[*1]

Barr v Attorney Gen. of the State of N.Y.
2017 NY Slip Op 50271(U) [54 Misc 3d 1222(A)]
Decided on March 2, 2017
Supreme Court, Suffolk County
Hudson, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through March 24, 2017; it will not be published in the printed Official Reports.

Decided on March 2, 2017

Supreme Court, Suffolk County

Thomas Barr, IV, Petitioner,

against

The Attorney General of the State of New York; SILLS, CUMMIS & GROSS, P.C.; BENTLEY MOTORS LIMITED; BENTLEY MOTORS INC.; EAC INC. d/b/a EAC NETWORK-LONG ISLAND DISPUTE RESOLUTION CENTERS; and BARRY COHEN, ESQ., Respondents.

20747/2015

APPEARANCES OF COUNSEL
HERBERT A. SMITH, JR., ESQ.
Attorney for Petitioner
3 Blue Goose Lane
Huntington, NY 11743

The HON. ERIC SCHNEIDERMAN
Attorney General of the State of New York by
RACHAEL C. ANELLO

Assistant Attorney General
of the State of New York
300 Motor Parkway, Suite 230
Hauppauge, NY 11788

WILLIAM R. TELLADO, ESQ.
JOSEPH BUCKLEY, ESQ.
Attorneys for Defendants
Sills Cummis & Gross, PC,
Bentley Motors Limited and Bentley Motors, Inc.
One Riverfront Plaza Newark, NJ 07102-5400

DAVID A. GOLDSMITH, ESQ.
Sills Cummis & Gross, PC,
101 Park Avenue, 28th Floor
New York, NY 10178

THOMAS BARR, IV, ESQ.
Petitioner
3855 Noyac Road
Sag Harbor, NY 11963-2817

BARRY COHEN, ESQ.,
Respondent
c/o EAC, Inc.,
60 Plant Avenue
Hauppauge, NY 11788

James Hudson, J.

Upon the following papers numbered *1 to 36* on this Motion/Order to Show Cause for CPLR Article 78 (motion sequence 001); Notice of Motion/ Order to Show Cause and supporting papers *1-15*; Notice of Cross motions (sequence 002) for an *Order Dismissing the Proceeding*, motion and supporting papers *16*, (motion sequence 003) for Dismissal motion and support papers 17; Answering Affidavits and supporting papers 18-33, 34-35; Replying Affidavits and supporting papers 0; Other Memorandum of Law 36; (and after hearing counsel in support and opposed to the motion), it is

ORDERED, that Petitioner's application for the Court to recuse itself from hearing this case is denied; and it is further

ORDERED, that Petitioner's application to disqualify the law firm of Sills, Cummis & Gross, P.C. from representing Respondents, Bentley Motors Limited and Bentley Motors, Inc, is denied; and it is further

ORDERED, that the motion of Respondent, the New York State Attorney General, to dismiss the Article 78 proceeding as to him is granted (CPLR Rule 3211); and it is further

ORDERED, that the motion of Respondent, Bentley Motors Limited, to dismiss the Article 78 proceeding as to it is also granted (CPLR Rule 3211); and it is further

ORDERED, that the stay imposed by Order of this Court dated December 10, 2015 (Tarantino, J.) upon the arbitration proceeding identified as NC-1215638 is hereby vacated; and it is further

ORDERED, that the parties shall appear at **The New York State Supreme Court of Suffolk County, One Court Street, Part XL, on Tuesday, April 11, 2017 at 11:00 am**, for the purpose of conducting a hearing on the issue of sanctions to be levied against Petitioner, Thomas Barr IV, Esq. (22 NYCRR § 130-1.1).

Petitioner, Thomas Barr IV, Esq., through his attorney, Herbert A. Smith, Jr., Esq., brings this proceeding pursuant to CPLR Article 78 (motion sequence 001) against the New York State Attorney General (hereinafter referred to as the "Attorney General" or "Mr. Schneiderman"), Bentley Motors Limited, Bentley Motors, Inc., the law firm which [*2]represents the Bentley corporations, Sills, Cummis & Gross, P.C. (hereinafter referred to as 'SCG'), EAC, Inc., d/b/a EAC Network - Long Island Dispute Resolution Centers and Barry Cohen, Esq. Petitioner seeks the relief of *mandamus* against Respondents, requesting that the Court compel New York's Attorney General to join Respondent, Bentley Motors Limited, to an arbitration proceeding under New York General Business Law § 198-a which has been previously brought by Petitioner and which has been temporarily stayed. The subject matter of the arbitration is a 2013 Bentley automobile which Petitioner purchased at an authorized dealership in New York City and had serviced at a second authorized dealership on Long Island. Petitioner further seeks an order from the Court disqualifying Respondents' attorneys from representing the Bentley Motors corporations in the arbitration proceeding.

