IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned June 19, 2017

DAVID CHASE v. CHRIS STEWART, ET AL.

Direct Appeal from the Circuit Court for Williamson County
No. 2015200 Michael Binkley, Judge

No. M2017-01192-COA-T10B-CV

Appellants sought disqualification of the trial court judge pursuant to Tennessee Supreme court Rule 10B based primarily on an order entered by the trial court in March 2016. Because Appellants waited approximately one year to seek disqualification of the trial court judge, they have waived their rights under Rule 10B.

Tenn. Sup. Ct. R. 10B Interlocutory Appeal as of Right; Judgment of the Circuit Court Affirmed and Remanded

BRANDON O. GIBSON, J., delivered the opinion of the court, in which RICHARD H. DINKINS, and THOMAS R FRIERSON, II, JJ., joined.

Brian D. Cummings and Brian Manookian, Nashville, Tennessee, for the appellants, Chris Stewart, Emily Stewart, Jason Ritzen, Susan Martin, Lino Lovrenovic, and Clayton McKenzie.

Gayle I. Malone, Jr., Charles Ingram Malone and Gibeault Cooper Creson, Nashville, Tennessee, for the appellees, Dean Chase, Sandra Chase, and D. F. Chase, Inc.

Marcus M. Crider and Heath H. Edwards, Nashville, Tennessee, for the Non-Parties, CK Global, LLC and NV Music Row, LLC.

Robert F. Parsley and Michael J. Dumitru, Chattanooga, Tennessee, for the Appellee, Andy Cho.

James Douglas Kay, Jr. and John B. Enkema, and Michael A. Johnson, Nashville, Tennessee, for the Appellee, Glenn Richard Funk.

Philip L. Robertson and Brittany Michelle Speight Bartkowiak, Franklin, Tennessee, for the appellee, David Chase.

Paul R. McAdoo, Nashville, Tennessee, for the Intervenor, Meredith Corporation.

OPINION

This Tennessee Supreme Court Rule 10B recusal appeal is ancillary to litigation involving multiple parties and claims, the majority of which are not relevant to the matter currently before the court. David Chase filed a Complaint in Williamson County Circuit Court on May 7, 2015, naming nine individuals as defendants, six of whom are the Appellants[1] in this accelerated interlocutory appeal. As a result of the filing of the Complaint, deposition testimony and documents were requested from the parents of Plaintiff David Chase ("Mr. Chase"). Mr. Chase's parents, Dean and Sandra Chase, are referred to repeatedly in the trial court's documentation and the parties' briefing as the "Non-Parties." Before documents were produced or depositions were conducted, the Non-Parties and the parties entered into an Agreed Limited Protective Order on or about August 28, 2015.[2] According to the trial court, this Agreed Limited Protective Order "restricted the disclosure of confidential documents and testimony to certain defined individuals, specifying that all documents or deposition testimony designated as confidential by the Non-Parties could only be used to prosecute, defend, or attempt to settle the litigation or future related litigation." Additional protective orders were issued by the trial court on November 6 and 7, 2015, which designated certain discovery materials protected as confidential and ordered the return or destruction of inadvertently disclosed privileged information.

Mr. Chase's counsel was told, in January and February 2016, that certain protected information disclosed by the Non-Parties in the course of discovery was shared with the media, and several news outlets published and broadcasted the Non-Parties' confidential discovery materials. Thus, the Non-Parties filed a Motion for Sanctions, based on an alleged violation of the various orders of the trial court. The Non-Parties asked the trial court to determine which party or counsel violated the trial court's orders. The trial court conducted a hearing on the Non-Parties' Motion for Sanctions on March 10, 2016, and issued a written order on March 29, 2016. The trial court's March 29, 2016 order forms one of the bases for Appellants' motion for disqualification.

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[1]The Petition for Accelerated Interlocutory Appeal indicates it is filed by Brian Manookian, who is counsel for Chris Stewart, Emily Stewart, Jason Ritzen, Susan Martin, Lino Lovrenovic, and Clayton McKenzie. However, the Motion to Disqualify filed in the trial court represents that it was filed on behalf of "Chris Stewart, Emily Stewart, Lino Lovrenovic, Susan Martin, Clayton McKenzie, Brian Manookian, and Cummings Manookian PLC."

