COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-13077

IN RE: PAUL M. SUSHCHYK

REVIEW OF THE REPORT AND RECOMMENDATION FOR DISCIPLINE OF THE COMMISSION ON JUDICIAL CONDUCT

BRIEF FOR THE APPELLEE, PAUL M. SUSHCHYK

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STATEMENT OF THE ISSUES

1. Whether Judge Paul Sushchyk on April 25, 2019, as formally charged by the Commission on Judicial Conduct, "…intentionally, without justification or excuse, and without invitation or consent from Ms. [Emily] Deines, placed one of his hands under Ms. Deines' buttock or buttocks and pinched or squeezed her buttock or buttocks" and thus violated the Massachusetts Code of Judicial Conduct and G.L. c. 211C, and

2. Whether Judge Paul Sushchyk, as formally charged by the Commission on Judicial Conduct, on April 25, 2019 violated the Massachusetts Code of Judicial Conduct and G.L. c. 211C, by removing a silver flask which contained whiskey from his coat pocket.

STATEMENT OF THE CASE

The matter before the Court is to consider the Report and Recommendation of the Commission on Judicial Conduct.

STATEMENT OF the FACTS

In April of 2019 Judge Paul Sushchyk and Emily Deines ("Complainant" or "Ms. Deines"), Attorney Evelyn Patsos ("Attorney Patsos") and Attorney Jocelynne Welsh ("Attorney Welsh"), the latter three of whom were administrative employees of the Probate and Family Court Department, were among the Judges and staff members of the Probate and Family Court attended a two-day conference at the Ocean's Edge Resort. (R.A. II/100-102).

On April 25, 2019, the first day of that conference, a dinner was held in the evening. (R.A. II/112) Following that dinner the attendees gathered at the Bayzo's Pub, a bar and restaurant in the same building in which the dinner was held. (R.A. II/117) The Pub was open to the public as well as to guests of the Resort. (R.A. II/197, 463).

Ms. Deines had met Judge Sushchyk only once before, approximately 10 months earlier at a short

meeting in connection with some technology provided to the Probate Judges. (R.A. II/110-111)

Ms. Deines, Attorney Patsos, Attorney Welsh and others in their party walked into the Pub together. Many other attendees at the dinner had already arrived. (R.A. II/118, 463, 477) Virtually everyone went to the Pub after the dinner. (R.A. II/463) Ms. Deines and her friends ordered drinks and then gathered at a small bar-height table near the bar. (R.A. II/123-125) Ms. Deines sat on a bar stool facing the table. (R.A. II/127) Attorney Patsos stood directly to her left and Attorney Welsh sat on another barstool, directly across the table from Ms. Deines. (R.A. II/123-125) The table and the stool at which and on which Ms. Deines was seated is shown at R.A. II/789.

Ms. Deines was seated six to seven feet from the bar, which was to her left. (R.A. II/200) Between her and the bar, a crowd of people was "milling about, so to speak, talking to each other, moving around." (R.A. II/200) The bar area directly behind where Ms. Deines was seated was also used as a passageway by patrons getting to and from the bar and the restaurant area of the Pub. (R.A. II/217) As time passed, the

crowd became larger and louder. (R.A. II/201) It was "filled with people from the conference." (R.A. II/197)

Five to seven feet to her left was the bar. Behind her and between her feet and the bar was the crowded bar area. (R.A. II/137, 148, 206, 212)

According to Ms. Deines' testimony at the Hearing, someone then slid his or her hand under her buttocks and raised it and then grabbed upward and squeezed it for between 5 and 15 seconds. (R.A. II/145, 148) As this occurred, she continued to speak to Attorney Welsh and gave no indication to Attorney Welsh that anything unusual had happened. (R.A. II/150). A few seconds after this occurred, she turned to her left and saw Judge Sushchyk conversing with Attorney Patsos, (R.A. II/150), who had known Judge Sushchyk from the time that she been assigned to the Worcester Probate and Family Court. [R.A. II/483] Ms. Deines had "no idea" how long Judge Sushchyk had been talking to Attorney Patsos when she turned and saw him and acknowledged that "for all I know" he was there during the time when someone grabbed her. (R.A. II/242)

Attorney Welsh was looking directly across the table at Ms. Deines and saw Judge Sushchyk over her shoulder as he walked on the way to meet up with Attorney Patsos. (R.A. II/533) She saw that he did not stop behind Ms. Deines and that he continued his walk until he stopped to speak with Attorney Patsos. (R.A. II/533, 539) She did not observe any contact by Judge Sushchyk with Ms. Deines. (R.A. II/539)

Attorney Patsos, who was standing next to Ms. Deines' and to her left and slightly behind her, also saw Judge Sushchyk as he walked towards her behind Ms. Deines to meet her. She saw him pass by Ms. Deines and saw no contact "physical or otherwise" between Ms. Deines and Judge Sushchyk. (R.A. II/487) Ms. Deines joined the conversation between Attorney Patsos and Judge Sushchyk, which included a short discussion of Judge Sushchyk's flask. (R.A. II/98, 152-155, 251, 489) Nothing happened that night which struck Attorney Patsos as in any way as unusual. (R.A. II/503)

Ms. Deines' colleagues were staying overnight at the resort for the second day of the conference but she and her three-year-old child were staying with her parents at their home 20 minutes from the Resort.

