

**IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

SAIPAN LAU LAU DEVELOPMENT,
INC., SHIMIZU CORPORATION, and
TOKIO MARINE & FIRE INS. CO.,

Petitioners,

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Respondent,

v.

JUAN M. SAN NICOLAS,

Real Party in Interest.

**ORIGINAL ACTION NO. 00-001
CIVIL ACTION NO. 97-1107**

**ORDER DENYING SECOND AND
THIRD MOTIONS TO DISQUALIFY
THE PANEL MEMBERS**

Cite as: *Saipan Lau Lau Development, Inc. v. Superior Court (San Nicolas)*, 2000 MP 15

I.

INTRODUCTION

On November 9, 2000 the Court conducted a hearing on its August 1, 2000 Order of Suspension and Order to Show Cause (“Order to Show Cause”) regarding Theodore R. Mitchell (“Mitchell”). Despite the Court’s order that any submissions regarding the show cause hearing must be filed by November 2, 2000, Mitchell made a last-minute, oral motion to disqualify the entire panel¹ once the hearing began. Because of the nature of the motion, the Court permitted Mitchell to address the Court on this issue. The Court gave Petitioners in this action ten days to file a written opposition thereto. The Court took the matter under advisement and now issues its ruling.

¹ This is the latest in a series of motions to disqualify the panel. Mitchell first moved to disqualify Chief Justice Miguel S. Demapan, who recused himself. Order of Self-Recusal (July 14, 2000). Mitchell has made one previous attempt to disqualify Special Judge Lamorena. Order Denying Motion for Disqualification of Justice *Pro Tempore* Alberto C. Lamorena III (Sept. 8, 2000). He has made two previous attempts to disqualify Justices Castro and Atalig. Order Denying Second Motions for Disqualification of Associate Justice Castro and Justice *Pro Tempore* Atalig (Aug. 25, 2000); Order Denying Motions for Disqualification (July 31, 2000). Mitchell also continues to informally insist on the panel’s disqualification. *See, e.g.*, Brief in Response to Court’s Order Dated August 1, 2000 (Oct. 2, 2000) (Brief at 26).

FOR PUBLICATION

II.

FACTUAL BACKGROUND

Mitchell's suspension and subsequent show-cause hearing stem from Mitchell's conduct in the underlying petition for writ of mandamus. The panel which Mitchell seeks to disqualify is composed of Associate Justice Alexandro C. Castro, Justice *Pro Tem* Pedro M. Atalig, and Special Judge Alberto C. Lamorena III.² Respondent Juan M. San Nicolas ("San Nicolas") is Mitchell's former client; Jeanne Rayphand is San Nicolas' current attorney of record. The law firm of Mair, Mair, Spade & Thompson ("Mair firm") is the attorney of record for Petitioners Saipan Lau Lau Development, Inc., Shimizu Corp., and Tokio Marine & Fire Ins. Co.

A. Allegations Regarding Justice Atalig

Mitchell's first accusation is that Justice Atalig has a conflict of interest due to his involvement as a private attorney in *Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki*, Civ. No. 98-0973 ("Carlsmith litigation"), a malpractice action against the Carlsmith law firm in connection with their handling of the probate of the estate of Larry Hillblom. At the hearing, Mitchell observed³ that in the Carlsmith litigation, Justice Atalig serves as counsel to Diego Mendiola ("Mendiola"), Special Administrator to the Estate of Larry Lee Hillblom ("Estate"). Justice Atalig submits his billings to Mendiola, who in turn submits the billings to Joe Lifofoi ("Trustee"), the trustee for the Hillblom Liquidating Trust. The Mair firm is counsel for both the Trustee in the Hillblom matter and Petitioners in this action. Mitchell further alleged that the Mair firm reviews Justice Atalig's billings before they are paid, and suggested that Justice Atalig's supposed dependence on the Mair firm for payment in the Carlsmith litigation should disqualify Justice Atalig from sitting on the panel in this original action and its ancillary show-cause hearing.

