SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of the Law Offices of Craig Avedisian, P.C. and Richenthal, Abrams and Moss to Fix and Determine a Charging Lien Pursuant to Judiciary Law § 475 and for a Money Judgment and Related Relief Against William W. Koeppel, regarding the Estate of

ROBERT A. KOEPPEL,

Deceased.

DECISION AND ORDER

File No.: 1996-4098/A

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In the Matter of the Application to Hold William W. Koeppel in Statutory Criminal and/or Civil Contempt and/or Common Law Civil Contempt for Violating Court Orders in a Proceeding by the Law Offices of Craig Avedisian, P.C. and Richenthal, Abrams and Moss to Determine a Charging Lien Pursuant to Judiciary Law § 475 and for a Money Judgment and Related Relief Against William W. Koeppel, Regarding the Estate of

ROBERT A. KOEPPEL,

Deceased.

File No.: 1996-4098/C

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M E L L A, S.:

Papers Considered	Numbered
Notice of Motion brought by Order to Show Cause, dated November 15, 2015, With Affidavit, dated November 15, 2016, of Robert Abrams, Esq., Attaching Exhibits A-E, and Memorandum of Law, Dated November 15, 2016	1, 2, 3

In these two proceedings, one seeking to punish respondent William Koeppel for contempt and the other concerning an attorneys' fees charging lien dispute between Koeppel and his former attorneys, respondent moves to have the court recuse itself. Respondent also requests a stay of both proceedings pending the determination of the recusal application.[1] The motion was filed with the court on the day before the trial of the charging lien proceeding was to commence,

[1]Respondent styles his application as one for a temporary restraining order, pursuant to CPLR 6301, but in essence, respondent seeks a stay of two trials, under CPLR 2201.

and two weeks after the court concluded the seventh day of trial in the contempt proceeding. After hearing oral argument on these applications on November 16, 2016, the court informed the parties, on the record, that it was denying the motion. This decision explains the court's ruling.

Background

Litigation in the estate of decedent Robert A. Koeppel began in this court in 1996, shortly after his death. Between 1996 and 2008, the parties to several proceedings in this estate engaged in protracted and vigorous litigation. Since 2008, however, when the dispute among the members of decedent's family was settled, litigation has concerned a legal fee dispute between respondent, one of decedent's children who was a party to the prior proceedings, and the attorneys who represented him in those proceedings, the Law Offices of Craig Avedisian, P.C., and Richenthal, Abrams and Moss (petitioners).

Two proceedings related to this legal fee dispute are currently before the court: 1) a proceeding seeking to punish respondent for civil and criminal contempt for violating three orders issued by Surrogate Kristin Booth Glen directing him to make certain payments as security in the fee dispute, the criminal contempt aspect of which is currently being tried by the court; and 2) a charging lien proceeding, the trial of which had been, since at least August 15, 2016, scheduled to commence on November 16, 2016.

The Criminal Contempt Hearing

Between 4:00 p.m. in the afternoon of November 30, 2015 and the afternoon of December 1, 2015, the date the trial on the contempt proceeding was scheduled to commence, respondent made five applications in connection with this matter: 1) an application by order to show cause seeking, among other relief, to vacate the orders of the court that served as the basis for the contempt proceeding; 2) an application by separate order to show cause seeking to quash subpoenas served by petitioners on two of respondent's former attorneys directing them to appear

to testify and produce documents at the hearing on December 1, 2015; 3) an oral application entertained by the court to bifurcate the civil and criminal contempt aspects of the contempt proceeding;[2] 4) an application for a jury trial in the contempt proceeding;[3] and 5) an oral application for reassignment of the court attorney-referee who, for at least twelve years, had assisted this court and the two prior surrogates who have presided in the proceedings relating to this estate to preclude his assisting this court in the contempt proceeding.

In order to avoid delaying the commencement of the hearing, which had already been adjourned from the original scheduled date of November 5, 2015, the court immediately ruled on all the applications. Citing relevant authority, the court declined, in writing, to entertain the two orders to show cause. Also citing relevant authority on the record, the court: a) granted respondent's application to bifurcate the criminal and civil aspects of the contempt application and decided to conduct the hearing on criminal contempt first; and b) denied respondent's application for a jury trial.