[2]This Agreed Limited Protective Order was not provided to this Court in the course of this Rule 10B recusal appeal, and we therefore do not know the date it was entered by the trial court. However, documents contained in our record indicate that the parties, the Non-Parties, and the attorneys all agreed to be bound by the terms of the Agreed Limited Protective Order as of August 28, 2015, as opposed to the date the order was actually entered by the trial court.

In the March 29, 2016 order, which spans over twenty pages, the trial court notes that the motion for sanctions and other motions addressing an alleged violation of protective orders make allegations that "are supported by fact and credible affidavit testimony, warranting serious consideration . . . ." The order goes on to identify four attorneys, along with their respective law firms, "whose actions in this matter strongly indicate violations of Tennessee Rule of Civil Procedure 37.02 and possible contempt of the orders" of the court. However, one of the attorneys identified by the trial court as potentially violating the orders of the court, Brian Manookian, did not appear at the March 10, 2016 hearing. Thus, the trial court's March 29, 2016 order gave the parties and/or non-parties "affected by alleged violations of Tennessee Rule of Civil Procedure 37.02 and violations of the corresponding Court Orders" ten days to file "appropriate pleadings for sanctions, listing specifically each violation alleged to have occurred and the specific injury inflicted upon each party." The order also provided that any civil and/or criminal contempt petitions must be filed within ten days of the March 29, 2016 order as well.

The Non-Parties filed contempt actions against three attorneys, including Mr. Manookian and Mark Hammervold, and their respective law firms on April 11, 2016. The trial court conducted an evidentiary hearing on September 23, 2016, and scheduled the second day of evidentiary hearing for November 7, 2016, as a second setting behind a previously scheduled trial. The hearing did not proceed on November 7, 2016, and a variety of motions and "supplemental filings" were filed in the meantime by Mr. Manookian and Mr. Hammervold. In March 2017, Mr. Manookian and Mr. Hammervold identified a number of witnesses and documents they intended to introduce at the resumed evidentiary hearing, and the trial court set a hearing for April 19, 2017, to consider the propriety and admissibility of Mr. Manookian's and Mr. Hammervold's proposed evidence.

Immediately prior to the scheduled hearing on April 19, Appellants[3] filed a Motion to Disqualify pursuant to Tennessee Supreme Court Rule 10B, and the trial court cancelled the hearing. The trial court entered a thirty-three page response and order

[3]In the trial court and before this Court, Non-Parties Dean and Sandra Chase and D.F. Chase, Inc. assert that Mr. Manookian could not file the Motion to Disqualify on behalf of his clients because they were voluntarily dismissed by Plaintiff David Chase. The trial court also noted that Mr. Manookian's clients were no longer a party to the proceedings. However, the record on appeal does not contain an Order of Dismissal with respect to these parties. Tennessee Rule of Civil Procedure 41.01(3) provides that "[a] voluntary nonsuit to dismiss an action without prejudice must be followed by an order of voluntary dismissal signed by the court and entered by the clerk. The date of entry of the order will govern the running of pertinent time periods." Because our record does not contain an order confirming the voluntary nonsuit, we must assume that the Motion to Disqualify and the Petition for Accelerated Interlocutory Appeal are filed on behalf of Mr. Manookian's clients. This distinction, however, does not impact our analysis.

denying the Motion to Disqualify on May 23, 2017[4], and Appellants timely appealed.

II. STANDARD OF REVIEW

When reviewing an appeal pursuant to Tennessee Supreme Court Rule 10B, we limit our review to whether the trial court erred in denying the appellant's motion for recusal. *Williams by & through Rezba v. HealthSouth Rehab. Hosp. N.*, No. W2015-00639-COA-T10B-CV, 2015 WL 2258172, at *5 (Tenn. Ct. App. May 8, 2015) (*no perm. app. filed*). We do not review the merits or correctness of the trial court's other rulings. *Duke v. Duke*, 398 S.W.3d 665, 668 (Tenn. Ct. App. 2012). "[W]e review the denial of a motion for recusal under a de novo standard of review." *Id.* (citing Tenn. Sup. Ct. R. 10B § 2.06).

The appellate court may order the other parties to answer the appellant's petition and file any necessary documents, but it is also authorized to adjudicate the appeal summarily, without an answer from other parties. *Id*. at § 2.05. Having reviewed Appellant's petition and supporting documents, we determined that responses from the other parties involved were necessary. The other parties either did not take a position or filed voluminous documents necessary to provide this Court with the background necessary to analyze Appellant's petition. We do not deem oral argument necessary in this case.