In response to these allegations, June S. Mair filed an Affidavit on November 20, 2000 in which

² Justice Castro is a full-time Supreme Court Associate Justice. Justice Atalig is a retired Supreme Court justice who is now in private practice. Special Judge Lamorena is the Presiding Judge of the Guam Superior Court. He was appointed to replace Supreme Court Chief Justice Miguel S. Demapan, who recused himself early in the proceedings.

³ Mitchell presented the following allegations in terms of an "offer of proof." He did not present oral or written testimony to support his allegations because he claimed he did not learn of the allegations until after the Court's November 2, 2000 deadline for submitting documents and witnesses he intended to present at the November 9 hearing. In reviewing Mitchell's factual allegations, we need not accept as true conclusory assertions which lack any factual support, and we may place allegations in context and examine surrounding circumstances. *United States v. International Bhd. of Teamsters*, 831 F. Supp. 278, 286 (S.D.N.Y. 1993).

she stated that:

- ¶ 9. [The Carlsmith litigation] was specifically not transferred to the Trustee. Under the terms of the Trust, the Trustee plays no role in the prosecution of the Carlsmith litigation. He was merely tasked with the responsibility to maintain a cash reserve funded by the agreement of the Beneficiaries of the Trust with their funds to make payment of the fees and expenses of said litigation.
- ¶ 10. The prosecution of the Carlsmith litigation is handled by the Special Administrator, Diego Mendiola and his attorneys, for the benefit of certain Beneficiaries of the trust. Neither the Trustee nor the [Mair] firm is involved in the prosecution of the Carlsmith litigation.
- ¶ 11. Furthermore, the Trustee is not required to review and has not undertaken to review any invoices submitted in support of the Carlsmith litigation for the substance of the invoices. The Trustee's only responsibility is to maintain the reserve established to finance the Carlsmith litigation and to make payment of invoices submitted in furtherance of the same.
- ¶ 12. . . . Neither the Trustee nor the [Mair] firm exercises discretion or control over the work performed or the amount paid for services in the Carlsmith litigation.

Affidavit of June S. Mair (Nov. 20, 2000) (Mair Affidavit at 3).⁴

Mitchell next alleges that Mendiola, a friend and business associate of Justice Atalig, convinced San Nicolas to hire David Lujan ("Lujan") to replace Mitchell in this action. San Nicolas apparently flew to Guam on November 1, 2000 to meet with Lujan. Mendiola was present at the meeting. Lujan is not licensed to practice law in the Commonwealth.⁵ Nevertheless, it appears that Mitchell is claiming that Mendiola, and therefore Justice Atalig by association, singled out Lujan to represent San Nicolas because of Lujan's professional relationship with the Mair firm, in which the Mair firm allegedly engages Lujan's services as a trial attorney for some of their cases.

In response to these allegations, the affidavit of June S. Mair states:

- ¶ 17. . . . Part of the Firm's practice is to represent our clients in very complicated and extensive litigation, in which numerous lawyers are also involved. We have had occasion to be co-counsel with Mr. Lujan in complex litigation. At any point in time, our Firm is co-counsel with a number of attorneys in Guam, CNMI and elsewhere. We have also, on several occasions, been on opposite sides of the table with Attorney Lujan in litigation.

⁴ The Court grants Petitioners' request that it take judicial notice of the Global Settlement Agreement and Declaration of Trust in the Hillblom probate.

⁵ At the November 9 hearing, the Court took judicial notice of the fact that David Lujan is not licensed to practice law in the Commonwealth. He was admitted *pro hac vice* to participate in the Hillblom probate, and may not practice law in this fashion again until the year 2001. Com. R. Admiss. II(3); In Re the Matter of *Pro Hac Vice* Admissions, Gen. Ord. No. 99-900 (N.M.I. Sup. Ct. Aug. 23, 1999).

Mair Affidavit at 5.

