in their official capacity as governor and attorney general, respectively.

The plaintiff seeks an Order from this Court directing defendant Pataki to remove officers and employees of the Public Service Commission (PSC) and to protect the plaintiff from an alleged conspiracy. The plaintiff also requests this Court to direct defendant Vacco to investigate a complaint connected to this matter allegedly referred to the Office of the Attorney General.

The Second Circuit has interpreted the Supreme Court to hold that the Eleventh Amendment prohibits federal courts from ordering state officials to conform their conduct to state law. *See Eng v. Coughlin,* 858 F.2d 889, 896 (2d Cir.1988), (*quoting, Pennhurst,* 465 U.S. at 106, 104 S.Ct. at 911). The Court stated that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst,* 465 U.S. at 106, 104 S.Ct. at 911.

There has been no showing that New York State has waived its immunity to suit; nor has Congress enacted legislation specifically overriding the State's immunity to suit. *See Trotman v. Palisades Interstate Park Comm.,* 557 F.2d 35, 39–40 (2d Cir.1977) (stating that New York has not waived its sovereign immunity for a § 1983 violation); *Mullin v. P & R Educ. Servs.,* 942 F.Supp. 110, 111–12 (E.D.N.Y.1996). Moreover, the plaintiff fails to set forth facts that, even if taken to be true, would establish violations of any federal law.

[14] On the contrary, the Governor's duty to remove PSC officials, such as the commissioner, is discretionary. *See* New York Public Service Law § 4(1) (McKinney's) (stating that "the Chairman of the Public Service Commission **serves** in such capacity at the Governor's pleasure."); Public Service Law § 4–b (stating that "[t]he governor *may* remove any public service commissioner ... for inefficiency, neglect of duty or misconduct in office...."). As for investigations, the plaintiff fails to assert any constitutional or federal statutory requirement which compels these state officials to meet obligations which would only arise under State law. Thus, if the defendants are sued in their official capacity, the § 1983 claim is barred by the doctrine of sovereign immunity.

2. Claims Asserted Against the Defendants in Their Individual Capacity

[15] Plaintiff has argued in response that the two defendants acted outside the scope of their authority, and thus, committed § 1983 violations in their individual capacity. This is a thinly veiled attempt by the plaintiff to inject life into claims that clearly would have been barred by sovereign immunity if brought against the defendants in their official capacity. *See Will,* 491 U.S. at 71, 109 S.Ct. at 2312. As discussed below, this attempt to sue the defendants in an unofficial capacity is unsuccessful.

[16] **[17]** It is well established that a defendant's personal involvement in the alleged constitutional violation is a prerequisite to the imposition of damages in a § 1983 claim. *See, e.g., Monell v. Department of Soc. Servs.,* 436 U.S. 658, 690–95, 98 S.Ct. 2018, 2035–38, 56 L.Ed.2d 611 (1978); *Al–Jundi v. Estate of Rockefeller,* 885 F.2d 1060 (2d Cir.1989). The Second Circuit recognizes four ways in which a supervisory official may be personally involved: (1) he or she may have directly participated in the infraction or be ***413** directly involved through ordering that the action be taken; (2) he or she may fail to remedy a wrong after learning of the violation; (3) he or she may have created or allowed a policy to continue under which the violation occurred; or (4) he or she has been grossly negligent in managing the subordinates who caused the violation. *Williams v. Smith,* 781 F.2d 319, 323 (2d Cir.1986); *Mullin,* 942 F.Supp. at 112. The plaintiff does not set forth any facts showing that defendants Pataki or Vacco were personally involved in NYSEG's denial of extending electrical service on his brother's property. There are no facts that defendant Pataki knew of the private dispute between the plaintiff and NYSEG and the PSC. In addition, there are no facts that either defendant directly participated in this matter, or established a policy permitting unlawful practices to continue.

Therefore, defendants Pataki and Vacco, should be dismissed from this case, despite plaintiff's efforts to sue them in their "individual" capacity.

3. Rule 12(b)(6) Motion

Notwithstanding the above discussion, the Court will examine the merits of the defendants' dismissal motion as it relates to whether the Complaint states a claim.

Pursuant to a motion to dismiss for failure to state a claim upon which relief can be granted under Fed.R.Civ.P. 12(b)(6), the Court examines the legal sufficiency of the claim. *LaBounty v. Adler,* 933 F.2d 121, 123 (2d Cir.1991). The rule in the Second Circuit favors courts not to dismiss the complaint for failure to state a claim "*unless* it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Ricciuti v. N.Y.C.*

Transit Authority, 941 F.2d 119, 123 (2d Cir.1991) (citation omitted) (emphasis added).

[18] Such a case for dismissal is warranted here. The plaintiff seems to allege a conspiracy against him and his brother, Raymond. The plaintiff asserts in his Complaint that defendant Pataki has a duty to protect the plaintiff from conspiracy and to remove guilty officers and employees of the PSC, but failed to do so. The plaintiff also asserts that defendant Vacco has a duty to investigate this alleged deprivation of electrical power, but failed to do so. These claims are all based on § 1983 violations of the plaintiffs civil rights. The Second Circuit has held that "complaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of a litany of general conclusions that shock but have no meaning." *Barr v. Abrams,* 810 F.2d 358, 363 (2d Cir.1987); *see also Polur v. Raffe,* 912 F.2d 52, 56 (2d Cir.1990) ("It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights.").

[19] The plaintiff relies on vague allegations and conclusions of a conspiracy without pleading any overt acts or providing a basis in fact for his claim. As a result, the plaintiff pleads a legal theory of conspiracy without offering any proof of these defendants' personal involvement in or connection to this matter. Even a *pro se* Complaint must be dismissed if it contains "only conclusory, vague or general allegations of conspiracy to deprive a person of constitutional rights...." *Zemsky v. City of New York,* 821 F.2d 148, 151 (2d Cir.1987); *see also Hall v. Dworkin,* 829 F.Supp. 1403, 1412 (**N.D.N.Y**.1993) (holding that a § 1983 action must contain more than broad based, conclusory statements).

[20] Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a), the plaintiff must state, at a minimum, "the purpose of or any overt acts perpetrated by defendants which reasonably relate to the claimed conspiracies." *Zemsky,* 821 F.2d at 151. Plaintiff **Jemzura's** claim fails to satisfy this pleading requirement. As this Court has stated, "To merely state in a conclusory fashion that a conspiracy exists is wholly insufficient, and to allow such a lax pleading requirement would do violence to even the liberal language of Rule 8(a)." *Hall,* 829 F.Supp. at 1413.

