DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2010

TATYANA NUDEL,
Petitioner,

v.

FLAGSTAR BANK, FSB, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR FLAGSTAR BANK, FSB, PALM BEACH COUNTY, and **ADORNO & YOSS, LLP,**
Respondents.

No. 4D10-641

RICHARD J. DAVIS and **NANCY DAVIS,**
Petitioners,

v.

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE, FOR SEQUOIA 2007-3,
Respondent.

No. 4D10-1842

[August 11, 2010]

PER CURIAM.

In these two cases, which we have consolidated for purposes of this opinion, the law firm of Ice Legal, P.A. (Ice), seeks, under the guise of disqualifying the judge, to exclude itself from proceeding before Judge Sasser, who presides over the foreclosure division of the Palm Beach circuit court.[1] These petitions for writ of prohibition represent the seventh and eighth petitions that this law firm has filed in this court

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[1]The foreclosure division, which attempts to streamline scheduling procedures, was created to handle the extraordinary backlog of foreclosure cases. *See* Administrative Order 3.302, Fifteenth Judicial Circuit. At the time the petition was filed, an estimated 55,000 foreclosure cases were pending in that court. This number has likely increased since that time.

seeking the same relief.[2] All the prior petitions were carefully reviewed and denied on the merits.

As in the prior petitions and motions to disqualify filed by the firm, Ice attempts to pyramid a host of unrelated matters, which were not raised within the ten-day time limit of Florida Rule of Judicial Administration 2.330(e), to achieve its goal. The repetitive claims have been reviewed *de novo* on numerous occasions and rejected on the merits. None of these issues, alone or together, provide Ice's clients with any objectively reasonable basis to fear that the judge is biased.

In addition to re-raising these issues, the Ice firm raised new arguments alleging that *ex parte* communication between opposing counsel and the judge requires disqualification. The communications involved a recurring scheduling dispute involving Ice. The Ice firm has insisted on specially-set hearings on its motions even though the judge, through her judicial assistant (JA), had expressed that the types of motions at issue should be set for ten-minute hearings on the uniform motion calendar. Ice has complained that it needs at least fifteen minutes to be heard and demanded specially-set hearings.

In one of these cases, aware of Ice's persistent objections to their motion being set on the uniform motion calendar, the plaintiff bank scheduled a hearing on Ice's motion to dismiss during a time reserved for summary judgment motions. The judge phoned the bank's counsel advising that the hearing needed to be scheduled on the uniform motion calendar and that twenty minutes was not necessary to argue the motion. The bank's attorney immediately informed Ice and tried to coordinate a convenient time for the hearing. The next day, the judge entered a written order requiring the bank to schedule the hearing on the motion calendar within ten days.

In the second case, an administrative employee for the bank's counsel attempted to coordinate scheduling of Ice's motions on the uniform motion calendar. Ice continued to object to the scheduling, maintaining its position that it needed fifteen minutes instead of ten.[3] Another

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[2]*Feith v. Indy Mac Fed. Bank*, 4D09-5070; *Sandomingo v. Washington Mut. Bank*, 4D09-5000; *Vidal v. U.S. Nat'l Bank Ass'n*, 4D10-397; *Glarum v. Lasalle Bank*, 4D10-603; *Brown v. Wachovia Bank*, 4D10-130; *Brown v. Wachovia*, 4D10-642.

[3]A specially-set hearing would not be available until much later in time, whereas the motions could be heard sooner if set on the uniform motion calendar. Ice made no attempt to schedule its motions for hearing nor has it provided any explanation why its motions—which do not involve evidentiary

administrative employee for the bank's counsel contacted the judge's JA to inform her that the Ice firm was again objecting to having their motions heard at the uniform motion calendar. Another judge, sitting in Judge Sasser's absence, signed orders scheduling the hearing on the uniform motion calendar. The above incident led Ice to request all emails between the law firm's staff and the JA. Ice contends the emails show that the law firm's administrative staff has been engaged in *ex parte* communications with the judicial assistant.

Based on these allegedly improper *ex parte* communications, Ice seeks to disqualify the judge from all of its cases. In all of its prior petitions, Ice has sought what amounts to firm-wide disqualification which would effectively exclude Ice from proceeding in the foreclosure division. Judge Sasser is presently the only judge presiding in the foreclosure division.

We review *de novo* the legal sufficiency of the motions to disqualify that were filed below. *See Edwards v. State*, 976 So. 2d 1177, 1178 (Fla. 4th DCA 2008).