B. Allegations Regarding Justice Castro and Special Judge Lamorena

Justice Castro served as the trial judge in the Hillblom probate proceedings. Mitchell apparently believes Justice Castro must recuse himself because if Lujan represents San Nicolas, then Justice Castro will be biased in favor of Lujan because Lujan allegedly has a good relationship with Justice Castro from their participation in the Hillblom probate.

Special Judge Lamorena presides over the guardianship of Lujan’s client, Junior Hillblom, in the Guam Superior Court. Mitchell believes Special Judge Lamorena is also biased in favor of Lujan because Lujan allegedly claimed that Special Judge Lamorena has consistently ruled in his favor in the guardianship case on Guam.⁶

III.

DISCUSSION & ANALYSIS

A. The Court Accepts the Lujan Affidavit for Filing

[1] On November 20, 2000 David Lujan filed an affidavit on his behalf, in connection with Mitchell’s latest disqualification motion. On November 28, 2000 Mitchell filed a motion to strike the Lujan Affidavit and requested an evidentiary hearing. By his motion, Mitchell essentially requests permission to conduct a fishing expedition at an evidentiary hearing, in the hope that he *might* find evidence to support his as-yet unsubstantiated allegations and accusations. If Mitchell did not have any evidence to support his “offer of proof” the day he made it, on November 9, 2000, the Court will not extend Mitchell more time to further delay these proceedings.

[2] By his motion to strike the Lujan Affidavit, Mitchell attempts to divert the Court’s attention from the fact that on November 9, 2000, Mitchell stood before the highest court in the Commonwealth and boldly accused an attorney of attempting to steal Mitchell’s former client, and of claiming to have influence

⁶ In response, Lujan filed an Affidavit on November 20, 2000 which states:

¶19. Mitchell’s description of my professional relationship with [Special Judge Lamorena] is exaggerated to say the least. In fact, by my count, Judge Lamorena has sanctioned me more than any judge in the courts of Guam.

Affidavit of David J. Lujan (Nov. 20, 2000) (Lujan Affidavit at 7).

over at least two Supreme Court justices. Given the gravity of Mitchell's accusations, this Court has accepted the Lujan Affidavit for filing. Mitchell cannot expect to make his accusations with impunity, then deprive the accused of a chance to explain himself.

B. Mitchell Has Exhausted His Opportunity to Disqualify a Panel Member Due to Bias or Prejudice

[3,4,5]Commonwealth Code of Judicial Conduct, Canon 3 ("Canon 3") and 1 CMC § 3308 govern judicial disqualification. When disqualification is based on bias or prejudice, Canon 3(D)(c) requires that: (1) the motion be brought at the earliest possible date, (2) the motion be accompanied by an affidavit⁷ setting forth facts and reasons supporting a charge of bias, and (3) the movant's attorney file a separate certificate of good faith. *United States v. International Bhd. of Teamsters*, 831 F. Supp. 278, 286 (S.D.N.Y. 1993).⁸ Any motion brought under Canon 3(D) must precisely comply with the rule's procedural formalities, "to guard against the danger of frivolous attacks on the orderly process of justice." *Travelers Ins. Co. v. St. Jude Med. Office Bldg.*, 843 F. Supp. 138, 141 (E.D.La. 1994), *amended and supplemented by* 154 F.R.D. 143 (E.D. La. 1994). The motion should be denied for failure to strictly comply with the procedures. *United States v. Occhipinti*, 851 F. Supp. 523, 526 (S.D.N.Y. 1993). Only one affidavit may be filed in any case, no matter how many judges happen to successively preside over the proceeding. Com. C. Judic. Conduct Canon 3(D)(c); *United States v. Hoffa*, 382 F.2d 856, 860-61 (6th Cir. 1967); *United States v. International Bus. Mach. Corp.*, 539 F. Supp. 473, 477 (S.D.N.Y. 1982) (affirming denial of motion for disqualification based on second affidavit filed in that case, where court also denied first motion); *United States v. Hoffa*, 245 F. Supp 772, 775 (E.D. Tenn. 1965)

⁷ Canon 3(D)(c) requires an affidavit which:

[S]hall state the facts and reasons for the belief that bias or prejudice exists, and the motion and affidavit shall be filed in sufficient time not to delay any proceedings unless the moving party can show he or she had no reason to previously question the justice's or judge's bias or prejudice or the proceeding was just recently assigned the justice or judge.