(R.A. II/104) She left the Pub to return there shortly after 9:00 p.m. that evening. (R.A. II/193) As she left, she stopped to talk with some of the Judges who were at the Pub, including Probate Department Chief Judge John Casey. (R.A. II/158) She made no mention of anyone grabbing or squeezing her buttocks or otherwise touching her. (R.A. II/158)

Once in her automobile, she sent the following text message to her sister:

> "Emily Deines: Omg I think one of the judges grabbed my butt on purpose!!!
>
> Sister: Wha??? Slap him!
>
> Emily Deines: He's also carrying a hip flask so maybe just fell?? Except it was a distinct pinch!!!"
>
> (emphasis added).

(R.A. II/162, 792)

The next day she wrote to several of her work colleagues, telling them that "I just attended a conference for judges and while at the bar after dinner one of the newer male judges full palmed my ass!" (R.A. II/269-270, 794) (emphasis added). She added that [I] "Kinda thought maybe it was a mistake

until today [the day after the alleged incident] he spent the day hovering uncomfortably around me.". (R.A. II/794) (emphasis added). Several days later, after speaking with her attorney, she decided to file a complaint with the Probate and Family Court. (R.A. II/173-174) She contacted Judge Casey and then prepared a written complaint, stating:

> "At or around 9 PM on Thursday April 25, 2019, someone grabbed my left buttock while I was seated on a stool at the Bayzos Pub at the Ocean Edge Resort during the Probate and Family Court's Spring Judicial Conference. I believe the person who grabbed me was Paul Sushchyk because he had recently come over to the table where I was seated and was the only person directly behind me at the time of the grab. The following other individuals were either seated at the table with me or were in the direct vicinity:
>
> Evelyn Patsos
>
> Jocelynne Welsh
>
> Christine Yurgelun
>
> The grab lasted a few seconds and felt like it was made using a full hand. I did not address

this with Judge Sushchyk, or anyone else at the table, at the time. I did try to make eye contact with Evelyn Patsos before leaving a few minutes later." (emphasis added)

(R.A. II/793)

Judge Casey then met with Judge Sushchyk and told him of the complaint. His response was immediate: "I couldn't have-I couldn't have done something like that...I wouldn't do something like that. I would never hurt anyone, especially a woman." (R.A. II/418, 450)

Ms. Deines testified that she did not see and does not know who slid his hand under her left buttocks and lifted it and then pinched or squeezed it for 5-15 seconds. (R.A. II/145-146, 148, 214-216, 226, 227)

She did not turn around when it happened. (R.A. II/214-216, 226-227) She testified that she believed that it was Judge Sushchyk because she "believed that he was the only person behind her at the time." (R.A. II/214-216). She admitted she had "no idea whether he was the only person behind me at the time I was grabbed" (R.A. II/248), that she doesn't know "how many people were behind [her] at that barstool" (R.A.

II/229) and that “if there were any other people behind me any one of them could have grabbed me.” (R.A. II/230).

SUMMARY OF ARGUMENT

There is no evidence, much less any preponderance of evidence and much less any clear and convincing evidence, of any intentional or inappropriate physical contact by Judge Sushchyk. The Commission’s Charge is based solely on Ms. Deines unsupported belief that the person who is claimed to have slid his hand under her buttocks and then pinched or squeezed it for up to 15 seconds is Judge Sushchyk because of her further unsupported belief that “he was the only one behind me at the time”, acknowledging that she doesn’t know whether he was behind her at the time or who else was behind her at the time. This Charge rests entirely on speculation, not on facts, and the facts as presented by the testimony of witnesses all indicate that this incident did not occur, at least with any involvement by Judge Sushchyk.

ARGUMENT

I. There Is No Evidence Of Any Wrongful Conduct By Judge Sushchyk.

Whether anyone had inappropriate contact with Ms. Deines on the evening of April 25, 2019 is open to question, but what is beyond question is that Judge Sushchyk did not do so. Ms. Deines has acknowledged that she does not know who did this, that anyone in the crowded area behind her could have done so, and that she has "no idea" who was in that area when this occurred. (R.A. II/227, 229-230)

This is not a case in which there is simply the absence of any persuasive evidence of culpability. It is a case in which there is no evidence whatsoever of culpability and in which direct eyewitness testimony by two members of the bar who were friends with Ms. Deines and who were called to testify by the Commission directly contradicts any involvement by Judge Sushchyk. It is impossible to reconcile what Ms. Deines' has come to believe with what those witnesses saw, and it is impossible to reconcile the record with the Commission's obligation to present clear and convincing evidence in support of its Charge.

As noted, Ms. Deines' belief that the person who touched her was Judge Sushchyk is based solely on the other belief that "he was the only one behind me at the time." In fact, and as she has admitted, she never turned her head to look behind her and has no knowledge whatsoever of who or "how many people were behind [me] at the time." (R.A. II/214-216, 226-227) As she also admitted "if there were other people behind me any one of them could have grabbed me." (R.A. II/230). She has acknowledged that there were people "milling about, so to speak, talking with each other, moving around" in that area and that there were "other people standing in between the bar and where we were seated." (R.A. II/200, 230) Any one of them could have grabbed her.

Attorney Patsos and Attorney Welsh, each a colleague and friend of Ms. Deines, directly observed what happened and what did not happen. While Judge Sushchyk supposedly grabbed and squeezed Ms. Deines' buttocks for between five and fifteen seconds, Attorney Welsh continued to be chatting with Ms. Deines, without interruption or any indication by Ms. Deines that anything had happened. (R.A. II/538-539) Attorney Patsos was standing next to Ms. Deines,

watching Judge Sushchyk as he passed behind Ms. Deines to meet her and saw no contact between him and Ms. Deines. (R.A. II/486-487)

Notably, Ms. Deines claims that the part of her body that was grabbed or pinched was her left buttocks. In her words, "It was my left what I would call cheek, left butt cheek." (R.A. II/230). This part of her body would have been directly next to Attorney Patsos, who was standing next to her, to her left.