The Attorney General moves (motion sequence 002) for an order dismissing the proceeding pursuant to CPLR Rule 3211(a)(7) for the failure on the part of Petitioner to state a cause of action against him. Respondent, Bentley Motors Limited, moves (motion sequence 003) for

dismissal pursuant to CPLR Rule 3211(a)(8) for lack of personal jurisdiction. Respondent, SCG, opposes Petitioner's application to have it disqualified. The remaining Respondents have not filed papers. The Court considers all three motion sequences together here in the interest of judicial economy.

Prior to addressing the respective applications, the Court must consider a motion by Mr. Barr for the Court to recuse itself. Counsel for SCG opposes the motion for recusal.

The gravamen of the motion for recusal is that the incendiary nature of the language contained in correspondence between the parties will predispose the Court against Mr. Barr and prevent a fair adjudication of his claims. For the reasons discussed herein, the Court disagrees.

There is no basis for recusal under Judiciary Law § 14 nor under the common law (***Caperton v. A.T. Massey Coal Co.***, 556 U.S. 868, 129 S. Ct. 2252, 173 L. Ed. 2d 1208 [2009]). Thus the Court must look to the provisions of the Rules of Judicial Conduct and case law to determine if recusal is warranted.

None of the specific subdivisions found in 22 NYCRR §100.3[E] which require disqualification are present in the case before the Court. Mr. Barr's argument, therefore, comes under the purview of 22 NYCRR §100.3[E][1] which reads "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Additionally, it could be argued that our deciding these applications creates an appearance of impropriety in violation of 22 NYCRR §100.2.

We must consider that the reason for Mr. Barr's request concerns the negative impression this Court may hold based upon language used in his correspondence. This argument can be brought to bear on any jurist hearing these applications. If the Court were to recuse on the basis offered, the same circumstances could easily be repeated and my colleagues placed in a similar dilemma. Regardless of the outcome, any jurist could have their impartiality questioned under these circumstances. This Court asserts that a claim of [*3]lack of impartiality would be as unreasonable in being directed towards this Court as any other. The Court cannot embrace a position which would allow litigants "...a license under which the judge would serve at their will" (***Spremo v. Babchik***, 155 Misc 2d 796, 799-800, 589 N.Y.S.2d 1019, 1022 [Sup. Ct. Queens Co.1992], aff'd as modified, 216 AD2d 382, 628 N.Y.S.2d 167 [2nd Dept. 1995] citing ***Davis v. Board of School Commrs.***, 517 F.2d 1044 [5th Cir.1975], cited in ***People v. Diaz***, 130 Misc 2d 1024, 498 N.Y.S.2d 698; ***U.S. v. Grismore***, 564 F.2d 929 [10th Cir.1977]).

Under these circumstances it is up to the conscience and discretion of the Court to determine if we should disqualify ourselves (***People v. Harris***, 133 AD3d 880, 22 N.Y.S.3d 62 [2nd Dept. 2015], leave to appeal denied, 26 NY3d 1145 [2016]). The Court, having searched its conscience, is comfortable in assuring the parties that it can be fair and impartial in this case (***Silber v. Silber***, 84 AD3d 931, 923 N.Y.S.2d 131 [2nd Dept. 2011]). Therefore, the motion for the Court to recuse is denied.

We now address the question of the disqualification of Respondent law firm, Sills, Cummis& Gross, P.C. from handling the arbitration. It is beyond cavil that "...a movant seeking disqualification of an opponent's counsel bears a heavy burden"(***Mayers v. Stone Castle Partners, LLC***, 126 AD3d 1 [1st Dept 2015]).