Moreover, the plaintiff fails to allege a violation of his federally protected rights. *See* ***414** *Baker v. McCollan,* 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979) ("The first inquiry in any § 1983 suit ... is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.' ") The plaintiff claims he has been denied "equal protection and procedural due process" under the Fourteenth Amendment. The plaintiff has not alleged, and the Court cannot identify, any process which he is or was due. As for the equal protection claim, the plaintiff has not alleged the existence of purposeful discrimination to support such a claim. *See Hall,* 829 F.Supp. at 1413.

Given the cursory and conclusory allegations contained in the complaint against defendants Pataki and Vacco, this Court finds that the plaintiff failed to state a claim against defendants Pataki and Vacco.

C. Motion to Amend the Complaint

[21] The general procedure is when a Complaint is dismissed pursuant to Rule 12(b)(6) and the plaintiff requests permission to file an Amended Complaint, that request should ordinarily be granted. *See Ricciuti,* 941 F.2d at 123, citing, *Branum v. Clark,* 927 F.2d 698, 705 (2d Cir.1991) and *Salahuddin v. Cuomo,* 861 F.2d 40, 42 (2d Cir.1988). The Second Circuit stated that the Court should not deny leave to file a proposed Amended Complaint unless the same rigorous standard for dismissing a Complaint—that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"—is met. *Ricciuti,* 941 F.2d at 123 (citation omitted). The Court added that "[t]his principle should be applied with particular strictness when the plaintiff seeks to file an Amended Complaint charging a violation of his civil rights." *Id.* (citations omitted).

[22] In the plaintiffs cross-motion, he requests an opportunity to replead his Complaint. Assuming the plaintiff is requesting an opportunity to amend his Complaint to include, in some way, defendants Pataki and Vacco, this Court denies leave to file such an Amended Complaint because it appears beyond doubt that the plaintiff cannot prove facts to support any claim against defendants Pataki and Vacco either in their official or individual capacity.

D. Rule 11 Sanctions

1. Procedural Requirements

Pursuant to Federal Rule of Civil Procedure 11, as amended in 1993, an attorney, law firm, or party may be subject to sanctions for violation of Rule 11 upon the initiative of

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a party by motion, or by the court by its own initiative. Fed.R.Civ.P. 11(c). The Rule makes clear that the Court "[o]n its own initiative, ... may enter an order describing the specific conduct that appears to violate subdivision (b) [of Rule 11] and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto." Fed.R.Civ.P. 11(c)(1)(b).

Under Rule 11, "[a] sanction imposed for violation of this rule shall be limited to what is sufficient to *deter* repetition of such conduct or comparable conduct by others similarly situated." Fed.R.Civ.P. 11(c)(2) (emphasis added). "[T]he sanction may consist of, or include, sanctions of a nonmonetary nature, [or] an order to pay a penalty into court...." *Id.* "Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims...." *Id.* Therefore, the Rule allows this Court to impose sanctions on the plaintiff upon meeting the procedural requirements set forth in the Federal Rules.

2. Basis for Sanctions

[23] Rule 11 sets forth the conduct that forms the basis for the imposition of sanctions. *See* Fed.R.Civ.P. 11(b). Relevant to this case, the party must bring, to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed.R.Civ.P. 11(b)(2). In the present case, the plaintiff continues to bring feckless and frivolous litigation connected to NYSEG's decision not to extend electrical service for the plaintiff. Even though the plaintiff's brother filed the previous actions in this District, this lawsuit arises from the same set of facts. The Court recognizes the ***415** plaintiffs disguise of changing the plaintiff in order to bring this claim again. [7] However, the plaintiff has played a central role in bringing repetitive and frivolous lawsuits in this matter to the courthouse door, and has received warnings about filing additional actions in this matter.

In a previous action in the Northern District, Judge Scullin warned:

> The ***Jemzuras*** are therefore put on notice that if they file any future actions in this District that seek the installation of electrical transmission lines to their home, or which claim that the **Jemzuras**' constitutional rights have been violated by a party as a result of such party's failure to effectuate such installation, the **Jemzuras** *shall* be subject to monetary and other sanctions as provided for in Fed.R.Civ.P. 11. [8]

The plaintiff, his brother, or both continue to file a stream of litigation in the federal and state courts. In this Court's Dec. 24, 1996 Memorandum–Decision & Order, the Court warned "against the filing of additional feckless motions or actions relating to the failure of NYSEG to provide the relief sought in the many actions comprising the family tree of litigation culminating in the present action in this Court." This Court further warned, "Such would be viewed by this Court as vexatious and frivolous, meriting the imposition of sanctions pursuant to Fed.R.Civ.P. 11."

The Raymond **Jemzura** was **served** with the Dec. 24, 1996 Memorandum–Decision & Order before George **Jemzura** filed this action on Jan. 10, **1997**. The **Jemzuras** continue to file motions and commence actions relating to NYSEG's alleged failure despite their frivolous and feckless nature, and despite warnings from judges in this District. The Court will not continue to be the **Jemzuras**' bully pulpit. Permitting their conduct to continue wastes the time and resources of the Court and of all those whom the **Jemzuras** choose to **serve** with the latest version of their Summons and Complaint.

The Court is mindful that the plaintiff proceeds *pro se,* and as a *pro se* litigant is entitled to a certain latitude. *See, e.g., McDonald v. Doe,* 650 F.Supp. 858, 861 (S.D.N.Y.1986). However, the plaintiff and his brother have pursued numerous claims connected to the failure of NYSEG to provide the relief sought here, all of which have been denied. [9] Based on the repeated baseless litigation by the **Jemzuras** relating to the matter complained of in the instant case, particularly in the face of judicial warnings that continuing such conduct would

result in sanctions, the Court has determined that warnings will not suffice. Accordingly, the Court finds that a fine of two hundred fifty ($250.00) dollars to be paid to the Court, by the plaintiff, for deposit into the *pro bono* fund of the district, is an appropriate sanction. Pursuant to Rule 11, the plaintiff is ordered to show cause why this Court should not impose such a sanction.

I. CONCLUSION

For the foregoing reasons, the plaintiffs motion for recusal is DENIED, and the Defendants' motion to dismiss this action against defendants Pataki and Vacco is hereby GRANTED.

It is further ORDERED that the plaintiff submit to this court, within twenty (20) days of the filing of this Order, in writing, an affidavit not to exceed ten (10) pages in length, and therein to show cause why the plaintiff has not violated subsection (b) of Rule 11, and why this Court should not impose the sanction of two hundred fifty ($250.00) dollars set forth herein.

IT IS SO ORDERED.

All Citations

961 F.Supp. 406

Footnotes

1 It appears the plaintiff has standing in this case because he owns a substantial mortgage against his brother's property, the subject property of the request that NYSEG install electrical service. With the plaintiffs interest and alleged lost business opportunities relating to that same property, the plaintiff appears to allege a personal injury fairly traceable to the defendants' allegedly unlawful conduct. *See Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324–25, 82 L.Ed.2d 556 (1984).