Attorney Welsh likewise saw no contact between Judge Sushchyk and Ms. Deines. (R.A. II/539) She saw him walking behind Ms. Deines to speak with Attorney Patsos and observed that he kept walking, that he did not stop until he reached Attorney Patsos (R.A. II/539) and that he did not stop behind Ms. Deines. (R.A. II/537)

Attorney Patsos concurred. She was specifically questioned about this by the Hearing Officer, as follows: "And during the time that you saw Judge Sushchyk behind Ms. Deines' barstool, did you observe any point at which he was not in motion, in other words moving behind her barstool?" Attorney Patsos answered "No. No.." (R.A. II/506, 507)

By Attorneys Welsh's and Patsos' direct observations Judge Sushchyk did not stop behind Ms. Deines for 15 seconds or 10 seconds or 5 seconds or even for 1 second and without stopping he obviously could not have done what Ms. Deines has claimed he did. If there is any clear and convincing evidence in this matter it is that if anyone pinched or grabbed Ms. Deines, that person was not Judge Sushchyk.

Facts are hard, as the saying goes, and the hard facts here prove that if this incident occurred, it did not occur at the hands of Judge Sushchyk. The Hearing Officer's conclusion to the contrary is remarkable and inexplicable. Referring to Ms. Deines, the Hearing Officer has stated that "I believe her." (R.A. II/856) But what is there to believe? There are no facts implicating Judge Sushchyk, much less any fact which could be believed.[1]

[1] The comparison to recent events in our country is inescapable. We have just witnessed a circumstance in which a Presidential candidate undisputedly lost an election which he believes, without basis, that he won. Millions of Americans believe him, but that doesn't prove that he won, only that they endorsed his unsupported belief that he had won.

II. The Hearing Officer's Conclusions Are Clearly Erroneous.

1. It is highly doubtful that Ms. Deines could have seen Judge Sushchyk, as she has claimed as he was walking on the other side of the pillar in her direction. See Hearing Exhibit 2 (R.A. II/789). As Ms. Deines was sitting on her barstool, leaning forward to talk with Attorney Welsh and with her elbows on the table, if she looked to the right she would not have seen anything other than a brick pillar. (R.A. II/126-127, 135-137, 789)

2. Despite the Hearing Officer's conclusion to the contrary, Ms. Deines' version of what occurred has not "remained essentially unchanged." (R.A. II/856)

While Ms. Deines has testified that whatever occurred by whoever was involved was not accidental. ("I believe that it was intentional") (R.A. II/149), that was not always the case. Her text message to her sister that evening stated that "…so maybe [he] just fell??" (R.A. II/792)

The next day she wrote to several of her colleagues, telling them that "I just attended a conference for judges and while at the bar after

dinner one of the newer male judges full palmed my ass." (emphasis added) (R.A. II/267-270, 794)

What had been described to her sister only a few hours earlier as a "distinct pinch", became a "full palmed [of] my ass."

These communication to her colleagues repeats her belief that the contact was accidental by noting that "kind of thought maybe it was a mistake until today [the day after the alleged incident] he spent the day hovering uncomfortably around me." (R.A. II/794) (emphasis added)

As Ms. Deines has admitted, Judge Sushchyk did not hover around her that day or for any part of it. She saw Judge Sushchyk only twice that day, once from a distance and once at a luncheon presentation at which they were seated at separate tables. (R.A. II/264, 266, 270-271) Her claim that he spent any part of the day around her is fictional, and reflects only her imagination.

By the time Ms. Deines delivered her written complaint to Judge Casey, her description of the incident had elevated to being described as a clearly intentional grab which "felt like it was made using a full hand" lasting a few seconds. (R.A. II/793)

By the time of the Hearing, the length of the "grab" or "pinch" had expanded from a "few seconds" to between 5 and 15 seconds and the contact was not only claimed to have been made using a full hand but by a full hand which slid under her buttocks and lifted her buttocks and then grabbed and squeezed it. (R.A. II/145, 148)

In the end, though, the Commission's case does not fail because of Ms. Deines' exaggerations. It fails because of the complete absence of probative evidence which supports its Charge. There were and are no facts which justify the conclusion that Judge Sushchyk squeezed, grabbed, palmed, pinched or lifted her buttocks.

3. Ms. Deines claimed that she concluded that Judge Sushchyk had grabbed or pinched her because "he had recently come over to the table where I was seated." (R.A. II/793) However, it is clear from the record that Judge Sushchyk had not "recently come over to the table where I was seated." She testified that this alleged incident occurred as he approached the table for the first time and that he was arriving at the table, not that he had recently been there. (R.A. II/148, 150, 226)

4. There is no basis for the conclusion by the Hearing Officer that Judge Sushchyk's culpability was "corroborated" by Attorney Patsos' testimony that prior to leaving the Pub Ms. Deines' tried to get her attention by giving her a "wide-eyed look." (R.A. II/490) The Hearing Officer reported that Attorney Patsos testified that Ms. Deines was "indicating towards Judge Sushchyk" when she gave this "look." The transcript clearly demonstrates that she did not do so, Attorney Patsos did not say that Ms. Deines did anything, by facial expression, wide-eyed look or otherwise, "indicating towards Judge Sushchyk." (R.A. II/490) Ms. Deines facial gesture could have meant anything, or nothing, including that she wanted to leave to go home. It is not corroborative of anything.

