IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, LAKELAND, FLORIDA

MARY F. PESIK,

Petitioner,

v.

BRAD L. COHAN and
MARGOT A. COHAN,

Respondents.
_____/

L.T. Case No. 06-CA-2436

Case No.: 2D09-

PETITION FOR WRIT OF PROHIBITION

Petitioner, Mary F. Pesik, by and through her undersigned counsel, petitions this Court for a Writ of Prohibition, precluding the Honorable R. Thomas Corbin ("the Judge") from presiding over Case No. 06-CA-2436, currently pending in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida ("the Case" or "Petitioner's lawsuit"), and as grounds would show:

BASIS FOR THIS COURT'S JURISDICTION

1. Petitioner moved to disqualify the Judge under Fla.R.Jud.Admin. 2.330. The Judge denied that motion. This Court has original jurisdiction under Fla.R.App.P. 9.030(b)(3) to enter a Writ of Prohibition.

NATURE OF THE RELIEF SOUGHT

2. Petitioner seeks a Writ of Prohibition from this Court, precluding the Judge from presiding over the Case and directing that the case be re-assigned to a

randomly-assigned judge.

FACTS

3. Petitioner initiated the Case by filing suit against Respondents, Brad L. Cohan ("B. Cohan") and Margot A. Cohan ("M. Cohan") in the Civil Division of the Lee County Circuit Court. In her lawsuit, Petitioner alleges, in essence, that B. Cohan and M. Cohan moved into her home for the purpose of caring for her, but instead: (i) defrauded her into executing a Quit Claim Deed, which purported to convey a portion of the home to them; (ii) stole Petitioner's money; and (iii) engaged in a series of actions designed to force Petitioner to move out of her home, including the remodeling of her home without her consent. See Appendix to Petition, 1.

4. Respondents have denied Petitioner's claims and have asserted that they spent approximately $200,000 in improvements on the home and that the Deed was given in consideration for those monies. See Appendix to Petition, 2.

5. For more than two years, Petitioner's lawsuit was consolidated with a divorce case between Respondents, B. Cohan and M. Cohan. In November of 2008, though, the Judge ruled that the cases would travel separately, essentially "un-consolidating" them. Moreover, the Judge ruled that Petitioner's lawsuit would be stayed until the divorce (in which he is also the presiding judge) was concluded. See Appendix to Petition 3, ¶ 1.

6. The divorce trial between B. Cohan and M. Cohan took place on February 17 and 18, 2009. See Appendix to Petition 3, ¶ 2.

7. Throughout the divorce trial, B. Cohan and M. Cohan repeatedly discussed, argued about, and presented evidence as to the claims at issue in Petitioner's lawsuit. For example, testimony and evidence was presented as to the value of improvements Respondents allegedly made on the house at issue in the Case, whether Petitioner consented to those improvements, the extent to which those improvements have decreased in value in the declining real estate market, and other such matters. Unfortunately, these issues, all of which are significant issues in Petitioner's lawsuit, became a significant aspect of the divorce case. See Appendix to Petition 3, ¶ 3.

8. These events were very problematic and troubling for Petitioner because she was not a party to the divorce case and was not able to participate. As such, what resulted was that Respondents (who are actually aligned with each other against Petitioner in Petitioner's lawsuit, even though they are getting divorced), were able to give their own, one-sided version of events concerning the claims at issue in Petitioner's lawsuit without Petitioner being there to present her side of the story. It was, in a lot of ways, a two-day, ex parte proceeding between Respondents and the Judge, wherein Respondents presented their version of events in Petitioner's lawsuit without Petitioner being able to present her side of the story.

See Appendix to Petition 3, ¶ 4.

9. For example, during the divorce trial, B. Cohan testified that he believed Petitioner and M. Cohan are in collusion with each other, against him, in Petitioner's lawsuit (even though they are on opposite sides of the case). In so testifying, B. Cohan was attempting to poison the well in Petitioner's lawsuit, knowing that she was not a party to the divorce case, was not allowed to participate, and was not able to rebut that false testimony. See Appendix to Petition 3, ¶ 5.

10. As the Judge was only hearing Respondents' version of events about Petitioner's lawsuit, Petitioner began to develop a well-reasoned fear that the Judge could not be neutral or detached. As the divorce trial continued to unfold, the Judge's actions continued to support Petitioner's concerns in this regard. See Appendix to Petition 3, ¶ 6.