Petitioner avers that SCG must be disqualified from representing the Bentley Motors Respondents as Counsel, Joseph L. Buckley, Esq. (who is referred to in Petitioner's papers as 'William Buckley'), will necessarily be called as a witness based upon representations made in communications with Petitioner. Petitioner relies for his argument on a body of case law which stands for the proposition that when an attorney will necessarily be called as a witness in the litigation, that attorney must withdraw from representing a party in the action (***Mondello v. Mondello***, 118 AD2d 549 [2nd Dept 1986]; ***Schmidt v. Magnetic Head Corporation***, 101 AD2d 268 [2nd Dept 1984]; ***Guterman v. Meehan***, 78 AD2d 618 [1st Dept 1980]). These cases, however, involve instances where the attorney had a clear conflict arising from the representation. In ***Mondello***, *supra*, the attorney in question in this matrimonial action for divorce of a marriage, was conflicted in his representation of defendant husband where he had represented the couple on the purchase of their marital home. In ***Schmidt v Magnetic Head***, *supra*, the issue of disqualification arose out of the attorneys representing the parties in separate shareholders derivative suits and conflicts arising out of ownership interests in those corporations and the corporate parties. As such, these cases can clearly be distinguished from the instant one. In ***Guterman v. Meehan***, *supra*, the First Department did not discuss the underlying facts which made it "...obvious that a member of the firm would likely be called as a witness." While the facts in that case may have made the attorney's necessity to testify as a witness obvious, the facts in the present case do not rise to this level. Petitioner avers that his communications with Mr. Buckley make it necessary to call him as a witness in the arbitration. Respondents argue that the attorneys for the Bentley Respondents merely relayed their clients' positions and policies to Petitioner. The same information which Mr. Buckley disseminated to Petitioner is available [*4]through the parties or third party witnesses, such as experts. The Court agrees with Respondents contentions. Petitioner has not shown conclusively that Respondent law

firm nor any of its associates or partners may be required to testify. The subject matter relevant to the arbitration will be given in the form of testimony by corporate representatives, not counsel, whose testimony is neither necessary nor relevant to Respondents' proofs in this matter. This Court is well within its discretion in denying Petitioner's application (*see,* ***S & S Hotel Ventures Ltd. Partnership v. 777 S. H. Corp.***, 69 NY2d 43 [1987]). The Court is obliged to deny the application.

Turning to the question of dismissal as against the Attorney General, Ms. Anello asserts that Mr. Schneiderman is neither a proper party to the Article 78 proceeding nor to the arbitration. Pursuant to CPLR Art. 75, the proper parties to an arbitration brought by way of NY Gen Bus Law § 198-a, the "Lemon Law," are the consumer and the manufacturer or its representative. New York's New Car Lemon Law provides consumers who allege that their vehicle does not conform to its warranty and qualifies for New Car Lemon Law relief, with the option of either commencing a legal action within four years of the date of delivery of the car to the consumer, or submitting their dispute to binding arbitration pursuant to a program established by the Attorney General. The program is administered by an independent arbitration firm appointed by Mr. Schneiderman and receives its authority through 13 NYCRR § 300.3. The Attorney General is responsible for establishing the regulations pursuant to which the program is conducted, Gen Bus Law § 198-1(k); 13 NYCRR Part 300. The Attorney General reviews and screens all application forms for arbitration to determine if they qualify facially for arbitration and accepts or rejects them. Those application forms that are accepted because they allege sufficient facts to qualify for relief under the New Car Lemon Law are referred to the Administrator for processing and arbitration, 13 NYCRR § 300.3, 300.6, 300.7. The Administrator is the New York State Dispute Resolution Association (hereinafter referred to as 'NYSDRA'). NYSDRA forwards the matter for arbitration to a local dispute resolution center, which in this case is Respondent EAC, Inc. and its agent Barry Cohen, Esq. The New York Lemon Law Arbitration program was established to provide an alternative arbitration mechanism "...to promote the independent, speedy, efficient and fair disposition of disputes" arising under the new and used car lemon laws, 13 NYCRR § 300.1(b). As pointed out by AAG Ms. Anello, her office serves only in an administrative role in the process to provide the true parties with a fair and just forum within which to conduct the arbitration and resolve the arbitration and resolve their dispute in a fair and expeditious manner. The Attorney General is not a necessary nor a proper party to the arbitration proceeding and his motion to dismiss is granted, CPLR Rule 3211(a)(7).

The Court next considers the motion of Bentley Motors Limited for an order of dismissal. Bentley Motors, Inc. is a corporate entity which is registered to do business in New York. It is

the U.S. distributor and importer of Bentley automobiles. It is also the company which issued the warranty for Petitioner's vehicle. NY Gen Bus Law § 198-a is a [*5]warranty law and is only applicable if the vehicle does not conform to the warranty. There is no requirement that a manufacturer provide its own express warranty. NY Gen Bus Law § 198-a does not preclude a manufacturer from delegating the issuance of an express warranty for its vehicle to another entity. In the instant case, the manufacturer is a foreign entity, Bentley Motors Limited (hereinafter referred to as 'BML') with its offices in England.

BML has delegated a domestic corporation, Bentley Motors Inc. (hereinafter referred to as 'BMI'), to issue a warranty on its behalf for its vehicles sold in this Country. In this case, BMI is the entity that stands behind the product. Because BMI issued the warranty for Petitioner's vehicle, is authorized to do business in New York and since BML is a foreign corporation, BMI is the proper party to the underlying Lemon Law arbitration. BML's application to dismiss this proceeding as against it is granted pursuant to CPLR Rule 3211(7).