2 In two previous actions in this District, Raymond **Jemzura**, the plaintiffs brother, was the named plaintiff. *See* ***Jemzura*** *v. NYSEG,* 91–CV–0843 (Oct. 19, 1992 and Sept. 23, 1994); ***Jemzura*** *v. NYSEG,* 95–CV–1012 (Aug. 17, 1995). However, George **Jemzura** has been named plaintiff along with his brother in numerous administrative and state court actions. Moreover, the plaintiff herein has played an active role throughout the 20 years of continuous litigation on this matter, whether named as a party or not, e.g., factual witness.

3 These decisions include ***Jemzura*** *v. Mugglin. et. al.,* 96–CV–0816 (Dec. 24, 1996), amended (Jan. 18, **1997**), and ***Jemzura*** *v. Bulsiewicz.*

4 In fact, the Court warned Raymond **Jemzura** that the filing of additional feckless actions with this Court relating to the alleged failure of NYSEG to provide electrical services would be viewed by this Court as possible grounds for sanctions. Thus, the Court looks suspiciously upon the instant Complaint as a less than transparent attempt by the **Jemzuras** to evade judicial sanction and provide sustenance to a seemingly endless stream of litigation.

5 The plaintiff filed an appeal to this Court's decision in *Jenzura v. Mugglin.*

6 This line of cases has been cited in *United States v. Jones,* 1989 WL 58544, at *5 (W.D.N.Y. June 2, 1989); *Raffe v. Citibank, N.A., et. al.,* 1987 WL 10825, at *2 (E.D.N.Y. May 1, 1987).

7 In fact, the plaintiff attempted to file an Amended Complaint in this action to name Raymond **Jemzura** as an additional plaintiff. This Court rejected the Amended Complaint for failure to comply with Local Rule 15.1.

8 ***Jemzura*** *v. NYSEG,* 95–CV–1012 (Aug. 17, 1995) (emphasis added).

9 In addition to three Northern District Court Actions, the **Jemzuras** have commenced more than 20 different legal proceedings connected to this matter. As a result, the state courts have barred any further action related to this electrical installation matter, and have sanctioned the **Jemzuras** for their continuing pattern of bringing new lawsuits on the same issues. *See* ***Jemzura*** *v. Mugglin,* 207 A.D.2d 645, 616 N.Y.S.2d 104 (3d Dept.1994).

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343 F.3d 120
United States Court of Appeals,
Second Circuit.

THE **CHASE MANHATTAN BANK**, Natwest **Bank** National Association, Banque Paribas, European American **Bank**, Rabobank Nederland, and American Express **Bank** Ltd., Plaintiffs–Appellees,
and
Andina Trading Corp. and Andina Coffee, Inc., Consolidated–Plaintiffs–Appellees,
v.
AFFILIATED FM INSURANCE COMPANY, Defendant–Appellant,
and
Lloyd's Syndicate No. 446, Lloyd's Syndicate No. 418, Lloyd's Syndicate No. 406, Lloyd's Syndicate No. 40, Lloyd's Syndicate No. 367, Lloyd's Syndicate No. 34, Lloyd's Syndicate No. 334, Lloyd's Syndicate No. 321, Lloyd's Syndicate No. 309, Lloyd's Syndicate No. 304, Lloyd's Syndicate No. 162, Lloyd's Syndicate No. 123, Lloyd's Syndicate No. 108, Lloyd's Syndicate No. 1014, Lloyd's Syndicate No. 52, Insurance Company of North America, Home Insurance Company, Phoenix Assurance Public Limited Company, Cornhill Insurance PlC, Commercial Assurance Co. PLC, River Thames Insurance Co. Ltd., Sovereign Marine & Gen. **Ins**. **Co**., Assicurazioni Generali S.P.A., Lloyd's Syndicate No. 447, Norwich Union Fire Insurance Society Ltd., Northern Assurance Company Limited, Lloyd's Syndicate No. 202, Lloyd's Syndicate No. 745, Lloyd's Syndicate No. 735, Lloyd's Syndicate No. 725, Lloyd's Syndicate No. 697, London & Hull Maritime Insurance Company Limited, Lloyd's Syndicate No. 843, Lloyd's Syndicate No. 65, Lloyd's Syndicate No. 831, Lloyd's Syndicate No. 803, Lloyd's Syndicate No. 80, Lloyd's Syndicate No. 633, Lloyd's Syndicate No. 483, Lloyd's Syndicate No. 455, Lloyd's Syndicate No. 625, Lloyd's Syndicate No. 62, Lloyd's Syndicate No. 575, Lloyd's Syndicate No. 535, Lloyd's Syndicate No. 448, and Phoenix 'L' Account, Defendants.

Docket No. 00–9436.
|
Argued: Dec. 18, 2001.
|
Decided: Sept. 9, **2003**.

Synopsis

Creditors of coffee importer, as additional insureds under importer's maritime open cargo insurance policy, sued insurer for losses suffered due to exporters' presentation of fraudulent draw documents. The United States District Court for the Southern District of New York, Milton Pollack, Senior District Judge, 970 F.Supp. 306, awarded creditors damages and prejudgment interest, and the Court of Appeals reversed with instructions. On petition for rehearing by the panel, The Court of Appeals, Winter, Senior Circuit Judge, 196 **F.3d** 373, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Southern District of New York, Milton Pollack, J., denied motion for recusal and vacatur, and insurer appealed. The Court of Appeals, Winter, Senior Circuit Judge, held that: (1) trial judge's equity interest in a plaintiff gave rise to appearance of partiality requiring disqualification, and (2) judge's divestiture of his equity interest did not cure prior appearance of partiality.

Reversed and vacated.

Jacobs, Circuit Judge, filed concurring opinion.

West Headnotes (9)

[1] Federal Courts
Judge

The Court of Appeals reviews a district judge's denial of a motion to recuse for abuse of discretion.

1 Cases that cite this headnote

[2] Judges
Bias and Prejudice

Statute which requires judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned

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governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown. 28 U.S.C.A. § 455(a).

14 Cases that cite this headnote

[3] Judges

Bias and Prejudice

For purposes of statute requiring a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, the determination of whether an appearance of judicial partiality has been created is an objective one based on what a reasonable person knowing all the facts would conclude. 28 U.S.C.A. § 455(a).

28 Cases that cite this headnote

[4] Judges

Stockholder of corporation

Judge's equity interest in party gave rise to appearance of partiality requiring disqualification, although judge did not know of his financial interest in party at time of trial, where his presiding role was not merely technical given that he presided over bench trial and rendered decision on the merits, and a reasonable person knowing pertinent facts would have known of disqualifying financial interest. 28 U.S.C.A. § 455(a), (b)(4).