The party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating it is made in good faith.

Com. R. Judic. Cond. Canon 3(D)(c) (emphasis added).

⁸ This Court may look to federal cases interpreting the federal counterpart to Canon 3(D), which is 28 U.S.C. § 144. *See Commonwealth v. Kaipat*, App. No. 95-006 (N.M.I. Sup. Ct. Sept. 27, 1996) (Opinion at 3-4).

(observing “Having heretofore filed one such affidavit, in accordance with the express provisions of the statute, the defendant is not permitted to file a second against another judge. Otherwise, the defendant could file successive motions and affidavits to disqualify each judge designated to try the case and thereby prevent any disposition of his case.”).

[6]Here, at least three disqualification motions later, Mitchell has already exhausted his one chance to move for disqualification for bias under Canon 3(D). Even if this Court were to afford Mitchell an opportunity to fully comply with the formalities of Canon 3(D), Mitchell has already filed the one supporting affidavit he is permitted in this case. Indeed, Mitchell has filed more than one affidavit because he has filed more than one motion for disqualification. He has filed one motion to disqualify Chief Justice Demapan. He has filed one previous motion to disqualify Special Judge Lamorena. He has filed two previous motions to disqualify Justices Castro and Atalig. Mitchell has done exactly what the *Hoffa* court predicted, filing successive motions and thereby preventing any disposition of his case.

[7]Moreover, we note that Mitchell claims to have “discovered” these new grounds for Justice Atalig’s disqualification only after Jeanne Rayphand reviewed documents related to the Hillblom probate on the day before the November 9 hearing. However, Justice Atalig’s participation in the Carlsmith litigation has been a matter of public record in this small island community⁹ and therefore readily discoverable since the inception of this original action and accompanying show-cause hearing. The most recent motion for disqualification is therefore untimely as to Justice Atalig. *See Santos v. Santos*, 3 N.M.I. 39, 55-56 (1992) (affirming judge’s refusal to recuse himself based on appearance of impropriety, where in-court clerk was married to a defendant in that case and party did not move to disqualify until after scheduled hearing date for motion for summary judgment); *Sablan v. Iginioef*, 1 N.M.I. 190, 206 (1990) (holding recusal motion should be made at time when it would not delay any proceedings, unless basis for disqualification was clearly not previously known, or proceeding was just recently assigned).

Finally, notwithstanding the motion’s fatal procedural deficits, we also find insufficient evidence of bias or prejudice, for the same reasons we find no appearance of impropriety, as discussed below.

C. There Is No Evidence to Disqualify the Panel Due to the Appearance of

⁹ The Court takes judicial notice of the fact that the island of Saipan is approximately 12.5 miles long and 5.5 miles wide. It has a land area of about 46.5 square miles, which is smaller than the District of Columbia.

Impropriety

[8,9]When disqualification is based on the appearance of impropriety under 1 CMC § 3308¹⁰, a judge must recuse himself or herself when others would have reasonable cause to question the judge's impartiality. *Commonwealth v. Kaipat*, App. No. 95-0006 (N.M.I. Sup. Ct. 1996) (Opinion at 4). The test for recusal is “whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.” *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 714 (9th Cir. 1990).

[10]We find that no reasonable person would conclude that Justice Atalig's impartiality might reasonably be questioned. The Mair Affidavit indicates that the firm does not participate in the Carlsmith litigation, nor does it review or exercise discretion in paying attorney fees in that litigation. Justice Atalig's and the Mair firm's respective roles in the Carlsmith litigation therefore do not give rise to the appearance of impropriety in this case.