Finally, the Court finds it necessary to turn its attention to very disturbing language contained in correspondence between counsel and the Court. Messrs. Buckley, and Tellado, representing the Respondent, SCG, have brought before the Court certain emails and faxes received from Mr. Barr. Mr. Tellado has attached Mr. Barr's correspondence as exhibits to his papers. The Court has also received (via fax) communications from Mr. Barr.

"O tempora o mores!"[FN1] The Court is saddened that the exclamation of the immortal Cicero in his first oration against Cataline should find employment in the case before us. It is with great consternation that the Court recounts what was received from a person purporting to be an attorney and hence, a gentleman.

A series of communications containing grievously insulting language, often of a racial nature was received by defense counsel. In one communication a cover illustration was included from a 19th Century novel or musical broadsheet. It depicts a demeaning racial stereotype of those times. In a letter to the Court requesting recusal, an inquiry is made as to my race. A female attorney is referenced in a particularly graphic and clinical manner. There is what appears to be a threat against the Court in the event that I do not grant his request for recusal:

> "Hudson-soon as I get finished with the racists business...what with the appeals which will now include first amendment stuff that I will be forced to charge him with-that the PTBS [FN2] has drug him into-he's going to take recusal out like a shot and thank me for the opportunity...And if he does not take the easy way out-which you boys

> better pray he does-than I will drop the smoking gun on him..." (letter of Mr. Tellado dated February 10th, 2017, Exhibit "A").

Additionally, correspondence sent directly to this Court has included language which could only be interpreted as racist and inflammatory, utilizing the slang of the "Uncle [*6]Remus" stories as well as utter vulgarities to emphasize his points. Decorum prevents the Court from further reciting, in detail what is included in the letters. Suffice to say that it is offensive by any reasonable analysis.

22 NYCRR § 130-1.1 provides that:

> "a) The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part."

The rule further states at subdivision [c] that "...conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."

22 NYCRR 130.1-1 (d) and attendant case law state that the person against whom the Court is considering sanctions must be afforded "...a reasonable opportunity to be heard" and that the " form of the hearing shall depend upon the nature and conduct and circumstances of the case" (*see*, ***Wagner v. Goldberg***, 293 AD2d 527, 528, 739 N.Y.S.2d 850, 851 [2nd Dept. July 24, 2002]; ***Cangro v. Cangro***, 272 AD2d 286, 707 N.Y.S.2d 895 [2nd Dept.2000]).

It must be proven that Mr. Barr is indeed the author of these missives. In these days of identity theft, the Court is mindful that these communications were via fax and the medium of email. The Court would prefer to believe that these statements are not the words of an admitted attorney, but instead that all parties and the Court have been the victim of some elaborate hoax of which Mr. Barr is also an unwitting victim. As the Bard of Avon observed "The truth will out."

Since one of the communications made reference to "...first amendment stuff," (sic) the Court wishes to place the parties on notice that any claim of the aforementioned communications being protected by the First Amendment is rejected by this Court as utterly specious. In regards to a free speech argument in a sanctions proceeding, it is well settled law that "[e]nforcement of the sanctions rule is essential to deter conduct that wastes judicial resources and inhibits the

proper administration of the court system. Any effect it may have on substantive rights... is merely incidental and not prohibited" (***Gordon v. Marrone***, 202 AD2d 104, 111, 616 N.Y.S.2d 98, 102 [2nd Dept. 1994]).

The hearing shall be conducted in the following manner: The offending communications will be marked as Court exhibits and the Court will hear evidence from the defense on the question of the authorship of same. Mr. Barr will be given the opportunity to be heard on the issue of the authorship of the communications and the propriety of sanctions relating thereto. The Court will not hear evidence or argument relating to Mr. Barr's claims concerning his automobile or the motions which are otherwise the subject of this decision.

The Respondents Bentley Motors Limited and Bentley Motors, Inc., are directed to serve a copy of this Order personally on Mr. Barr within fourteen days from the issuance of [*7]this decision.

The foregoing constitutes the decision and Order of the Court.

DATED: MARCH 2, 2017

RIVERHEAD, NY

HON. JAMES HUDSON, A.J.S.C.

Footnotes

Footnote 1:"Alas the times and the manners."

Footnote 2:PTBS is an acronym for an insulting nickname that The Mr. Barr allegedly applies to one of his adversaries.

Return to Decision List