III. It Was Error for The Hearing Officer to Completely Disregard the Testimony of Attorney Patsos And Attorney Welsh.

Attorney Patsos was admitted to the bar in 2003. After working in private practice she joined the Probate and Family Court in 2007. (R.A. II/458-459) At the time of her testimony in 2020, she had worked with Ms. Deines for seven years. (R.A. II/458-460) They were social friends. (R.A. II/500) She

testified that after the dinner on April 25 she walked into the Pub with Ms. Deines and Attorney Welsh, encountering “a lot of people in the pub.” (R.A. II/477) She knew Judge Sushchyk from when she worked at the Worcester Probate Court six or seven years earlier. (R.A. II/483)

As Ms. Deines verified, Attorney Patsos was standing next to Ms. Deines, to her left. (R.A. II/150). Counsel for the Commission asked her, “and did you see any contact, physical contact of any time between Emily Deines and Judge Sushchyk while you were all seated at a table at Bayzo’s Pub on April 25, 2019?” Her answer was direct: “No.” (R.A. II/484-485) She testified that while Judge Sushchyk was at the table with her and Ms. Deines it was a “friendly sociable occasion” (R.A. II/502-503) and that “we were all at the table at one point together, all gabbing.” (R.A. II/503) Nothing occurred that evening which struck her as in any way unusual. (R.A. II/503) At the conclusion of her testimony, the Hearing Officer asked her “was there any time that you observed him [Judge Sushchyk] behind Ms. Deines’ barstool?” (R.A. II/506) She indicated in the affirmative. And then Hearing Officer asked the following question: “And

during the time that you saw Judge Sushchyk behind Mr. Deines' barstool did you observe any point at which he was not in motion, in other words moving behind her barstool?" Her answer: "No. No." (R.A. II/506) The Hearing Officer then asked "Did you observe him stop at any point in that location?" Her answer was the same: "No." (R.A. II/507)

According to Attorney Patsos, "we were all at the table at one point together all gabbing." (R.A. II/503) This included Judge Sushchyk, Attorney Patsos and Ms. Deines. (R.A. II/503)

Attorney Jocelynne Welsh worked for the Court for 34 years and retired on July 5, 2019, a couple of months after the event at the Bayzo's Pub. She worked with Ms. Deines for at least six years. (Tr. II/516) She knew Judge Sushchyk only in connection with some training after he was appointed. (R.A. II/517) She arrived at the Bayzo's Pub with Ms. Deines, Attorney Patsos and others and sat on a barstool at the small table directly across from Ms. Deines. (R.A. II/521) While sitting there "chatting and having a drink" with Ms. Deines (R.A. II/532-533) she saw Judge Sushchyk as he "came around the tables which were behind the pillar…, past Emily Deines, I believe probably to chat

with Evelyn Patsos, who was more acquainted with him than we were." (R.A. II/533).

She testified that she was looking directly at Ms. Deines and saw Judge Sushchyk walking behind her on the way to meet up with Attorney Patsos. (R.A. II/536)

Counsel for the Commission asked her: "who was the first person who basically passed by or was closest to as we (sic) got to the table?" Her answer: "I believe it would have been Emily Deines." Then he asked "and how long was he behind Emily Deines before he continued moving further along…approaching the table?" Her answer: "I do not think there was any time element that I recall with the judge stopping behind Emily." (R.A. II/537) He then asked her "And as he approached your table--did he stop at a particular point once he reached the table? Or did he continue walking around the table after he arrived at it.?" Her answer was "I believe he stopped to chat with Evelyn Patsos." (R.A. II/539) He then asked "And Evelyn [Patsos] would have been the person who was sitting directly next to Emily Deines at the table?" Answer: "Correct." (R.A. II/539) And then he asked "Did you see any physical contact between Judge

Sushchyk and Emily Deines on the evening of April 25th, 2019?" Her answer was specific: "I did not." (R.A. II/539) He then asked: "Did you notice anything about her behavior during the ten minutes that immediately preceded her departure from the table that day?" Her answer: "No." (R.A. II/539)

IV. The Claim That Judge Sushchyk Has Been Dishonest Is Baseless.

There is no Charge by the Commission that Judge Sushchyk has been dishonest. The flask claim aside, the only question before this Court is whether the Charge that Judge Sushchyk placed one of his hands under Ms. Deines' buttock or buttocks and pinched or squeezed her buttock or buttocks is supported by clear and convincing evidence. (R.A. I/84)

Judge Sushchyk has consistently denied any intentional contact of any type involving Ms. Deines. That was his response to Judge Casey and it remains his response today. (R.A. II/417-418) After initially speaking with Judge Casey he provided a written statement describing that at some point during the evening of April 25 he left the table to go to the mens' room and that on his return he brushed against someone sitting on a chair and supposed, in light of

what had been reported to him by Judge Casey, that that person had been Ms. Deines. He later learned that Ms. Deines claimed that this incident occurred at the beginning of the evening, when he first arrived at the table. Being reminded that Ms. Deines had left the Pub before he went to the mens' room later that evening, he realized that the person with whom he had unintentional contact as he returned from the mens' room could not have been Ms. Deines. (R.A. II/808)

V. The Standard Of Clear And Convincing Evidence.

The Commission's burden is to prove its case against Judge Sushchyk by clear and convincing evidence. G.L. c. 211C, §7(4). The Hearing Officer acknowledged that this evidence must be sufficient to prove "to a high degree of probability." See Tosti v. Ayik, 394 Mass. 492, 493 n.9 (1985). She apparently determined that this standard was met by her conclusion that "Ms. Deines is a percipient witness with direct knowledge of the facts she related" (R.A. II/856). But Ms. Deines is not a percipient witness with any knowledge of any relevant facts. Ms. Deines is percipient only to her beliefs, and has no factual basis on which to conclude any involvement by Judge

Sushchyk. The only witnesses with "direct knowledge of the facts" other than Judge Sushchyk are Attorney Welsh and Attorney Patsos.