10 Cases that cite this headnote

[5] Judges

Pecuniary Interest

For purposes of statute requiring a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, no suspect appearance is created when, in the eyes of a reasonable person, the disqualifying financial interest is not easily ascertainable or otherwise apparent to the judge. 28 U.S.C.A. § 455(a).

2 Cases that cite this headnote

[6] Judges

Pecuniary Interest

Not every appearance of a violation of statute requiring a judge to disqualify himself when he has a financial interest in a party creates a disqualifying appearance under statute requiring disqualification in any proceeding in which judge's impartiality might reasonably be questioned; judges may preside over cases in which they appear disqualified but do so only in a very technical sense, since no appearance of partiality can attend a situation in which the judge has decided nothing. 28 U.S.C.A. § 455(a), (b)(4).

5 Cases that cite this headnote

[7] Judges

Bias and Prejudice

For purposes of statute requiring a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, a truly disqualifying appearance must be determined by a reasonable person standard and not by the ability of the complaining party to voice its concerns through the media. 28 U.S.C.A. § 455(a).

5 Cases that cite this headnote

[8] Judges

Pecuniary Interest

Judges bear principal burden of compliance with statute requiring the judge to disqualify himself when he has a financial interest in a party, since statute's provisions are directive and require some reasonable investigation and action on a judge's own initiative. 28 U.S.C.A. § 455(b)(4).

3 Cases that cite this headnote

[9] Judges

Removal of disqualification

Judge's divestiture of his equity interest in a party immediately following his discovery that he had such financial interest did not cure prior disqualification that arose under statute requiring

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a judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned, although judge had devoted substantial time to matter before discovery of his interest, where a reasonable person would have known that judge had interest in party prior to judge's discovery and divestiture, which occurred long after he had presided over bench trial and rendered decision on the merits. 28 U.S.C.A. § 455(a), (b)(4), (f).

9 Cases that cite this headnote

Attorneys and Law Firms

***122** Daniel P. Levitt, New York, N.Y. (H. Richard Chattman, Marianne C. Tolomeo, of counsel), for Defendant–Appellant.

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Before: KEARSE, WINTER, and JACOBS, Circuit Judges.

Opinion

Judge JACOBS concurs in a separate opinion.

WINTER, Senior Circuit Judge.

Affiliated FM Insurance Company ("**Affiliated**") appeals from a modified judgment entered by Judge Pollack, *see Chem. **Bank** v. **Affiliated FM Ins. Co.***, No. 87 Civ. 0150(MP) (S.D.N.Y. Oct. 24, 2000) ***123** (modified consolidated judgment on remand), after a remand by this court, *see Chem. **Bank** v. **Affiliated FM Ins. Co.***, 196 **F.3d** 373 (**2d Cir**.1999), *cert. denied,* 531 U.S. 1074, 121 S.Ct. 767, 148 L.Ed.2d 667 (2001). The modified judgment awarded approximately $70 million in damages, fees, and prejudgment interest to Chemical **Bank**, and five other **banks** (collectively, the "**Banks**") and Andina Coffee, Inc. ("Andina"), a New York-based coffee importer. *See Chem. **Bank***, No. 87 Civ. 0150(MP) (modified consolidated judgment on remand).

The issue on this appeal concerns the disqualification of the judge from presiding over this matter. Apparently because of the problems of staffing the White Plains courthouse with permanent judges, this case, like others, *see, e.g., Ramirez v. Atty. Gen. of N.Y.*, 280 **F.3d** 87, 93 n. 3 (**2d Cir**.2001), suffered from a series of transfers to various judges. Before the transfer to Judge Pollack, one of the original plaintiffs, Chemical **Bank**, merged with The **Chase Manhattan Bank**. The merged entity used the **Chase** name. After the merger, the judge, his wife, and a family trust purchased between $250,000 and $300,000 of stock in the merged entity. When the case was transferred to the judge for a bench trial, neither the caption nor the corporate disclosure form had been amended to reflect the merger, and, during subsequent proceedings, counsel and the court generally used the old name Chemical **Bank**, to refer to that plaintiff.

After the bench trial, the judge rendered a decision for the **Banks**, and a judgment of $92 million was entered. *See Chem. **Bank** v. **Affiliated FM Ins. Co.***, 970 F.Supp. 306 (S.D.N.Y.1997). Extensive appellate proceedings followed. *See Chem. **Bank** v. **Affiliated FM Ins. Co.***, 169 **F.3d** 121 (**2d Cir**.1999), *vacated and superseded on reh'g by, Chem. **Bank***, 196 **F.3d** 373. Part of the judgment was reversed, and the matter was remanded for further proceedings. *See* 196 **F.3d** at 377. After receiving the formal mandate of this court on August 15, 2000, the judge appears to have reviewed the original (1997) judgment and seen the description of Chemical **Bank** as "Now the **Chase Manhattan Bank**." *See* J.A. at 792. This alerted him for the first time to the fact that Chemical **Bank** had merged with The **Chase Manhattan Bank** prior to the issuance of his 1997 ruling. The judge immediately divested himself of the **Chase** stock and, acting under 28 U.S.C. § 455(f), *see* 2000 WL 1585075, at *2, thereafter conducted the requisite proceedings on remand. We hold that the divestiture after remand could not cure the past appearance of a disqualifying financial interest at the time of trial, *see* 28 U.S.C. § 455(a), and therefore reverse.

While the name Chemical **Bank** was generally used by counsel to refer to that party (one of five plaintiffs but the lead one), its new status and name were no secret. The merger was highly publicized, papers filed by the parties mentioned it, the judge met with a senior **Chase** official in settlement

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discussions, the Chase official sent correspondence to the judge on the Chase letterhead, and trial witnesses who were then employees of Chase explained the merger. Most significantly, the opinion of the judge containing his findings of fact referred to Chase as a party, *see* 970 F.Supp. at 309 n. 2 (as did our opinion on appeal, *see* 169 F.3d at 123 n. 1).

On this record and for reasons stated at length below, we hold that the judge was disqualified under 28 U.S.C. § 455(a), at the latest, when he prepared the findings of fact and that a divestiture after the remand cannot cure the prior disqualification.

*124 BACKGROUND

In 1987, Andina and the Banks sued Affiliated, as well as certain London insurers and their brokers, in the Southern District of New York, claiming that the defendants' marine open cargo policies covered certain losses that had been suffered by Andina. Affiliated denied coverage, claiming among other things that the coverage had been terminated by two cancellation agreements signed by Andina's broker in 1985 and 1986. During the ten-year pretrial phase of this case, the parties conducted discovery and engaged in the usual motions practice that attends litigation of this sort. Four different judges presided over the case and rendered various decisions.