11. For example, during the afternoon of the second day of the divorce trial, the Judge made a relatively long speech, announcing that Petitioner's case had two basic components: the parties' fee simple interest in the house and the improvements thereto. The Judge then announced, during the divorce trial, that even if the deed at issue in Petitioner's lawsuit was fraudulent, that Petitioner could not accept the benefit of Respondents' improvements to the house without paying for them because of principles of quantum meruit. The Judge even went so far as

to say that Petitioner could not get a "free ride." See Appendix to Petition 3, ¶ 7.

12. These comments, made during a divorce trial in which Respondents were participating but Petitioner was not, clearly showed that the Judge had pre-judged Petitioner's lawsuit. To illustrate, it is Petitioner's position in the Case that Respondents are not entitled to be paid for the "improvements" to the house at issue because Petitioner did not consent to those improvements (and did not even know about many of them until after they were completed). Unfortunately, the Judge's comments at the divorce trial clearly reflected his predisposition to rule against Petitioner on this critical issue even though he has not heard any evidence or argument from Petitioner. See Appendix to Petition 3, ¶ 8.

13. The Judge's repeated statements that the improvements to the house give rise to a claim for quantum meruit showed that the Judge was no longer acting neutral and detached, as he was giving legal advice to Respondents. Tellingly, Respondents had not even pled a claim for quantum meruit at the time the Judge voiced his predisposition to rule in Respondents' favor on such a claim. See Appendix to Petition 3, ¶ 9.

14. In sum, the Judge heard a myriad of evidence and arguments about Petitioner's lawsuit from Respondents at a two-day trial in which Petitioner was not a party and was not able to participate. As such, the Judge heard only one side of a disputed lawsuit without Petitioner being able to say word one. The fact that

the Judge began suggesting claims that Respondents should file, and announced how he intended to rule regarding the improvements Respondents allegedly made to Petitioner's home, illustrated Petitioner's well-reasoned fear that they could not obtain a fair trial before the Judge. See Appendix to Petition 3, ¶ 10.

15. Petitioner did not personally attend the February 17-18 divorce trial, so she did not learn of the above facts until February 26, 2009. In any event, on March 2, 2009, based on the above-stated facts, Petitioner moved to disqualify the Judge. See Appendix to Petition 3. On March 9, 2009, the Judge denied the Motion "as legally insufficient." See Appendix to Petition 4. The instant Petition ensued.

ARGUMENT

16. Fla.R.Jud.Admin. 2.330 imparts several obligations on a litigant who seeks disqualification of a judge. Petitioner complied with all such requirements. First, Petitioner satisfied the timeliness requirement of Fla.R.Jud.Admin. 2.330(e) by filing the Motion on March 2, 2009, just four days after February 26, 2009 (when she learned of the facts that gave rise to the Motion). See Appendix to Petition 3. Second, the Motion complied with Fla.R.Jud.Admin. 2.330(c), as it alleged, in writing and under oath, the reasons the Judge should be disqualified, was mailed to the Judge, and included the undersigned's certification that the Motion was made in good faith. See Appendix to Petition 3.

17. As there was plainly no basis to deny the Motion on procedural grounds, the issue before this Court is whether the Motion presented legally sufficient grounds to disqualify the Judge. In other words, the issue is whether the Motion showed Petitioner's fear that she would not receive a fair trial or hearing because of specifically described prejudice or bias of the Judge. See Fla.R.Jud.Admin. 2.330(d). In adjudicating this issue, this Court should give no deference to the lower court's ruling, but should apply a *de novo* standard of review. See Chamberlain v. State, 881 So. 2d 1087 (Fla. 2004); Frengel v. Frengel, 880 So. 2d 763 (Fla. 2d DCA 2004).

I. THE JUDGE'S SUGGESTIONS AND LEGAL ADVICE TO RESPONDENTS REQUIRE HIS DISQUALIFICATION.

18. Legions of Florida cases have held that judicial disqualification is required where a judge gives suggestions to a party on how to proceed with a case. For instance, in Shore Mariner Condo. Ass'n, Inc. v. Antonious, this Court granted a Petition for Writ of Prohibition where "…the judge instructed Antonious to amend his pleadings associated with necessity." 722 So. 2d 247, 248 (Fla. 2d DCA 1998). In support, this Court explained "[t]rial judges must studiously avoid the appearance of favoring one party in a lawsuit, and suggesting to counsel or a party how to proceed strategically constitutes a breach of this principle." Id. Other decisions have also so held. See Blackpool Associates, Ltd. v. SM-106, Ltd., 839

