

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS, PART 29

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ALAYNE REAL ESTATE INC. and SETAM REALTY
ASSOCIATES, LLC,

Plaintiffs,

- against -

ALAN D. LASHER and ANGELA MILLWATER

Defendants.
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Index No.: 11134/00

HON. WAYNE P. SAITTA

DECISION AND ORDER

Date: August 7, 2006

The Defendant, ALAN D. LASHER, (hereinafter "Defendant"), moved by Order to Show cause on July 17th, 2006, returnable to this court on August 3rd, 2006, seeking an Order to stay the inquest in the above captioned matter until a determination is made in the Supreme Court, Queens County, as to a Release and an Order directing the Judicial Hearing Officer, Hon. Maxine Archer, to recuse herself from further participating in the matter, appointing another Judicial Hearing Officer, and granting other relief as this Court may deem just and proper.

Upon review and consideration of the Defendant's Order to Show Cause dated July 17th, 2006; Affirmation of Defendant's Attorney, Howard M. File, Esq., dated July 17th, 2006, and all exhibits annexed thereto; Plaintiff's Memorandum of Law dated August 1st, 2006; Affirmation of Plaintiff's counsel, Steven J. Shore, Esq., and all exhibits annexed thereto, dated August 1st, 2006; Affirmation of Richard M. Gabor in Support of the Application for Stay and other relief, dated August 2nd, 2006; the Reply Affirmation of Defendant's Attorney, Howard M. File, Esq.

Dated August 2nd, 2006, and all exhibits annexed thereto; the Affidavit of Hon. Herbert A. Posner dated August 1st, 2006, and all exhibits annexed thereto; all the proceedings had herein and after due deliberation, the Defendant's Application to stay the inquest proceeding in the above captioned matter is denied, and the Defendant's Application for the Judicial Hearing Officer to be recused and replaced is denied for the reasons set forth below.

The underlying action seeks damages for, inter alia, Defendant Lasher's breach of ethical obligation to the Plaintiffs while acting as their attorney. The current hearing is on damages only as the issue of liability has been determined and was referred to Hon. Maxine Archer by an Order of this Court on December 13th, 2005. On the second day of the hearing, July 7th, 2006, the Defendant first raised the defense that he was released from liability in the underlying proceeding by way of the Final Settlement Agreement and Release, (hereinafter "Settlement Agreement"), dated December 15th, 2005. Defendant Lasher continues to argue that position in the motion before this Court.

Plaintiff asserts Defendant Lasher is not part of the Settlement Agreement and was not intended to be a third party beneficiary of the Settlement Agreement.

Defendant also argues that JHO Archer should be directed to recuse herself because her statement that co-Defendant Millwater's attorney, Richard Gabor, Esq., was not being truthful demonstrates her inability to be impartial and objective.

Plaintiff counters that nothing in the exchange between JHO Archer and Mr. Gabor rises to the level of requiring a recusal.

Defendant's allegation that he is included in the Settlement Agreement is not supported by the weight of the evidence. Defendant relies on Sec. 7(b) of the Final Settlement Agreement and Release which states the Plaintiffs release, among others, the Hoffman Parties and their respective attorneys.

The Settlement Agreement covers certain proceedings, as set forth in the "WHEREAS" clauses; neither Defendant Lasher nor the instant proceeding are listed therein. Furthermore, releases for the named parties and proceedings intended to be covered were annexed to the Settlement Agreement; no release was appended as to Defendant Lasher or this instant proceeding. The Defendant has failed to provide evidence that there was a meeting of the minds as to his being included in the Settlement Agreement. Defendant provides no affidavit from anyone with knowledge to contradict the Affidavit of Special Referee, Hon. Herbert A. Posner, who presided over the hearing, which states that the Settlement Agreement was not intended to include Lasher or this proceeding.

Defendant further contends that pursuant to paragraph 13 of the Settlement Agreement, any dispute over the terms of the settlement should be determined in Supreme Court, Queens County. However, that paragraph only covers disputes between the parties and since Defendant Lasher is not a part to the settlement, he has no standing to invoke paragraph 13.

During the hearing, while attempting to clarify the intent of the parties who drew up the Settlement Agreement, JHO Archer spoke to co-Defendant Angela Millwater's attorney, Richard Gabor, Esq., stating,

“You need to stay out of it because I think there’s a big conflict.
You were here. You know what went on, and you’re not telling the truth.”
Hearing transcript - July 7th, 2006 - Page 44, Line 1-4.

Defendant’s counsel further alleges that JHO Archer referred to Defendant Lasher as a “skunk”, off the record. Defendant’s counsel requested JHO Archer recuse herself, which she declined to do.

JHO Archer expressed her opinion regarding co-Defendant Millwater’s attorney, Richard Gabor, Esq.’s, credibility regarding a particular factual issue before her; as the finder of fact it is within her discretion to do so. The fact that he had personal knowledge of relevant facts gained in his role of attorney does not effect the JHO’s role. JHO Archer’s remarks were limited to the truthfulness of particular statements of Mr. Gabor during the exchange and did not speak to Mr. Gabor’s character. The fact that she believed some of his statements to be untrue does not require removal.

Although in his Affirmation dated July 17th, 2006, Defendant’s counsel Howard M. File, Esq. states that JHO Archer characterized the Defendant as a “skunk” off the record he did not raise this alleged comment on the record when he requested JHO Archer to recuse herself. There is no reference anywhere in the record of the hearing as to this allegation. Neither the allegation, which was not raised on the record at the hearing, nor anything else in the record supports a finding that JHO Archer abused her authority, or that JHO Archer cannot hear this matter impartially. Therefore the Court declines to direct JHO Archer to recuse herself from the matter.

WHEREFORE, the Court denies Defendant's Motion for a stay and other relief. This shall constitute the decision and order of this Court.

ENTER,



WAYNE P. SAITTA, J.S.C.

HON. WAYNE P. SAITTA
J.S.C.