In August 1995, Chemical Bank announced a planned merger with Chase; the merger became effective in April 1996, at which time the new entity issued a new class of stock called "Chase Manhattan Corporation New Stock." Sometime thereafter in 1996, the district judge, his wife, and a testamentary trust of which his wife was a trustee and income beneficiary purchased between $250,000 and $300,000 of shares of the Chase New Stock.

On April 14, 1997, after discovery was concluded and with various motions pending, the case was reassigned to Judge Pollack for purposes of the bench trial. Notably, the caption and Chemical's corporate disclosure form had not been altered to reflect Chase's presence as a party. The bench trial began on May 12, 1997, less than two weeks after the judge filed the statutorily required financial disclosure forms indicating the purchase of the Chase New Stock in 1996. The trial lasted three and a half weeks, involving a large number of witnesses and hundreds of exhibits. On July 18, 1997, the district judge issued findings of fact and conclusions of law rejecting the various defenses advanced by Affiliated and awarding approximately $92 million to plaintiffs. The largest share—approximately $29 million—was awarded to the lead plaintiff, Chase/Chemical.

Affiliated appealed. Based on a determination that the district court had improperly calculated the period of effectiveness of the Banks' coverage under the insurance policies in question, we vacated the judgment in part and remanded for a recalculation of damages. *See Chem. Bank*, 196 F.3d at 376–77.

On August 18, 2000, three days after receipt of the mandate from our decision remanding the case, and the day after the denial of Affiliated's application for a stay pending the filing of its certiorari petition, the district judge requested that Chase/Chemical's counsel provide updated information regarding the corporate connections and history "pertaining to Chase Manhattan Corporation (New) stock." J.A. at 811. During a conference with the parties on August 23, 2000, the district judge disclosed his ownership of the Chase stock, which had continued (and was properly disclosed as required) since its purchase. He asserted that, during the previous week, he had "learned for the first time that some of the cases consolidated for trial have, in the past few years, undergone corporate changes including mergers and name changes." *Id.* at 309. He stated that "[l]ast week I accidentally became aware for the first time that Chemical Bank had absorbed or merged with The Chase Manhattan Bank, N.A., and that later Chemical changed its name to The Chase Manhattan Bank." *Id.* at 310. Accordingly, he announced that he, his wife, and the family trust had promptly divested themselves of the Chase New Stock.

Affiliated moved under Fed.R.Civ.P. 59 and 60(b)(6) for disqualification of the district judge—including for purposes of the balance of the motion itself—under *125 28 U.S.C. §§ 455(a) and 455(b)(4), vacatur of all decisions and orders, including the July 1997 judgment, previously entered by the district judge, and a new trial on all claims before another judge.

The motion was supported by an evidentiary submission regarding whether the judge knew or should have known of his disqualification when the case was transferred and thereafter. This submission included a substantial number of stories in the media indicating the great publicity that had surrounded the merger, as reflected in articles and discussion in The New York Times, The Wall Street Journal, Fortune,

Time, Newsweek, U.S. News & World Report, Money, and Barron's.

Also included was a catalog of instances in which **Chase's** role as a party in interest was mentioned and might have caught the judge's attention. In April 1997, at the outset of the judge's involvement in this case, motions papers included at least three documents describing plaintiff Chemical **Bank** as "now known as The **Chase Manhattan Bank**" or "now the **Chase Manhattan Bank**." Soon thereafter, in a settlement effort, the district judge met privately with senior executives of the parties, including Jeffrey A. Sell of **Chase**. In connection therewith, the judge received a letter dated May 1, 1997 from Mr. Sell, written on **Chase's** letterhead, stating that Mr. Sell was writing expressly "on behalf of The **Chase Manhattan Bank** (Chemical **Bank**)." Shortly before trial, the plaintiffs submitted proposed pretrial findings of fact, identifying the lead plaintiff as "Chemical **Bank** (now known as The **Chase Manhattan Bank**)." At about the same time, the judge filed his financial disclosure form for the prior year reflecting the 1996 purchase of the **Chase** New Stock.

The trial began on May 12, 1997. Two **Chase** employees, who had been with Chemical before the merger, testified as witnesses at the bench trial. Each described the Chemical–**Chase** merger and their own prior employment at Chemical **Bank**.[1] On June 9, 1997, the final day of ***126** trial, plaintiffs submitted proposed findings of fact and conclusions of law in which they identified the lead plaintiff as "Chemical **Bank** (now known as The **Chase Manhattan Bank**)."

Most significantly, the district judge's findings of fact and conclusions of law identified the lead plaintiff as "Chemical **Bank** (now known as The **Chase Manhattan Bank**)." *Chem. **Bank***, 970 F.Supp. at 309 n. 2. The judgment, entered on July 23, and the supersedeas bond issued for the appeal and approved by the district judge on August 21, 1997, both contained the same identification of the lead plaintiff as "Chemical **Bank** (now The **Chase Manhattan Bank**)." J.A. at 145, 151.

The district judge rejected **Affiliated's** request to transfer the disqualification motion to a different judge, denied the motion from the bench, and proceeded to rule on the remanded damages issues. The district judge stated that his ignorance of **Chase's** role as a party was a result of the fact that the original Rule 9 form filed by Chemical's counsel in January 1987 identified the lead plaintiff as "Chemical **Bank**" and was never amended by **Chase**/Chemical, that the caption of the consolidated case always referred to "Chemical **Bank**," as did the order assigning the case to him in 1997, and that a finding submitted to him after trial proposed that "Chemical **Bank**" would act as paymaster for all plaintiffs. *See Chem. **Bank***, 2000 WL 1585078, at *1.

The district judge acknowledged that he was always aware of his **Chase** New Stock purchases and that, referring to the publicity surrounding the merger, he "must have seen some of the newspaper hearsay which the defendant has found in the 1996 press about the Chemical/**Chase** acquisition." J.A. at 791. Nevertheless, the fact that **Chase** and Chemical were now the same entity "did not come to my mind in respect to this case when I took the reassignment in 1997." *Id.* He stated that not until he received the August 15, 2000 mandate had he "focused for the first time on the meaning of the phrase in the form of the original judgment prepared by the Clerk ('Now the **Chase Manhattan Bank**')." *Id.* at 792. The district judge also acknowledged the existence of record references to Chemical **Bank** as "now The **Chase Manhattan Bank**" but stated that these did "not detail the history of and transactions involved in the merger." *Chem. **Bank***, 2000 WL 1585078, at *1. However, he announced that he had decided to divest the stock after seeing the phrase in the original judgment identifying "Chemical" as "**Chase**," even though he "was unable to find out authoritatively in a short time what the corporate transactions were that had taken place," J.A. at 793, 806, and was "still mystified as to what these **banks** were doing with each other back there in 1996, in the mad rush by **banks** generally to merge and **affiliate**," *id.* at 794–95.

