Trimarco v Data Treasury Corp.
2014 NY Slip Op 30664(U)
March 7, 2014
Sup Ct, Suffolk County
Docket Number: 30324-2003
Judge: Emily Pines

[* 1]

SHORT FORM ORDER **INDEX NUMBER: 30324-2003**

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

***Present*: HON. EMILY PINES**
J. S. C.

Original Motion Date: 03-06-2014
Submission Date: 03-06-2014
Motion Sequence Number: 026 MD

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MICHAEL C. TRIMARCO,

Plaintiff/Counterclaim-Defendant,

-against-

DATA TREASURY CORPORATION,

Defendant/Counterclaim-Plaintiff.

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On October 30, 2013, following more than 41 days of trial during which both parties were afforded every reasonable opportunity to make out their claims, counterclaims, and defenses, this Court issued an 83-page decision dismissing both Plaintiff's Complaint and Defendant's Counterclaim, in their entireties. Judgment in accordance with the decision was signed on December 10, 2013. On or about January 14, 2014, Plaintiff filed a Notice of Appeal, appealing from so much of the judgment as dismissed Plaintiff's Complaint.

Presently before this Court is Plaintiff's second attempt to set aside the decision dated October 30, 2013. Plaintiff's initial attempt to do so, which took the form of a letter application

faxed to this Court on January 3, 2014, requesting an extension of time to make a post-trial motion pursuant to CPLR 4404, was denied by Order of this Court dated January 7, 2014, on the grounds that it was untimely, and because good cause for an extension of time had not been demonstrated.

Plaintiff now moves for an order seeking the following relief: (I) a "stay" of this Court's decision dated October 30, 2013; (ii) a determination of whether ceratin attorneys for defendant violated, or "caused a violation" of New York's "Judicial Laws" (sic), including "Judicial Law §14" and "applicable ethical and conduct rules"; (iii) an award of sanctions and treble damages against Defendant and its attorneys pursuant to "New York Judicial Law 487" and "other New York Judicial Laws and the CPLR;" and (iv) "reversal" of this Court's" October 30, 2014 decision" (sic), with "reasonably assessed damages." Plaintiff's motion is supported only by the hearsay affidavit of a new attorney who has never previously appeared in this case, who never participated in the 41 day trial of this matter, who has not filed any Notice of Appearance or Notice of Substitution as Counsel for Plaintiff, as required pursuant to CPLR 321, and, most egregiously, has purported to base Plaintiff's application upon the assertion of serious allegations of professional and ethical misconduct against both a respected fellow attorney and this Court, based solely upon alleged unattributed hearsay information and "feedback" provided by unnamed "sources," including accusations of a claimed personal "affinity" between this Court and one of Defendant's counsel. Defendant opposes the motion.

For the reasons set forth below, Plaintiff's motion is denied in its entirety.

Prior to considering the merits of Plaintiff's new application to vacate this Court's trial decision, the Court must first consider whether it is required to recuse itself from even hearing

and deciding the instant motion, based upon allegations in the moving papers. Although Plaintiff's motion does not expressly request recusal, the Plaintiff's contention that this Court harbors some kind of bias in favor of the Defendant by virtue of the Court's alleged "affinity" with one of Defendant's trial counsel and exhibited such a bias during the trial, is the essence of Plaintiff's complaint against this Court and the foundation for Plaintiff's current motion in all respects. Thus, the demand for this Court's immediate recusal is implicit, if not explicit, in the motion presently pending before this Court, and the issue must be addressed before this Court can hear and determine the motion.