The Hearing Officer has challenged the assertion that independent corroboration of the testimony of a witness is necessary in order to satisfy the standard of clear and convincing evidence presented by that witness. It is for this Court to articulate whether that is the case, as it was suggested to be by the Appeals Court in Adoption of Iris, 43 Mass. App. Ct. 95 (1997), affirmed, 427 Mass. 582 (1998). At the very least, clear and convincing evidence should require evidence of fact other than evidence of belief.

The Hearing Officer's reasoning in support of her conclusions is flawed even beyond the absence of facts implicating Judge Sushchyk. According to the Hearing Officer, Ms. Deines "gave cogent, credible consistent account of what occurred." (R.A. II/856) But Ms. Deines does not know anything which occurred which implicates Judge Sushchyk. She only knows what she believes may have occurred. Moreover, as demonstrated supra, her accounts of what occurred were not consistent.

Courts have routinely held that uncorroborated testimony of a single witness, (even a witness whose testimony is based on factual observations rather than on speculation) is insufficient as a matter of law to constitute clear and convincing evidence. See, e.g., Finnigan Corp. v. Int'l Trade Comm'n, 180 F.3d 1354, 1368–69 (Fed. Cir. 1999), quoting Washburn & Moen Mfg. Co. v. Beat 'Em All Barbed-Wire Co., 143 U.S. 275, 284 (1892) (in patent infringement matter, holding that "corroboration is required of any witness whose testimony alone is asserted to invalidate a patent, regardless of his or her level of interest" because even disinterested witnesses "whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information") (emphasis in original); Darden v. Darden, 152 F.2d 208, 209 (4th Cir. 1945) ("The standard of proof required by the authorities to establish a parol trust of personalty . . . demands clear and unequivocal evidence . . . and the naked oath of one witness, without other corroborating circumstances proved, ought never to be held as sufficient."); Easton v. Brant, 19 F.2d 857, 859 (9th Cir. 1927) (in action to

alter terms of a written contract and establish a trust, stating that "courts have frequently held the testimony of a single witness not to be [] clear and convincing proof as is required to sustain a verdict or finding where it was offered for the purpose of varying or contradicting a writing"); In re Leach, 2010 WL 3038794, at *4 (W.D. Pa. July 30, 2010) ("To satisfy the clear and convincing standard in [mortgage] reformation cases, the movant must provide evidence by 'two witnesses, or one witness and corroborating circumstances.'"); Perdigao v. Delta Air Lines, Inc., 2003 WL 21181510, at *1 (E.D. La. May 19, 2003) (where defendant disputed adequate service of process, holding that "while the 'return of a sheriff is given great weight,' it can be overcome by clear and convincing evidence, and a return cannot be overcome by the uncorroborated testimony of a single witness"); In re Speer, 2020 WL 3167690, at *6 (Bankr. D. Conn. June 12, 2020) (holding that "the testimony of one witness without any documentary support" was insufficient to meet the clear and convincing standard required for an award of sanctions under applicable federal statute).

Massachusetts courts have typically utilized the standard of clear and convincing evidence to resolve witness identification disputes in criminal cases. Those cases suggest that the standard is not met where the witness did not have an adequate opportunity to observe the defendant engaging in the alleged offense at issue. See Com. v. Worlds, 9 Mass. App. Ct. 162, 170 (1980).

VI. There Is No Evidence Of Anything Improper By Judge Sushchyk Regarding The Flask.

The Commission apparently believes that Judge Sushchyk violated a standard of appropriate conduct by carrying a flask in his pocket. No authority has been advanced for that position and the record reflects nothing involving the flask that was inappropriate. He certainly did not "remove a silver flask…from his pocket", as charged. According to Attorney Welsh, "I was aware that he had a flask but I would not say he pulled it up to show it to us. I think he opened his jacket pocket and pulled it up a tiny bit to support his conversation that he had a flask." "…I saw the top of it." (R.A. II/543) According to Attorney Patsos: "I remember…the idea of the flask, or the issue of the flask coming up in conversation. But I

did not see a flask." (R.A. II/489) According even to Ms. Deines, "he just pulled it out a little but, a small amount, maybe an inch." (R.A. II/251) In any event, this is no evidence that he removed a silver flask from his coat pocket, as charged.

VII. Even If the Charges Against Judge Sushchyk Had Been Proven by Clear and Convincing Evidence, The Recommended Discipline Is Greatly Excessive By Comparison with Discipline In Other Cases Of Judicial Misconduct.

The Commission's Annual Reports present only what are described as "examples" of complaints on which the Commission has taken action. Accordingly, there is only an incomplete record of discipline which is available. However, the Commission issues occasional press releases which are instructive and there are two relevant published decisions of this Court.