That same day, the district judge entered the modified consolidated judgment on remand.

DISCUSSION

a) *Standard of Review*

[1] We review a district judge's denial of a motion to recuse for abuse of discretion. *In re Certain Underwriter,* 294 **F.3d** 297, 302 (**2d Cir.**2002). Errors of law or fact constitute an abuse of discretion. *See id.* (citing ***127** *Beal v. Stern,* 184 **F.3d** 117, 122 (**2d Cir.**1999)); *see also Zervos v. Verizon New York, Inc.,* 252 **F.3d** 163, 169 (**2d Cir.**2001) ("A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision—though not necessarily the product of a

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legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions.") (footnotes omitted).

b) *Statutory Disqualification*

[2] **[3]** We briefly review the relevant statutory provisions. Title 28 U.S.C. § 455(a) provides:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

This provision governs circumstances that constitute an appearance of partiality, even though actual partiality has not been shown. *See Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 860, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). The determination of whether such an appearance has been created is an objective one based on what a reasonable person knowing all the facts would conclude. *See id.* at 860–61, 108 S.Ct. 2194; *see also Liteky v. United States,* 510 U.S. 540, 548, 114 S.Ct. 1147, **127** L.Ed.2d 474 (1994) (noting that Section 455(a) requires an "objective" evaluation of a potentially disqualifying interest, and that "what matters is not the reality of bias or prejudice but its appearance").

Section 455(b) provides in relevant part that a judge

> shall also disqualify himself in the following circumstances:
>
> . . . . .
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b).

Section 455(c) imposes a duty upon a federal judge to

> inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

28 U.S.C. § 455(c). For these purposes, Section 455(d)(4) defines "financial interest" to mean "ownership of a legal or equitable interest, however small." 28 U.S.C. § 455(d)(4).

Unlike Section 455(a), therefore, Section 455(b)(4) embodies an actual knowledge test regarding disqualifying circumstances and provides a bright line as to disqualification based on a known financial interest in a party—i.e., an equity financial interest of any size is disqualifying. *See Liljeberg,* 486 U.S. at 859–60 n. 8, 108 S.Ct. 2194. Moreover, the parties may, if fully informed, waive grounds for disqualification under Section 455(a) but not under Section 455(b). *See* 28 U.S.C. § 455(e).

In some circumstances, however, a judge may avoid disqualification if he discloses and divests his financial interest. *See* 28 U.S.C. § 455(f); *Kidder, Peabody & Co. v. Maxus Energy Corp.,* 925 F.2d 556, 561 (**2d** **Cir**.1991). Section 455(f) provides as follows:

> Notwithstanding the preceding provisions of this section, if any ... judge ... to whom a matter has been assigned would be disqualified, after substantial ***128** judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he ... or his ... spouse ... has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the ... judge [or] spouse ... divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455(f).

c) *Application*

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[4] We hold that, under Section 455(a), the district judge was required to disqualify himself, at the very latest, before his decision on the merits in July 1997. In relying on Section 455(a), we emphasize that there is no possibility here that the judge ruled for the **banks** in order to enrich himself. The asset size of **Chase Manhattan Bank** is such that its portion of the sizeable judgment originally entered by the judge would not cause any discernible increase in the value of the shares he owned. Moreover, the shares of **Chase** New Stock held by him were not even 1% of the particular judge's personal fortune. The disqualifying appearance here is of a different character.

We hold that an appearance of partiality requiring disqualification under Section 455(a) results when the circumstances are such that: (i) a reasonable person, knowing all the facts, would conclude that the judge had a disqualifying interest in a party under Section 455(b)(4), and (ii) such a person would also conclude that the judge knew of that interest and yet heard the case. In short, we hold that Section 455(a) applies when a reasonable person would conclude that a judge was violating Section 455(b)(4).

Section 455(b)(4) requires disqualification when a judge knows of his or her financial interest in a party. However, actual knowledge of the interest need not be present if the circumstances are such that the objective test of Section 455(a) is triggered by a financial interest. *See In re Certain Underwriter,* 294 **F.3d** at 306 ("Even where the facts do not suffice for recusal under § 455(b) ... those same facts may be examined as part of an inquiry into whether recusal is mandated under § 455(a). The two sections focus on different types of conflicts requiring recusal. Section 455(b) focuses on interests and situations which raise conflicts, while 'the goal of section 455(a) is to avoid even the appearance of partiality.' " (alteration omitted) (quoting *Liljeberg,* 486 U.S. at 860, 108 S.Ct. 2194)).

Congress has, as noted, provided that a known financial interest in a party, no matter how small, is a disqualifying conflict of interest and one that cannot even be waived by the parties. This is a bright-line test that is, as to actual partiality, more than a little overbroad. One share of stock in a large corporation cannot induce a corrupt decision. However, a bright-line test as to equity interests in parties, particularly stock, avoids many difficult line-drawing decisions and is in that sense actually helpful to judges. As Congress has observed, in the absence of bright-line rules, judges are forced to decide the extent of their financial interest at their "peril," leaving them open "to a criticism by others who necessarily had the benefit of hind sight ... [and] weaken[ing] public confidence in the judicial system." H.R.Rep. No. 93–1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352. A bright-line rule also avoids mistaken but sensationalist accusations of corruption that are wrong—even dead wrong—but may further shake public confidence in the judiciary. *Id.* We are fully confident of our ***129** observation that the judge had no real financial stake in the outcome. However, we are equally confident that Congress was right in apprehending that a headline (accurately) stating that the judge had entered a $92 million judgment to be shared by a corporation in which he owned $250,000 of stock would damage public confidence in the judiciary.

[5] We realize that resort to appearances rather than actualities runs dual risks. The first risk is the potential slippery slope resulting from the fact that appearances are often in the eye of the beholder. However, the appearance rule we adopt is not one that is so unforgiving of all honest mistakes as to cause it to swallow up the knowledge requirement of Section 455(b)(4). District judges in particular carry a large caseload involving parties that may number in the thousands. Judges may often preside over cases involving parties with complex corporate relationships that can be made known to the judge only through express revelation. No suspect appearance is, therefore, created when, in the eyes of a reasonable person, the disqualifying financial interest is not easily ascertainable or otherwise apparent to the judge.

[6] Not every appearance of a violation of Section 455(b)(4) creates a disqualifying appearance under Section 455(a). Judges may preside over cases in which they appear disqualified but do so only in a very technical sense. For example, a member of a district judge's family may receive a gift of a small number of shares in a firm that is a party in litigation before the judge. A magistrate judge may make various rulings in the case while that district judge continues to "preside" until some matter is ripe for decision by the judge, at which time the district judge transfers the case. No appearance of partiality can attend a situation in which the judge has decided nothing. Or a district judge may issue routine, standard scheduling orders in a large number of newly filed cases, missing a disqualifying party in a case with several parties. This may happen in some cases of *pro se* litigation in which a large number of defendants with no particular connection to the claimed harms are named. There is no reasonable appearance of partiality in such circumstances.