Having given due consideration to Plaintiff's professed concerns, the Court declines to recuse itself from deciding the motion. "'Absent a legal disqualification under Judiciary Law § 14, a court is the sole arbiter of the need for recusal, and its decision is a matter of discretion and personal conscience'" (*Galanti v Kraus*, 98 AD3d 559 [2d Dept 2012], quoting *Matter of O'Donnell v Goldenberg*, 68 AD3d 1000, 1000 [2d Dept 2009]). Here, in support of the claim of bias, the Plaintiff has not proffered a single word of competent admissible evidence based upon the alleged personal knowledge of a single identified witness. The vague and patently incompetent hearsay rumors attributed in Plaintiff's motion papers to four unidentified "sources," unsupported by a single affidavit based upon personal knowledge, are unworthy of this Court's consideration. Indeed, for this Court to grant recusal based upon such a grossly inadequate and incompetent showing would be manifest error. The Plaintiff's present application appears to be nothing more than a transparent effort at judge shopping by lodging unsupported accusations in an attempt to cast doubt as to the Court's impartiality and have the Court recuse itself. Such blatant attempts at judge shopping are frowned upon (*see Albany Specialties, Inc. v County of*

Orange, 255 AD2d 439 [2d Dept 1998]), and will not be countenanced in this instance. Accordingly, the Court declines to recuse itself from this motion and will proceed to consider the merits of the motion.

The heart of Plaintiff's application rests on the twin assertions that one of Defendant's trial attorneys, John P. Bracken, Esq., allegedly had an undisclosed stock ownership interest in the defendant corporation, and further, that because of an alleged personal "affinity" between this Court and Mr. Bracken, within the meaning of New York Judiciary Law §14, Mr. Bracken's alleged failure to disclose his stock interest resulted in a violation by this Court of Judiciary Law §14, which Plaintiff claims, if properly disclosed, would have required this Court to recuse itself in this matter, absent a waiver by Plaintiff. However, Plaintiff's factual accusations are false and wholly unsubstantiated and his legal contentions are utterly lacking in merit.

Contrary to Plaintiff's assertion that Mr. Bracken failed to disclose his stock ownership in defendant corporation, the record clearly shows that Mr. Bracken's stock ownership was fully known to the Plaintiff's counsel prior to the trial of this action, and before this matter was even assigned to this Court. Indeed, as early as February 14, 2011, 18 months before the commencement of the trial in this action, the issue of Mr. Bracken's stock ownership was directly raised in correspondence between Plaintiff's counsel and Defendant's counsel, and Plaintiff's counsel threatened at that time to seek Mr. Bracken's disqualification as counsel on said basis, but failed to do so. In addition, on multiple occasions, the issue of Mr. Bracken's stock ownership in defendant corporation was the subject of both testimonial and documentary evidence submitted during the course of the trial. Thus, there was no failure to disclose by Mr. Bracken, and even if there were, Plaintiff's failure to raise this issue with the Court either before

or during the trial constitutes a waiver of any objection to Mr. Bracken's participation as Defendant's counsel during the trial based upon his stock ownership in defendant corporation.

In any event, the mere fact that Mr. Bracken is possessed of a minimal stock interest in the defendant corporation (approximately .038% of Defendant's outstanding shares) is not sufficient grounds to have required Mr. Bracken's disqualification of counsel. Plaintiff has cited no law supporting the proposition that an attorney's mere ownership of shares in the corporate entity he or she represents creates an inherent conflict-of-interest requiring the attorney's disqualification as counsel. In fact, the Commission on Ethics and Professional Responsibility of the American Bar Association has issued a formal opinion to the contrary. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-418, p. 9 (2000).

Examination of this first issue leads this Court to the true gravamen of Plaintiff's current motion, which is that it is the combination of Mr. Bracken's stock interest (which, in Plaintiff's view, made Mr. Bracken into a "**quasi (**and, de fact [sic], actual) **party** to the action"), combined with this Court's supposed close personal "affinity" with Mr. Bracken, that required this Court's disqualification and recusal from this matter pursuant to section 14 of the New York Judiciary Law. Judiciary Law § 14 provides, in relevant part:

> A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding . . . if he is related by consanguinity or affinity to any party to the controversy within the sixth degree.