Ex parte communications regarding purely administrative, non-substantive matters, such as scheduling, do not require disqualification. *See Rose v. State*, 601 So. 2d 1181, 1183 (Fla. 1992) ("[A] judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, . . . this would not include *strictly* administrative matters not dealing in any way with the merits of the case."). *See Rodriguez v. State*, 919 So. 2d 1252, 1274-75 (Fla. 2006) (*ex parte* discussion of an administrative matter, the nature of a scheduled hearing, did not require disqualification); *Randolph v. State*,

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matters—required any additional time for oral argument. As noted by the judge, at a hearing where the policy was explained to Ice, the judge had read the motions—which raised similar issues Ice has repeated in many of its cases—and additional time for oral argument was unnecessary.

We are aware of no rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion. *See Gaspar, Inc. v. Naples Fed. Sav. & Loan Ass'n,* 546 So. 2d 764, 766 (Fla. 5th DCA 1989) ("Judicial consideration and determination of a non-evidentiary motion on the basis of memoranda of law rather than oral argument by counsel at a noticed hearing does not constitute an ex parte hearing or a denial of due process"); *First City Dev. of Fla., Inc. v. Allmark of Hollywood Condo. Ass'n,* 545 So. 2d 502, 503 (Fla. 4th DCA 1989) ("There is no rule of procedure or law that requires the trial court to have oral argument as to [objections to discovery]"). *See also* Fla. R. App. P. 9.320 ("Oral argument *may* be permitted in any proceeding") (emphasis supplied); *In re Proposed Florida Appellate Rules*, 351 So. 2d 981, 1011 (Fla. 1977) ("[T]here is no right to oral argument" in appellate proceedings).

853 So. 2d 1051, 1064 (Fla. 2003) (*ex parte* conversation about ministerial matter—wording of a sentence in an order—was insufficient to disqualify); *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000) (holding that an *ex parte* communication between the judge and the state attorney in a death penalty case did not require disqualification where the communication related to purely administrative matters, including the amount of time the state would be provided to respond to defendant's postconviction motion and the scheduling of hearings).

The *ex parte* communications in the present cases all involved purely administrative, non-substantive matters regarding the scheduling of motions, not the merits of the case. The judge, who had read and was familiar with Ice's motions, did not exhibit any objectively reasonable basis for Ice's clients to fear bias when she indicated that the motions did not require additional time.

As to the communications between the administrative personnel of the bank's law firm and the JA, neither the *ex parte* communications, nor the alleged animosity that has developed between the JA and one of Ice's employees, provides an objectively reasonable basis for Ice's clients to fear that the judge will not be fair and impartial. *See Leone v. F.J.M. Constr.*, 911 So. 2d 1285, 1285-86 (Fla. 1st DCA 2005) (holding that a judicial assistant's disparaging comments to a party's attorney, made after a scheduling dispute, did not provide any reasonable basis to fear that the judge would not be fair). As noted in *Leone*, scheduling of hearings is typically a matter delegated by judges to judicial assistants. This is particularly necessary in the foreclosure division which has an extraordinary backlog of cases. Judge Sasser cannot be expected to hold hearings *regarding the length of upcoming hearings* in order to settle insignificant disputes about whether an additional five minutes is necessary for oral argument on a motion.

Contrary to Ice's accusations, Judge Sasser did not violate Canon 3(B)(7) of the Florida Code of Judicial Conduct, which expressly exempts communications relating to scheduling and other administrative matters from its prohibition on *ex parte* communications. The judge's *ex parte* communication with the bank's counsel regarding the bank's improperly-scheduled motion was immediately brought to Ice's attention. Ice has had abundant opportunity to respond but never specified any reason why fifteen minutes was required to hear its motions.

Ice's repetitive attempts at disqualification in these cases appear designed, not to ensure that the proceedings against their clients are presided over by a neutral and fair tribunal, but to achieve a strategic advantage and/or frustrate the efficient function of the foreclosure

division. As we suggested in *Nassetta v. Kaplan*, 557 So. 2d 919, 921 (Fla. 4th DCA 1990), this tactic is an improper use of the disqualification procedure.

The petitions are denied on the merits.

GROSS, C.J., STEVENSON and DAMOORGIAN, JJ., concur.

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Consolidated petitions for writ of prohibition to the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Meenu T. Sasser, Judge; L.T. Case Nos. 2009CA023221XXXXMB and 2009CA040226XXXXMB.

Thomas E. Ice of Ice Legal, P.A., West Palm Beach, for petitioners Tatyana Nudel, Richard J. Davis and Nancy Davis.

No response required for respondents.

Not final until disposition of timely filed motion for rehearing.