1. Complaint No. 2009-45. Judge Christine McEvoy. The Commission reprimanded Judge McEvoy for having operated a motor vehicle while under the influence of alcohol on April 15, 2009. It appears that the only discipline which was imposed was this reprimand and the Judge being restricted to hearing only civil cases for one year. No details of Judge McEvoy's drunk driving were provided but newspaper

reports indicate that Judge McEvoy had been arrested after drinking several glasses of wine and driving erratically on Interstate 95, one of the busiest highways in Massachusetts, thus obviously creating risk of serious property damage as well as bodily harm to members of the public. (ADD 60)

2. Complaint No. 2003-31. Justice Joseph A. Trainor. The Commission's press release of March 19, 2004 indicates that Justice Trainor was reprimanded for driving while under the influence of alcohol. He was required not to participate in any appeals involving drunk driving for one year. (ADD 56)

3. OE-117. Judge Robert E. Murray. According to the Commission's press release of November 28, 2005, Judge Murray engaged in inappropriate conduct directed at two female employees of the Juvenile Court in Brockton. He was suspended for one year, paid a $50,000 fine and agreed not to sit in any court in Plymouth County. (ADD 58)

4. In re: Brown, 427 Mass. 146 (1998). While hearing oral argument as a Justice of the Appeals Court, Justice Frederick L. Brown expressed strong animus against a litigant, a Union, and accused the Union and its officers of persistent neglect of their

obligations. His disparagement included his statement that the Union "doesn't represent anybody as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have fancy banquets." 427 Mass. at 155. In accordance with the Commission's recommendations, the Supreme Judicial Court publicly reprimanded Justice Brown and also recused from cases involving the Union, its President, or its President's immediate family.

5. In Re King, 409 Mass. 590 (1991). Judge Paul King engaged in a long list of offenses, including making derogatory and obscene references to members of the bench and bar, engaging in public intoxication and urination, being untruthful before a Commissioner, setting unusually high bail for black defendants, and otherwise acted unprofessionally. In accordance with the Commission's recommendations, the Supreme Judicial Court publicly censured him and ordered that he no longer sit in the Dorchester District Court.

The offenses in these cases are more significant than the allegation against Judge Sushchyk. Judge McEvoy put herself in a position of driving drunk on a

busy highway with prospect of injuring and perhaps killing other motorists. Justice Brown's actions as a member of the Appeals Court was an affront to the dignity and impartiality of the Court. Justice Trainor's operation of a motor vehicle while drunk presented the same risks as presented by Judge McEvoy. Judge King's conduct is a laundry list of serious and embarrassing actions, some of which were prejudicial to constitutional protections. Simply banning him from sitting in the Dorchester District Court was hardly a heavy penalty. While the details of Judge Murray's conduct are not clear, they were presumably serious.

If the Charges against Judge Sushchyk had been proven they would not warrant any greater penalty than those imposed on Judges McEvoy, Trainor, Murray, Brown or King. If they had been proven they would reflect a serious but impulsive act, not the purposefulness of setting out to drive drunk, not an apparently intended and destructive diatribe and not a slew of meaningful violations.

Judge Sushchyk has been publicly vilified. He has been removed from sitting as a Judge for approximately a year and a half. Private and

embarrassing information regarding his lack of sexual vitality has been needlessly publicized by the Commission's counsel. The Charges against him have been broadly publicized. No further penalty would be appropriate.

CONCLUSION

The Commission's Charges have not been proven by clear and convincing evidence.

Paul M. Sushchyk

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Dated: April 15 2021

ADDENDUM

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Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 211C. Commission on Judicial Conduct (Refs & Annos)

M.G.L.A. 211C § 7

§ 7. Hearing; recommendation for discipline; attorneys' fees

Currentness

(1) The commission shall schedule a hearing without undue delay after the appointment of the hearing officer by the supreme judicial court. The commission shall schedule the time and place of the hearing, and shall notify the judge and all counsel of the hearing. The judge shall be afforded ample opportunity to prepare for the hearing and may amend his written response to the charges.

(2) The judge and the commission shall each be entitled to discovery to the extent available in civil proceedings, within the time limits provided by commission rules. The judge and the commission shall each be entitled to compel by subpoena the attendance and testimony of witnesses, including the judge, and to provide for the inspection of documents, books, accounts, and other records.

(3) The formal hearing shall be public and shall be conducted before the hearing officer appointed by the supreme judicial court. At the hearing, all testimony shall be under oath, the rules of evidence applicable to civil proceedings shall apply, and the judge shall be accorded due process of law.

(4) An attorney or attorneys of the commission staff, or special counsel retained for the purpose, shall present the matter to the hearing officer. The commission shall have the burden of proving the charges by clear and convincing evidence. The judge and the commission shall be permitted to present evidence and cross-examine witnesses, subject to the rules of evidence applicable to civil proceedings.

(5) The raising of mental or physical condition as a defense constitutes a waiver of medical privilege.

(6) By leave of the commission or with the consent of the judge, the statement of charges may be amended after commencement of the hearing only if the amendment is technical in nature and the judge and his counsel are given adequate time to prepare a response.

(7) Every hearing shall be transcribed.

(8) The hearing officer shall submit to the commission and to the judge a report containing proposed findings and recommendations, the transcripts of testimony and all exhibits. Counsel for the judge and commission shall have twenty days after receipt of such report to submit written objections to the findings and recommendations, and said objections shall become part of the record.

(9) Before the commission reaches its decision, the judge and the complainant, if any, shall have the right to be heard before the commission regarding its recommendation for discipline, and their statements shall be transcribed. Such hearing shall be public, but commission deliberations regarding such recommendation shall be conducted in executive session. The commission shall reach a decision on the basis of the full record within ninety days after such hearing, unless there is good cause for delay. Its conclusions may differ from those proposed by the hearing officer. Its decision shall state specific reasons for all conclusions and recommendations.