Mitchell attempts to raise a factual issue as to whether the Mair firm, as attorneys for the Hillblom Trustee, is required to review Justice Atalig's billings as part of its duty to manage the trust assets. However, Mitchell provides no evidentiary support for this bald assertion. On November 9, Mitchell did not identify which witnesses or documents would confirm the allegations in his lengthy “offer of proof.” He did not request an opportunity to submit affidavits or documents either during or after the hearing, even though the panel granted the Mair firm ten days to file a written response which would presumably include factual documentation. Indeed, in his motion for an evidentiary hearing¹¹, Mitchell essentially requests permission to perform a fishing expedition to support the motion for disqualification he made at the November 9 hearing. At the time he made his motion, it was Mitchell's burden to support the motion with sufficient facts to allow this Court to rule. Ten days later, Petitioners filed their written opposition and

¹⁰ 1 CMC § 3308 reads in relevant part:

(a) A justice or judge of the Commonwealth shall disqualify himself or herself in any proceeding in which his or her impartiality might reasonably be questioned.

1 CMC § 3308(a).

¹¹ See Motion to Strike the Lujan Affidavit and for an Evidentiary Hearing in Connection with His Motion to Disqualify the Justices and the Mair Law Firm (Nov. 28, 2000).

accompanying affidavits. Thereafter, instead of filing a reply and any documentary evidence, Mitchell instead claimed entitlement to a hearing to allow him to find the evidence necessary to support a motion which by then was almost two weeks old. This is clearly the latest of a series of attempts to delay the proceedings and resolution of this matter.

[11]With respect to Mitchell's attempt to connect Justice Atalig with San Nicolas' supposed desire to hire Lujan, Mitchell alleges that the benefit Justice Atalig would derive from Lujan's representation is that Lujan and the Mair Firm would resolve the underlying action favorable to the Mair firm. In turn, the Mair firm would look more favorably on the billings Justice Atalig submits to the Hillblom Trustee. However, since the Mair firm has no authority to deny Justice Atalig's billing in the Carlsmith litigation, Justice Atalig would in fact receive no benefit from Lujan's representation of San Nicolas. Once again, Mitchell proposes a conspiracy scenario between Mendiola, Lujan, and Justices Castro and Atalig, but provides no evidentiary support for his serious allegations. Once again, this Court will not allow Mitchell to boldly accuse the Court and third parties of wrongdoing for the mere purpose of delaying these proceedings.

Mitchell having failed to meet his burden of demonstrating grounds for disqualification, we must deny his motion to disqualify Justice Atalig.

[12]We also find no grounds for disqualification of either Justice Castro or Special Judge Lamorena. Mitchell has offered nothing to prove his bald accusation that Lujan claims to have influence over two Supreme Court justices simply because that attorney has appeared before them. The Lujan Affidavit does not give rise to a factual dispute that would compel an evidentiary hearing. Mitchell having failed to meet his burden of demonstrating grounds for disqualification, we must deny his motion to disqualify Justice Castro and Special Judge Lamorena.

IV.

CONCLUSION AND ORDER

All litigation must come to an end. That end is now. Based on the foregoing, we hereby ORDER as follows:

- 1) Mitchell's motion to disqualify the panel members for bias, prejudice, or the appearance of impropriety, is hereby DENIED.
- 2) Mitchell's Motion to Strike the Lujan Affidavit and for an Evidentiary Hearing in

Connection with His Motion to Disqualify the Justices and the Mair Law Firm, filed on November 28, 2000 is hereby DENIED.

3) Because the Court did not seek a recommendation from Lujan as to how to rule on this matter, the Court on its own motion ORDERS that Paragraph 25, in its entirety, of the Lujan Affidavit is hereby STRICKEN.

CONCLUSION

For the foregoing reasons, we hereby DENY Mitchell's motion to disqualify the entire panel in this case.

DATED this 1st day of December, 2000.

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ Pedro M. Atalig
PEDRO M. ATALIG, Justice *Pro Tem*

/s/ Alberto C. Lamorena III
ALBERTO C. LAMORENA III, Special Judge