So. 2d 837, 838 (Fla. 4th DCA 2003) ("We grant relief in connection with the trial court's order that denied disqualification as the trial court provided Blackpool/Kevin Murphy with legal advice and suggestions."); Cammarata v. Jones, 763 So. 2d 552, 553 (Fla. 4th DCA 2000) ("we conclude the trial judge's suggestions to the Respondent's counsel caused the Petitioners to have a well-rounded fear that they would not have a fair trial); Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

19. Following these authorities, the Judge's suggestion to Respondents that they file a claim for quantum meruit, at a time when Respondents had not pled such a claim, was sufficient to require the Judge's disqualification. For that reason alone, this Court should issue the Writ.

II. THE JUDGE'S ANNOUNCED PRE-DISPOSITION TO RULE AGAINST PETITIONER REQUIRES HIS DISQUALIFICATION.

20. Numerous Florida courts have prohibited a judge from presiding on a case where the judge has announced his pre-disposition to rule against a party. In Marvin v. State, for instance, the Fourth District ruled:

> A trial judge's announced intention before a scheduled hearing to make a specific ruling, regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice. We could not imagine a more telling basis for a party to fear that he will not receive a fair hearing.

804 So. 2d 360, 363 (Fla. 4th DCA 2001) (quoting Gonzalez v. Goldstein, 633 So.

2d 1183 (Fla. 4th DCA 1994)); see also Barnett v. Barnett, 727 So. 2d 311 (Fla. 2d DCA 1999) (requiring judicial disqualification where the judge's comments during trial created the impression that he had prejudged the case); Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996) (Writ of Prohibition issued where the judge began to rule without giving a party a chance to be heard).

21. In the Motion, Petitioner set forth a myriad of facts showing that the Judge had pre-judged the Case, particularly *vis-a-vis* the improvements Respondents allege they made to the home. Perhaps most troubling was the Judge's statement that Petitioner could not get a "free ride" for these improvements and that Respondents were entitled to quantum meruit.

22. What is so obviously disconcerting about the Judge's statements is that the Judge had announced his intent to rule against Petitioner (during a proceeding in which she was not a party) without even giving her a chance to present any evidence or articulate her position (i.e. that she did not consent to the alleged improvements and did not even know about them). Instead, without hearing word one from Petitioner, the Judge concluded that Petitioner could not get a "free ride" and that she would have to pay for the improvements. Under the above-cited authorities, the Motion contained sufficient facts to require the Judge's disqualification. This Court should rule accordingly.

III. THE JUDGE'S EX PARTE COMMUNICATIONS WITH RESPONDENTS ABOUT THE FACTS AT ISSUE IN THIS CASE REQUIRE HIS DISQUALIFICATION.

23. It is axiomatic that judicial disqualification is required where a judge engages in *ex parte* communications about the merits of a case. Here, Petitioner has alleged that the divorce trial, a proceeding in which she was not a party, effectively became a two-day, *ex parte* communication about the merits of this Case. The fact that Respondents were able to "poison the well" by presenting evidence and arguments in support of their version of events in the Case, without Petitioner being able to do likewise, would lead any litigant to fear that the Judge could not provide a fair hearing.

24. The fact that the Judge, on the afternoon of the second day of trial, began suggesting claims that Respondents should file, and announced his pre-disposition to rule in Respondents' favor on those claims, confirmed Petitioner's fears. Quite simply, at the end of a two-day trial that in many ways constituted an *ex parte* proceeding about the merits of Petitioner's lawsuit, the Judge was openly expressing favoritism for Respondents. Such conduct requires disqualification.

CONCLUSION

Petitioner alleged three separate grounds for disqualification of the Judge, any one of which should have been sufficient to require that the Motion be granted. Applying a *de novo* standard of review, this Court should issue a Petition for Writ

of Prohibition and direct that the Case be re-assigned to a randomly-assigned judge.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail to Linda H. Fried, Esquire, 2524 East First Street, Fort Myers, FL 33901; William T. Haverfield, Esquire, P.O. Drawer 1507, Fort Myers, FL 33902; and the Honorable R. Thomas Corbin, Lee County Justice Center, 1700 Monroe Street, Fort Myers, FL 33901 on this 14th day of March, 2009.

_____

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the instant Petition complies with the font requirements of Fla.R.App.P. 9.100(l).

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Mark P. Stopa, Esquire