(10) A recommendation for discipline shall be reported to the supreme judicial court only if a majority of all members of the commission concur that discipline should be recommended. Any dissent as to the need for or the form of discipline shall be transmitted with the majority decision. A copy of said recommendation and dissent shall be given to the judge and shall become part of the public record. The entire record, including transcripts, exhibits and the hearing officer's report, shall be transmitted to the supreme judicial court.

(11) If a majority of the members of the commission concur that discipline should not be recommended, the matter shall be dismissed, and the judge and complainant, if any, shall be notified of such dismissal.

(12) The provisions of subdivisions (10) and (11) shall not be construed to prohibit the commission from disposing of the matter by informal adjustment pursuant to section eight as a result of commission deliberations regarding a recommendation for discipline.

(13) The expense of witnesses shall be borne by the party that calls them unless:

(a) physical or mental disability of the judge is in issue, in which case the commission shall reimburse the judge for the reasonable expenses of the witnesses whose testimony related to the disability; or

(b) the supreme judicial court determines that the imposition of costs and expert witness fees will work a financial hardship or injustice upon him and orders that those fees be reimbursed.

(14) All witnesses shall receive fees and expenses in the same manner as witnesses in civil actions before the courts. A transcript of all proceedings shall be provided to the judge without cost. Except as provided in subdivision (13), costs of all proceedings shall be at public expense.

(15) With the approval of the supreme judicial court, a judge shall be entitled to the payment of reasonable attorneys' fees by the commonwealth in any case where the matter is dismissed by the commission at any stage after the filing of a sworn complaint or statement of charges, where the supreme judicial court determines despite a commission recommendation for discipline that no sanction is justified, or where the supreme judicial court determines that justice will be served by the payment of such fees.

Credits

Added by St.1987, c. 656, § 2.

M.G.L.A. 211C § 7, MA ST 211C § 7
Current through Chapter 3 of the 2021 1st Annual Session

End of Document

2010 WL 3038794
Only the Westlaw citation is currently available.
United States District Court,
W.D. Pennsylvania.

In re Mark J. LEACH, Debtor.
Wells Fargo Home Mortgage, et. al., Appellant,
v.
Mark J. Leach, Appellee.

Civil Action No. 10–449.
|
Appeal related to Bankruptcy Case No. 09–21594.
|
July 30, 2010.

MEMORANDUM OPINION

CONTI, District Judge.

Introduction

***1** Pending before the court is an appeal by appellant Wells Fargo Home Mortgage ("Wells Fargo" or "creditor") from an order of the bankruptcy court dated February 23, 2010. (Bankr.W.D.Pa. No. 09–21594) (Docket No. 75). The bankruptcy court denied a motion to reform a mortgage and for relief from an automatic stay filed by Wells Fargo (*Id.*) (Docket No. 36). After considering the submissions of the parties, the February 23, 2010 order of the bankruptcy court is reversed because as a matter of law the mortgage in issue should be reformed to include certain residential real property owned by appellee Mark J. Leach ("Leach" or "debtor"). The matter must be remanded for the bankruptcy court to determine whether the adjacent property is included in the mortgage and to reconsider whether relief from the automatic stay should be granted.

Background

Debtor and his wife, Doretta Leach (collectively, the "mortgagors"), own as tenants by the entirety a parcel of real property on which their residence is located (the "residential property"). (Appellant's App. (Civil Action No. 10–449, Docket No. 2) at 316.) The mortgagors also own a separate parcel of real property adjacent to the residential property (the "adjacent property") on which a tennis court was constructed and which has been extensively landscaped. (Appellant's App. at 316.) The mailing address of the residential property is 688 Maple Drive, Monongahela, Pennsylvania 15063. (*Id.*) The adjacent property does not have a separate mailing address. (*Id.*) Debtor considered the mailing address of the residential property to be the *de facto* address of the adjacent property and frequently referred to it in that manner. (*Id.* at 327.)

The mortgagors applied in early August 1999 for a loan in the amount of $240,000. (Appellant's App. at 316.) "The primary purpose of the loan was to pay off a previous mortgage lien on the properties." (*Id.*) An appraisal was conducted in connection with the loan application and contained references to the residential property. (*Id.* at 324.) The loan application was approved and closed on August 31, 1999. (*Id.*) At the closing the mortgagors granted Crossland Mortgage ("Crossland") (subsequently acquired by Wells Fargo) a first-priority mortgage in the amount of $240,000 that Crossland duly recorded. (*Id.*) The metes and bounds description of the property attached to the mortgage was of the adjacent property and not the residential property. (*Id.*)

The loan application listed the residential property mailing address as the "Subject Property" and indicated that the property would be the "Primary Residence". (*Id.* at 325.) The HUD–1 Settlement Statement additionally specified that the "Property Location" was to be the residential property mailing address. (*Id.* at 326.) The Truth–In–Lending Disclosure document stated that the "Property Address" was the residential mailing address and that "debtor was granting Crossland a security interest in 688 Maple Drive." (*Id.*) "The Occupancy Declaration listed 688 Maple Drive as the property address and stated that debtor would occupy the 'Subject Property' as his principle residence." (*Id.*) The mortgage stated the encumbered property address was 688 Maple Drive and noted the property was a "Single Family" residence. (*Id.* at 200; Hr'g Tr. at 57.) All the documents listed above (excluding the Appraisal Report) were signed or initialed by debtor at the closing of the August 1999 real estate transaction. (*Id.* at 325.) Debtor does not dispute the statements and declarations listed above. (*Id.* at 326.)

***2** Debtor stated that he " 'assumed' the mortgage encumbered the residential property as well [sic] the adjacent property because he 'would have thought that would have been the better decision' for Crossland based on the values of the residential property and the adjacent property" at closing.