Respondent's application for reassignment of the court attorney was ostensibly based on allegations of inappropriate conduct on the court attorney's part in sending an email to all counsel a few hours before the hearing was scheduled to start on December 1, 2015, reminding them that the court was conducting an evidentiary hearing and providing them guidance concerning the conduct of the hearing including the handling of exhibits, and suggesting the order in which witnesses should be called by petitioners. As petitioners' counsel made clear on the record on December 1, 2015, the court attorney's suggestion that respondent should be the

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[2] This application had been included in one of the orders to show cause the court declined to issue.

[3] Respondent demanded a jury trial in his verified answer in the contempt proceeding, filed on November 25, 2015, but failed to pay the corresponding jury demand fee.

first witness to be called was in response to inquiries about the scheduling of witnesses's testimony made by petitioners' counsel himself. Respondent's counsel was copied in that inquiry, but argued that the court attorney's response was "improper" as it showed that the court attorney was acting as an advocate for petitioners.

Counsel for respondent first made these accusations off the record, but the court insisted on having them on the record. The court asked counsel what remedy he was seeking given that the court itself (and not the court attorney in question) was conducting the hearing. Counsel asked for time to "digest it and put papers in." Later in the proceedings, counsel requested "that the court at this point prohibit [the court attorney] from being involved in this – not only this hearing, but in this case on a going forward basis [sic]." Despite considering the application meritless, the court informed the parties that it would proceed with the contempt hearing, which the court wished to commence that day, without the court attorney's assistance. The court then directed respondent's counsel to make in writing and on notice to petitioners' counsel any application seeking the court attorney's reassignment from any other proceedings. The court commenced the hearing in the contempt proceeding, immediately thereafter, on December 1, 2015. No written application seeking the court attorney's reassignment was ever made.

As noted, the hearing on the criminal contempt proceeding has been conducted before the court during the course of seven days and has not yet concluded. In addition to numerous, on-the-record, evidentiary rulings, six written decisions have been rendered by the court determining various motions and applications made by the parties during the trial. These include respondent's motion to amend his answer filed on the fourth day of trial, and two applications to

disqualify two different attorneys for the petitioners.[4]

The October 18, 2016 motions

On October 18, 2016, the court heard four motions in the two proceedings pending before the court. Three of them were motions in limine in connection with the charging lien proceeding. The other was the above-mentioned motion by respondent to amend his answer in the contempt proceeding. The court heard oral arguments on all the motions and determined the motions in limine on the record. It then reserved decision on the motion to amend respondent's answer.

The November 1, 2016 court proceedings

On November 1, 2016, during the seventh day of testimony in the criminal contempt proceeding, the court informed the parties that it was granting respondent's motion to amend his answer and that it would issue a written decision at a later time.[5]

In the afternoon of November 1, 2016, the court held a pretrial conference in the charging lien proceeding, at which time the court made rulings concerning the conduct of the upcoming trial. During this conference, counsel for respondent made serious accusations on the record against court personnel concerning the court's consideration of respondent's motion to amend his answer in the contempt proceeding. In particular, respondent's counsel accused the previously-mentioned court attorney of communicating with petitioners' counsel ex parte prior to October 18, 2016, to inform counsel of questions that would be asked by the court during oral argument on that day on the motion to amend.[6] In very strong terms, the court rejected counsel's

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[4] One of these disqualification applications required the court to order a continuance of the trial in order to entertain the application in writing.

[5]That decision was in fact issued by the court on November 4, 2016.

[6] Specifically, respondent's counsel insinuated that the court attorney had brought to the attention of petitioners' counsel, ex parte, an email that petitioners' counsel himself had sent on

accusations.[7] The court reminded respondent's counsel that the court attorney had been reassigned from the contempt matter, had nothing to do with the motion, and that only the court and its principal law clerk were working on the matter. Counsel nevertheless maintained his accusation of wrongdoing. Counsel's accusations notwithstanding, the court informed him that despite his unfounded claims, the court could and would be fair to him and his client.