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[7] The second danger of an incautious use of appearance as a disqualifying factor is that a suspicious appearance of partiality can be manufactured by inspiring publicity of repeated claims of bias. A truly disqualifying appearance must thus be determined by a reasonable person standard and not by the ability of the complaining party to voice its concerns through the media. *See In re Aguinda,* 241 F.3d 194, 206 (2d Cir.2001); *In re Drexel Burnham Lambert Inc.,* 861 F.2d 1307, 1309 (2d Cir.1988).

The present circumstances, however, implicate neither risk. First, the judge's presiding role here was anything but technical. He presided over a bench trial and rendered a decision on the merits. Nor was Chase's role as a party obscure; the judge's opinion on the merits noted it. Second, Congress has defined as a non-waivable disqualifying circumstance any known financial interest in a party no matter how small, subject to the provision of Section 455(f), discussed *infra.* We neither embark on a slippery slope nor invite parties to seek public pressure to disqualify a judge by holding that Section 455(a) applies to circumstances in which a reasonable person would believe, even if incorrectly, that a judge had a disqualifying financial interest in a party to litigation and knew it, i.e. was in violation of Section 455(b)(4).

***130** Those are the circumstances of the present case. It is true that, given the judge's post-trial statement that he did not learn of the Chemical–Chase merger until our mandate had issued, a reasonable person might, albeit not without difficulty, discount: (i) the high profile of the merger and the district judge's concession that he "must have seen" the merger's media coverage, (ii) the references to "Chemical Bank (now known as The Chase Manhattan Bank)" contained in papers submitted to the district judge early in his involvement in the case, (iii) the meeting between the judge and a Chase official and the correspondence from that official on the Chase letterhead, and (iv) the testimony of witnesses at the bench trial before the district judge describing the merger of Chemical and Chase and their resultant employment at Chase. A reasonable person might note that the description "Chemical Bank" was by far the most common reference to the party in question. The record in this case is long, with many motions and trial exhibits, and testimony of witnesses. The factual and legal issues are complex. Most of the references to Chase by the parties, witnesses, or participants in settlement negotiation can be described, not entirely inaccurately, as isolated. These facts alone, although troubling, do not conclusively establish the judge's knowledge of Chase's presence as a party.

Nevertheless, a reasonable person knowing the pertinent facts, the contents of the judge's disclosure form, and the judge's findings of fact, which expressly described the lead plaintiff as "Chemical Bank (now know as The Chase Manhattan Bank)," would conclude that the district judge knew of his disqualifying financial interest in Chase/Chemical at the time of his 1997 decision. We do not question the district judge's later claim that he was unaware of the Chemical–Chase merger. However, by the same token, a reasonable person would view as actual knowledge the judge's recognition of the fact of the merger two years before in his decision on the merits. That recognition, the contents of his disclosure forms, and the other circumstances detailed above, cannot, under Section 455(a)'s objective reasonable person test, be disregarded because of the judge's later profession of ignorance.

In *Liljeberg,* the Supreme Court held that a judge's "forgetfulness" was not deemed "the sort of objectively ascertainable fact that can avoid the appearance of partiality." 486 U.S. at 860, 108 S.Ct. 2194 (quoting *Health Servs. Acquisition Corp. v. Liljeberg,* 796 F.2d 796, 802 (5th Cir.1986)). We hold that under the present facts the district judge's stated ignorance of the merger cannot overcome the objective appearance of a conflict of interest requiring disqualification under Section 455(a).

[8] In this regard, it is important to understand that judges have an obligation to exercise reasonable effort in avoiding cases in which they are disqualified. Section 455 is not a provision that requires judicial action only after a party to the litigation requests it. The relevant provisions are directive and require some reasonable investigation and action on a judge's own initiative. Indeed, a Section 455(b)(4) conflict is non-waivable by the parties' express consent, much less by their silence. There are important reasons for this. One is the damage to public confidence in the federal judiciary's impartiality that would result from constant recusal motions or recurrent controversies over judges' financial interests in parties to litigation. Another reason is that lawyers for the most part expect judges to disqualify themselves under Section 455(b)(4) without a formal motion. In fact, lawyers do not routinely research judges' ***131** financial disclosure forms—the only information available on a particular judge's financial holdings—but even if they did, those forms are generally a minimum of four months out-of-date, i.e., the

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forms are filed by May 1 and report holdings and transactions for the previous calendar year.[2] Judges therefore bear the principal burden of compliance with that section.

[9] We now turn to whether the violation of Section 455(a) was cured under Section 455(f) when the district judge divested his interest in **Chase**/Chemical immediately upon his discovery of the problem in 2000. In particular, appellees argue that the requirements of Section 455(f) were met in that: (i) the district judge devoted "substantial judicial time" to the matter before "appearance or discovery" of the conflict; (ii) his financial interest cannot be substantially affected by the outcome of the case; and (iii) he divested himself of the interest once he discovered it.

While Section 455(f) allows a judge to divest a newly-discovered disqualifying interest and continue to preside over a case, that divestiture cannot cure circumstances in which recusal was required years before and important decisions have been rendered in the interim. The statutory language, legislative history, and caselaw all support this conclusion.

It is clear from the language of Section 455(f) itself that a curative divestiture must be made upon the "appearance or discovery" of the potentially disqualifying financial interest. The **Banks** do not dispute this. *See* Br. of Pls.—Appellees Banque Paribas, Rabobank Nederland, and Natwest **Bank** at 24 (stating that "regardless of how long the possible conflict of interest remained latent," Section 455(f) "is triggered by the 'appearance or discovery' of a disqualifying interest"); Br. of Pls.—Appellees Chem. **Bank**, Am. Express **Bank** Ltd., Andina Coffee, Inc. & Andina Trading Corp. at 20 (stating that Section 455(f) "prescribes prompt disclosure and divestiture as the remedy"). It follows that where an earlier "appearance" of a potentially disqualifying interest mandated recusal under Section 455(a), a divestiture years later cannot cure a judge's presiding over significant proceedings in a case—here rendering a decision after a bench trial—in the intervening years.

Even if the statute were deemed ambiguous in this regard—and we do not so deem it—the legislative history of Section 455(f) indicates that the provision was intended to address situations, particularly complex multidistrict class actions, where a judge is "unable to determine whether a cognizable interest exists" in the outcome of the case "until long after litigation has commenced." H.R. Rep. No. 100–889, at 68 (1988) *reprinted in* 1988 U.S.C.C.A.N. 5982, 6029.[3] This is not such a case. As ***132** stated above, a reasonable person would believe that the district judge knew that he had a financial interest in a party to the litigation at some point before the decision on the merits.