III. DISCUSSION

Appellants' failure to timely file their Motion to Disqualify is dispositive of this case. Tennessee Supreme Court Rule 10B, Section 1.01 provides as follows:

> Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by a timely filed written motion. . . .

[4]The trial court's order denying the Motion to Disqualify includes references to at least seven exhibits. However, the exhibits were not included by Appellants in their Petition for Accelerated Interlocutory Appeal. Tennessee Supreme Court Rule 10B, Section 2.03 provides that the "petition shall be accompanied by a copy of the motion [for disqualification or recusal] and all supporting documents filed in the trial court, a copy of the trial court's order or opinion ruling on the motion, and a copy of any other parts of the trial court record necessary for determination of the appeal." Any exhibits attached to a trial court's order ruling on the motion for disqualification are necessarily a part of the trial court's order and should be provided to this Court by parties seeking an accelerated interlocutory appeal.

The Explanatory Comments to Rule 10B state:

> Although the rule does not state a specific period of time within which the motion must be filed, a motion under this rule should be made promptly upon the moving party becoming aware of the alleged ground or grounds for such a motion. The requirement that the motion be timely filed is therefore intended to prevent a party with knowledge of facts supporting a recusal motion from delaying filing the motion to the prejudice of the other parties and the case. Depending on the circumstances, delay in bringing such a motion may constitute a waiver of the right to object to a judge presiding over a matter. Further, the delay in bringing a motion or the timing of its filing may also suggest an improper purpose for the motion.

Tenn. Sup. Ct. R. 10B, Explanatory Comments, Section 1.

As evidenced by the plain language of Rule 10B, as well as the explanatory comments, "a party may lose the right to challenge a judge's impartiality by engaging in strategic conduct." *Duke*, 398 S.W.3d at 670 (citing *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)). Recusal motions must be filed "promptly after the facts forming the basis for the motion become known, . . . and the failure to assert them in a timely manner results in a waiver of a party's right to question a judge's impartiality." *Kinard*, 986 S.W.2d at 228. This requirement prevents a party from preserving an allegedly prejudicial event as an "ace-in-the-hole" to be used in the event of an adverse decision, s*ee Bracey v. Bracey*, No. M2014-01865-COA-R3-CV, 2016 WL 2585771, at *5 (Tenn. Ct. App. Apr. 26, 2016) (*no perm. app. filed*), and it also prevents a party from preserving an allegedly prejudicial event to *prevent or delay* a potentially adverse decision. In *In re: Samuel P.*, 2016 WL 4547543, at *6 (Tenn. Ct. App. Aug. 31, 2016), we held that a one year delay in raising allegedly prejudicial events caused a party to waive his right to question the judge's partiality. We hold likewise here.

In this case, Appellants claim that Williamson County Circuit Court Judge Michael Binkley should be disqualified from hearing this case because: the trial court's March 29, 2016 order demonstrates that Judge Binkley has pre-judged the facts; Senior Judge William Acree made a statement on May 20, 2016, in a different case, indicating that Judge Binkley had discussed certain facts with him; Judge Binkley has removed the media from his courtroom, and; Judge Binkley has personal connections to parties and material witnesses. The bulk of Appellants' claims in the Motion to Disqualify center around the trial court's March 29, 2016 order and Appellants' assertions that Judge Binkley prejudged the facts. However, Appellants waited well over a year to file their Motion to Disqualify, which was filed on April 19, 2017. Likewise, Appellants claim that comments made on May 20, 2016, by Senior Judge William Acree, in a different case in

another county, provide grounds for disqualification of Judge Binkley. Again, Appellants waited just under a year to raise this allegation as a ground for disqualification. None of the arguments raised in the Motion to Disqualify were timely raised. Thus, Appellants have waived their right to seek the disqualification of Judge Binkley.

Because Appellants' waiver of their grounds for disqualification of the trial judge is dispositive of the matter before us, Appellants' remaining arguments are pretermitted. The judgment of the Williamson County Circuit Court is affirmed, and this cause is remanded to the trial court for further proceedings. Costs of this appeal are taxed to Appellants, for which execution may issue if necessary.

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BRANDON O. GIBSON, JUDGE