Those accusations were leveled by respondent's counsel on November 1st. The trial was scheduled to commence on November 16, 2016. Respondent waited until November 15th, a day before trial, to file his recusal motion.[8]

The Recusal Motion

Respondent claims that the court's recusal is required in these proceedings because its impartiality might reasonably be questioned as a result of its: a) having personal knowledge of "disputed evidentiary facts concerning the proceedings," in particular, its having been present in

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December 1, 2015, to the court and to opposing counsel to which petitioners' pretrial memorandum was attached. Petitioners' counsel brought the email and the memorandum to the October 18, 2016 oral argument and used them to oppose the motion to amend, but had not appended them to his written opposition to the motion. Petitioners' counsel has explained that he only re-discovered these documents after submitting his opposition papers.

[7] As stated by the court on the record on November 1, 2016, these accusations were baseless. The court attorney has not worked on the contempt proceedings since December 1, 2015, and had no knowledge that a motion in the contempt proceeding was returnable on October 18, 2016. Additionally, as it is her practice, the night before the calendar, the undersigned reviewed the relevant case and statutory law and personally prepared the questions she would ask during oral argument and included them in her notes. No one in the courthouse had access to those notes, including the questions for oral argument. Counsel for respondent had no way of knowing, of course, that the undersigned prepared those questions without the assistance of court personnel and that no one other than she was privy to those questions. But this fact underscores the perils of making accusations based on speculation and without any foundation in fact.

[8] Respondent's counsel sent a letter to the court by email on Friday, November 11, 2016, informing the court and petitioners' counsel that, unless the court conducted a conference on Monday, November 14, 2016, or the morning of Tuesday, November 15, 2016, he would file a recusal motion on November 15th. November 11th was a holiday on which the court was closed.

the courtroom, after having been elected as Surrogate, while former Surrogate Glen entertained a prior contempt application brought by petitioners against respondent; and b) having made a public statement in defense of Surrogate Glen on the record during the contempt proceeding which is inconsistent with the court's impartial performance of its duties.

Additionally, in support of the motion for recusal, respondent's counsel repeats his accusations against the court attorney and makes them even more explicit, stating, with respect to the October 18, 2016 oral argument, that counsel, in 70 years of collective practice, "ha[s] never previously seen such a perfect coordination of questioning by the Court and submission of evidence that effectively answered the Court's inquiries." Respondent questions the court attorney's ability to be fair and impartial and the impartiality of the court itself as illustrated by its allowing the court attorney to assist the court in the charging lien proceeding. Respondent further argues that permitting the court attorney to be present in the courtroom during the October 18, 2016 oral argument on the motions "raises an indisputable appearance of impropriety, partiality and/or bias."

Discussion

It is initially worth noting that all of respondent's purported bases for recusal were known to him and his counsel, at the latest, by October 18th, almost a month prior to the scheduled trial date in the charging lien proceeding. Despite expressing, many times on the record, respondent's wish for an immediate trial on that proceeding, respondent's counsel has chosen to raise formally on the eve of trial an issue that was ripe considerably earlier and that inevitably has required postponing the day of reckoning as to whether and what his client should have paid his former

lawyers many years ago.[9] The court views this recusal motion as likely designed to delay these matters further. The motion, in any event, is meritless and must be denied.

In general, a judge is disqualified from hearing a case if she has an interest in the outcome, or is related by consanguinity or affinity to any party to the controversy (Judiciary Law § 14), but that is not alleged here. In the absence of a legal disqualification under Judiciary Law § 14, "a Trial Judge is the sole arbiter of recusal" (*People v Moreno*, 70 NY2d 403, 405 [1987]). The first ground for recusal pressed here by respondent is an alleged appearance of impropriety based on the Rules Governing Judicial Conduct, which require that a judge disqualify herself in a proceeding in which the judge's impartiality might reasonably be questioned, specifically where "the judge has personal knowledge of disputed evidentiary facts concerning the proceeding" (22 NYCRR 100.3[E][1][a][ii]).