Appellees rely heavily upon our decision in *Kidder, Peabody,* in which we held that Judge Pollack's potentially disqualifying financial interest in a party under Section 455(b)(4) was cured by his prompt divestiture immediately upon discovery. 925 F.2d at 561. In *Kidder, Peabody,* however, we did not find, as we do here, that the appearance of a disqualifying interest was created long before the subsequent discovery and divestiture. *Id.* Because the disqualifying circumstances here appeared in 1997, they cannot be cured by a divestiture in 2000, long after the district judge's conduct of the bench trial, findings of fact, and issuance of judgment. Were we to rule otherwise, Section 455(f) would go far to eliminate the objective appearance test of Section 455(a).

In no case cited by appellees, and in none that we have found, has a judge been able to cure a past Section 455(a) violation by disposing of the interest in question under Section 455(f) long after a decision on the merits. *See, e.g., Kidder, Peabody,* 925 F.2d at 561 (allowing cure under Section 455(f) where the judge disposed of his disqualifying interest "immediately upon learning" thereof, and where no past violation of Section 455(a) was found); *In re Certain Underwriter,* 294 **F.3d** at 302–04 (allowing Section 455(f) divestiture to cure potential Section 455(b)(4) violation where the judge disposed of disqualifying interest promptly upon discovery, and where there was no prior Section 455(a) violation).

d) *Remedy*

As for the propriety of the vacatur remedy, we need only quote from the Supreme Court's decision in *Liljeberg,* which for this purpose involved a similar factual scenario:

> These facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although [the district judge] did not know of his fiduciary interest in the litigation, he certainly should have known .... Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court

> of Appeals' willingness to enforce § 455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered. It is therefore appropriate to vacate the judgment unless it can be said that [appellant] did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment.

Liljeberg, 486 U.S. at 867–68, 108 S.Ct. 2194.

Of course, it is burdensome to appellees for us to require a new trial. However, it is not unfair. As noted by the district judge, no updated Rule 9 disclosure statement was filed following the Chemical–**Chase** merger until September 2000. *Chem. **Bank***, 2000 WL 1585078, at *1. **Chase**/Chemical, or for that matter any of the appellees, could have safeguarded against potential disqualification by revising ***133** the Rule 9 disclosure statements at the time of the merger.

CONCLUSION

For the foregoing reasons, we hold that the district judge's denial of **Affiliated's** recusal motion was an abuse of discretion. We therefore reverse, vacate all decisions and orders made in this case subsequent to April 14, 1997, and remand with instructions that the case be reassigned for disposition of all motions outstanding as of April 14, 1997 and a new trial. Finally, we amend the caption to reflect **Chase's** role as a party.

JACOBS, Circuit Judge, concurring.

I concur entirely in the panel opinion. I write separately and briefly to make an observation that may be obvious.

The standard that properly governs the panel opinion is what a reasonable person would believe, knowing the salient circumstances—not what a reasonable person would think who had the benefit of inside knowledge about the work of courts, of particular judges, and of judges in general. A reasonable person would not know that it is possible (and efficient) for a judge conducting a bench trial to pay little attention to the pedigree testimony in which witnesses give their employment history, and to adopt verbatim without close attention the undisputed findings concerning a party's merger history where that history has no bearing on the complex merits of the case. Similarly, a reasonable person knowing the facts and circumstances would nevertheless not know that the reputation of a particular judge would preclude a knowing conflict, that a judge's personal financial resources may render a sizeable investment insignificant, or that many judges avoid reading newspaper accounts of mergers, transactions and other matters that may come before them.

No findings are made or considered as to these circumstances in the panel opinion or in this concurrence, because analytically they do not matter. I mention them only to emphasize that the panel opinion cannot be fairly read to cast the slightest aspersion on an estimable senior judge.

All Citations

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Footnotes

1 On the fifth day of trial, May 19, 1997, **Chase**/Chemical's counsel called and examined William H. Blanc. The testimony began as follows:

Q: Mr. Blanc, by whom are you presently employed?
A. **Chase Manhattan Bank**.
Q. How long have you been employed by the **Chase Bank**?
A. Since the merger with Chemical **Bank**.
Q. Prior to the merger with Chemical, by whom were you employed?
A. Chemical **Bank**.
Q. How long have you been employed by Chemical **Bank**?
A. Since December 3, 1962.

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Q. Do you have a current title with the **bank**?
A. I do.
Q. What is that title?
A. Senior vice president.
Q. What are your duties as a senior vice president of the **bank**?
A. I am responsible for the North American trade operations for **Chase Manhattan**.

J.A. at 229, Tr. at 557:3–20. In the course of this testimony, **Chase**/Chemical's counsel advised Blanc and the judge that he would "use the name Chemical for **Chase**." J.A. at 229, Tr. at 558:10.

The next day, May 20, 1997, **Chase**/Chemical's counsel called and examined William T. Strout. This testimony began as follows:

Q. Mr. Strout, before we begin, would you please tell the court what you are here to testify about?
A. Chemical **Bank's** losses, the shared recoveries of all the **banks**, and the application of those recoveries.
Q. By whom are you presently employed?
A. The **Chase Manhattan Bank**.
Q. How long have you been employed by the **Chase Manhattan Bank**?
A. 27 years.
Q. You were employed by Chemical **Bank** prior to its merger with **Chase**?
A. Yes.
Q. So that you have been employed by Chemical **Bank** and by its successor **Chase** for the past 27 years?
A. Yes.
Q. For the purposes of your examination I am going to refer to the **bank** as Chemical **Bank**, is that all right with you?
A. Yes.

J.A. at 231, Tr. 757:17–25, 758:1–10.

2 For example, had counsel in this case examined the judge's disclosure forms existing on the date the case was transferred to him, the forms would not have shown the purchase of **Chase** New Stock.

3 Section 455(f) was the product of a recommendation by the United States Judicial Conference intended to remedy circumstances as described in the House Report. The Conference's proposed legislation cited in *In re Cement & Concrete Antitrust Litigation,* 515 F.Supp. 1076, 1081 (D.Ariz.1981), read:

> Notwithstanding the foregoing provisions, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance, after the matter was assigned to him, of a party in which he individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest (other than an interest that could be substantially affected by the outcome), a waiver of disqualification may be accepted from the parties; in the absence of waiver, disqualification is not required if the judge determines that the public interest in avoiding the cost of delay of reassignment outweighs any appearance of impropriety arising from his continuing with the matter to completion.

The Conference's version used "appearance" in the sense of a disqualifying party entering the case. The statute as enacted by Congress may have altered the meaning by changing the language to "appearance ... that [the judge] ... has a financial interest in a party."

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