Plaintiff's contention is utterly without merit for numerous reasons. First, denial of Plaintiff's request for recusal is warranted because the Plaintiff inexplicably withheld the allegations of bias until after this Court adversely ruled against him (*see Glatzer v Bear Stearns*

& Co., Inc., 95 AD3d 707, 707 [1st Dept 2012]). Second, as noted above, the only "evidence" submitted by Plaintiff in support of the accusations against both Mr. Bracken and this Court is the affidavit of his new attorney, Jason O. Keene, Esq., who lacks any personal knowledge of the alleged facts (*See Zuckerman v. City of New York,* 49 N.Y.2d 557 [1980][bare affirmation of attorney without personal knowledge is without evidentiary value]). Third, "affinity," as used in Judiciary Law §14, does not have the general, colloquial meaning attributed to it in the affidavit of Plaintiff's counsel. Rather, it means the relationship which arises from marriage between the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband (*Paddock v Wells*, 2 Barb.Ch. 331 [1847]). Here, there is no allegation, hearsay or otherwise, of any such relationship of legal "affinity" between this Court and Mr. Bracken. In any event, such an allegation, would be completely false and without foundation in fact.

Finally, even were this Court to interpret Plaintiff's allegation of an alleged personal "affinity" between the Court and Mr. Bracken in the broader, more colloquial and informal manner perhaps intended by Plaintiff, the accusation would remain absolutely false and without any basis in fact. This Court has read the affidavit submitted by Mr. Bracken in this matter and it fully and accurately describes the nature of this Court's purely arms-length, professional relationship with Mr. Bracken over the many years we have both served in various capacities in the legal profession on Long Island. However, lest there be any doubt, the Court hereby reiterates that it has no personal or social relationship with Mr. Bracken of any sort, that this Court has no recollection of ever being in the company of Mr. Bracken other than in court, or at some kind of bar association or other professional gathering or function; and that, while the Court has the highest professional regard for Mr. Bracken, it has the same high regard for many

of the practicing attorneys who regularly appear before it, including Plaintiff's own former counsel, Mr. Del Col. In sum, the factual premise for Plaintiff's application, based as it is entirely upon incompetent hearsay, is, in any event, completely without basis, and the application for relief based upon the provisions of Judiciary Law §14 is hereby denied.

In light of the above, Plaintiff's remaining contentions can be disposed of summarily. First, this Court has not granted any form of relief to any party, either monetary or equitable, that can be "stayed." The sole effect of this Court's October 30, 2013 decision was to dismiss the action in its entirety. Therefore, there is nothing to "stay," and Plaintiff's application in this respect is denied.

Plaintiff's claims purportedly arising under Judiciary Law § 487 are similarly denied. Judiciary Law § 487 permits the commencement of a separate action at law in the event that the provisions thereof are violated. This Court has no jurisdiction or authority to adjudicate Plaintiff's purported section 487 claim against Mr. Bracken, in the context of this action, especially given the fact that this action has been finally adjudicated and closed, and it declines to do so. Accordingly, Plaintiff's application is denied in this respect as well.

Plaintiff's application for a "reversal" of this Court's October 30, 2013 decision is also denied. Plaintiff's application fails to state upon what specific grounds, or according to what provision of law, such a "reversal" is requested. If Plaintiff means to renew its attempt to apply for reconsideration of this Court's October 30, 2013 decision under CPLR 4404, Plaintiff's application is denied as both repetitive and untimely for the same reasons previously stated in this Court's January 7, 2014 Order. To the extent that Plaintiff purports to seek either reargument or renewal under CPLR 2221, Plaintiff has failed to specify any alleged grounds for

such relief and has not made any showing of sufficient grounds for such relief based upon competent and admissible evidence. Plaintiff's remedy, if, he disagrees with this Court's decision, is to pursue his noticed appeal to the Appellate Division, Second Judicial Department.

This constitutes ***DECISION*** and ***ORDER*** of the Court.

Dated: March 7, 2014
Riverhead, New York

Emily Pines
EMILY PINES, J. S. C.