Respondent relies on the fact that, after having been elected Surrogate, the undersigned was present – as an observer, sitting in the audience – during open court proceedings held before Surrogate Glen on December 4, 2012, involving a prior application by petitioners to hold respondent in contempt of certain court orders. The December 4, 2012 proceeding resulted in the court's granting a one-week adjournment of that contempt application and allowing respondent an opportunity to submit papers in opposition. The argument for recusal is that "given Surrogate Mella's physical presence in the courtroom (not in any official capacity) when the contempt issue was before Surrogate Glen, Surrogate Mella became uniquely qualified as a witness as to what

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[9] The order to show cause issued by the court made the recusal and stay motions returnable on November 16, 2016. The parties were informed during a telephone conference in the afternoon of November 15, 2016, that the court had signed the order to show cause and would commence the trial on November 17, 2016, in the event that the application for a stay was denied.

she saw and heard that day while sitting in Court, and thus, she cannot erase same from her memory and will necessarily rely upon that information – consciously or not – to the detriment of Respondent, particularly where, as here, Surrogate Mella is not only the arbiter of the law, but the finder of fact" (R's Mem of Law at 7).

The arguments for recusal in this regard fail for several reasons. First, the allegation of personal knowledge acquired as a result of exposure to the December 4, 2012 proceedings would, if true, concern only knowledge that would affect this court's ability to preside impartially over the contempt proceeding and not the charging lien trial. Second, this argument is akin to one in which the court has participated in prior proceedings involving the same parties, but such participation does not provide grounds for recusal. As the Court of Appeals emphasized in *People v Moreno* (70 NY2d at 406): "Unlike a lay jury, a Judge 'by reasons of * * * learning, experience and judicial discipline, is uniquely capable of distinguishing the issues and of making an objective determination' based upon appropriate legal criteria, despite awareness of facts which cannot properly be relied upon in making the decision" (citation omitted).[10] The *Moreno* court continued, "Recognizing this key premise, 'it suffices to say that there is no prohibition against the same Judge conducting a pretrial hearing as well as the trial itself'" (*id.* [citation omitted]).

In light of *Moreno*, it is clear that mere observation of a prior open-court proceeding cannot serve as a basis for the court's recusal now (*see Matter of Mavroidi*, 60 NYS2d 344 [Sur Ct, Bronx County 1946], *affd* 270 App Div 920 [1st Dept 1946]; *People v Groves*, 157 AD2d 970 [3d Dept 1990]; *People v Davenport*, 173 AD2d 633 [2d Dept 1991]). There were simply no

[10] This principle was quoted with favor again by the Court of Appeals in the recent case of *People v Pabon*, 2016 NY Slip Op 07108 (Nov 1, 2016).

"evidentiary facts" to be gained from the prior proceeding, during which no fact-finding was conducted. Even if knowledge acquired through exposure to the prior proceedings could be considered "evidence," this is the same "evidence" that the court could learn from reading the transcript of the December 4, 2012 proceedings. Respondent's counsel himself attached this transcript as an exhibit to his affirmation in support of respondent's cross-motion filed in opposition to the petition in the current contempt proceeding.[11] Finally, as this court made clear on the record on September 9, 2016, it will consider only the evidence admitted in the proceedings currently before it. This court remains confident in its ability to be fair and impartial.

Respondent also claims that this court's recusal is required because its impartiality might be questioned as a result of its having made "statements in defense of Surrogate Glen" that ran afoul of the prohibition in the Rules Governing Judicial Conduct that "[t]he judge, while a judge . . . [not make] a pledge or promise of conduct in office that is inconsistent with the impartial performance of the adjudicative duties of the office or . . . a public statement not in the judge's adjudicative capacity that commits the judge with respect to: (i) an issue in the proceeding; or (ii) the parties or controversy in the proceeding" (22 NYCRR 100.3[E][1][f]). The statements in question, made during the September 9, 2016 contempt hearing, and thus made in the court's adjudicative capacity, were that this court considered Surrogate Glen to have been "a very careful judge," and were clearly made in light of the implication by respondent's counsel that Surrogate Glen "was just signing things" that petitioner's counsel drafted and submitted for signature. The record shows that it was a stray comment in relation to a non-issue, since respondent's counsel

[11] Respondent's counsel also had a witness read portions of the December 4, 2012 transcript during the contempt hearing.

then confirmed that "no one is attacking Judge Glen." There is no indication in the transcript of the September 9, 2016 proceedings that the court was or would be basing any decision on a sense of loyalty to the former Surrogate. Instead, the transcript itself makes clear this court's readiness to make a determination based solely on what is established by the record.

Respondent's final argument in support of his request for recusal is grounded on the theory that the court attorney assigned to assist the court in this matter engaged in ex parte communications with petitioners' counsel prior to the October 18, 2016 oral argument, a proposition that, as stated above, was first raised at the November 1, 2016 pretrial conference. The court rejected that proposition then, and rejects it now as untrue and based on pure speculation (*cf. Daniel D v Linda C*, 24 Misc 3d 220 [Family Ct, Kings County 2009]).

Further, nothing should be read into the court's reassignment of the court attorney in question in the contempt proceeding on December 1, 2015, as the decision was made to avoid further delaying the hearing of that proceeding, and not because of any perceived partiality on the part of the reassigned court attorney. The conduct of that court attorney about which respondent then complained and continues to complain consisted of providing a suggestion in an email to all counsel that respondent Koeppel be the first witness called. As previously explained, the suggestion was made in response to an inquiry by petitioners' counsel concerning the scheduling of witnesses, and counsel for respondent was copied in that inquiry. There is no evidence of bias or impartiality, actual or apparent, on the part of the court attorney. Respondent's further theory that the court attorney's presence in the courtroom on October 18, 2016, while a portion of the oral argument on the motion to amend in the contempt proceeding was held, raises an appearance of impropriety and impartiality is without merit.

The cases on which respondent relies do not require recusal here (*see Matter of Wiggins*,

218 AD2d 904, 904 [3d Dept 1995] [unspecified statements made by the Surrogate in support of the motion for leave to appeal to the Court of Appeals in a matter over which Judge had presided]); *Matter of Schiff*, 83 NY2d 689 [1994] [judicial disciplinary matter, removing Village Court Justice for intentionally making inappropriate and derogatory remark about ethnic and racial groups, appearing to decide civil motion in retaliation for personal vendetta, and failing to maintain adequate records in criminal cases]; *Matter of Cunningham*, 57 NY2d 270 [1982] [judicial disciplinary matter, County Court judge censured for letters written to a City Court judge to calm the latter's anger at him and avoid his criticism and which stated that he would never change a sentence which the latter had imposed]; *People v Zappacosta*, 77 AD2d 928, 929 [2d Dept 1980] [noting the "unusual circumstances" in this proceeding requiring recusal, including, during the course of the plea colloquy, the court's having actively elicited statements from the codefendant which incriminated the appellant]; *People v Corelli*, 41 AD2d 939 [2d Dept 1973] [prior prosecution, when Judge was Assistant District Attorney, of the same defendant before the court]; *Hall v Small Bus. Admin.*, 695 F2d 175, 177 [5th Cir 1983] [Judge's law clerk was member of class in Title VII class action before the Judge]).[12]

In the end, and notwithstanding the baseless allegations made in the current motion, there is nothing raised by respondent that would or could affect this court's impartiality or require its

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[12] Although respondent states that *Matter of Murphy* (82 NY2d 491 [1993]), in which a Town Justice was removed for mishandling court funds and failing to recuse himself (or disclose the relevant facts) in several cases involving a litigant from whom the justice had once borrowed several hundred dollars, stands for the proposition that when a party requests recusal, better practice should be "to err on the side of recusal," the quote from *Murphy* more fully states: "while Judges should strive to avoid even the appearance of partiality, and the 'better practice' would be to err on the side of recusal in close cases (*see Corradino v Corradino*, 48 NY2d 894, 895), formal charges of misconduct are inappropriate when the circumstances fall in that vast discretionary area over which reasonable Judges can differ" (*Murphy*, 82 NY2d at 495). This case falls in the discretionary area.

recusal (*see People v Wallace*, 84 Misc 2d 619 [County Ct, Suffolk County 1975]).

Accordingly, respondent's motion is denied in its entirety.

This decision, together with the transcript of the November 16, 2016 proceedings, constitutes the order of the court.

Dated: November 18, 2016

SURROGATE