(*Id.* at 328.) Debtor further stated that "he 'thought' the residence was consideration for the loan" at closing. (*Id.*)

Debtor subsequently defaulted on the loan and Wells Fargo commenced a mortgage foreclosure action in state court in 2004 with respect to the residential and adjacent properties. (*Id.* at 317 .) After debtor informed Wells Fargo that the property description in the mortgage only referred to the adjacent property, Wells Fargo moved to dismiss the action in mortgage foreclosure. (*Id.*)

"On January 28, 2005, debtor granted a mortgage in the residential property to ... the Mark J. Leach Irrevocable Trust to secure payment of an alleged debt in the amount of $140,000 arising from a promissory note debtor purportedly executed on March 14, 2004." (*Id.*) "The description of the property subject to the mortgage was of the residential property." (*Id.*) Debtor filed a voluntary chapter 7 bankruptcy petition on March 9, 2009. (*Id.*) Debtor's bankruptcy petition schedules identified the residential property with a declared value of $200,000 and the adjacent property with a declared value of $50,000. (*Id.* at 318 .)

Debtor filed a motion "seeking a determination that the mortgage lien of Wells Fargo attached to the adjacent property but not to the residential property." (*Id.*) Wells Fargo filed a cross-motion to reform the mortgage and for relief from the automatic stay. The bankruptcy court determined that an evidentiary hearing was required to resolve the dispute. (*Id.* at 319.) The bankruptcy court issued an order and memorandum opinion dated February 23, 2010 denying Wells Fargo's motion. (*Id.* at 314, 335.) On March 3, 2010, Wells Fargo filed a notice of appeal with this court. (*Id.* at 338.)

Standard of Review

This court has jurisdiction over the appeal from the bankruptcy court's order dated February 23, 2010 pursuant to 28 U.S.C. § 158(a). A district court, "in reviewing the decision of a bankruptcy court, must apply a clearly erroneous standard to findings of fact and exercise plenary review over conclusions of law." *Rosen v. Bezner,* 996 F.2d 1527, 1530 n. 2 (3d Cir.1993); *see In re Sharon Steel Corp.,* 871 F.2d 1217, 1222 (3d Cir.1989) (where the parties disputed the proper standard of review to be applied, the court held that "it is settled law that this court applies a clearly erroneous standard to findings of fact, conducts plenary review of conclusions of law, and must break down mixed questions of law and fact, applying the appropriate standard to each component"); *Brown v. Pa. State Employees Credit Union,* 851 F.2d 81, 84 (3d Cir.1989) (holding that "the findings of fact by the bankruptcy court are reviewable only for clear error" and "legal questions are, of course, subject to plenary review").

Discussion

***3** The issue before the court raises a matter of state law—whether a mortgage should be reformed under Pennsylvania law. Wells Fargo argues that the bankruptcy court erred as a matter of law in determining Wells Fargo did not establish by clear and convincing evidence that the mortgage should be reformed to include the residential property. "Reformation ... [is an] equitable remed [y] that [is] sparingly granted." *H. Prang Trucking Co. v. Local Union No. 469,* 613 F.2d 1235, 1239 (3d Cir.1980). Reformation of a contract "presupposes that a valid contract between the parties was created but, for some reason, was not properly reflected in the instrument that memorialize[d] the agreement." *H. Prang,* 613 F.2d at 1239. The Pennsylvania Supreme Court stated in *Regions Mortgage, Inc. v. Muthler,* 585 Pa. 464, 889 A.2d 39, 41 (Pa.2005), that "[i]t has long been the law that courts of equity have the power to reform a written instrument where there has been a showing of fraud, accident or mistake." [1] *Regions Mortgage,* 889 A.2d at 41 (citing *Kutsenkow v. Kutsenkow,* 414 Pa. 610, 202 A.2d 68, 68–69 (Pa.1964)). A court has the authority "to reform the written evidence of a contract and make it correspond to the understanding of the parties." *Bugen v. N.Y. Life Ins. Co.,* 408 Pa. 472, 184 A.2d 499, 500 (Pa.1962).

To warrant reformation based upon mutual mistake, the movant must demonstrate that "both parties to [the] contract [were] mistaken as to existing facts at the time of execution. Moreover, to obtain reformation of [the] contract because of mutual mistake, the moving party is required to show the existence of the mutual mistake that is clear, precise and convincing." *Zurich Am. Ins. Co. v. O'Hanlon,* 968 A.2d 765, 770 (Pa.Super.Ct.2009) (citing *Holmes v. Lankenau Hosp.,* 426 Pa.Super. 452, 627 A.2d 763, 767–68 (Pa.Super.Ct.1993)). Additionally, the movant must clearly show the actual intent of the parties at the time the instrument was executed. *Giant Eagle, Inc. v. Federal Ins. Co.,* 884

F.Supp. 979, 988 (W.D.Pa.1995); *Hassler v. Mummert,* 242 Pa.Super. 536, 364 A.2d 402, 403 (Pa.Super.Ct.1976). To determine whether mutual mistake exists, the court may consider the subject matter, the apparent object or purpose of the parties and the conditions existing when the instrument was executed. *Daddona v. Thorpe,* 749 A.2d 475, 487 (Pa.Super.Ct.2000); *see Yuscavage v. Hamlin,* 391 Pa. 13, 137 A.2d 242, 244 (Pa.1958).

Even if one party to the contract denies the existence of a mistake, the other party may still show there was a mutual mistake. *Bollinger v. Cent. Pa. Quarry Stripping & Constr. Co.,* 425 Pa. 430, 229 A.2d 741, 742 (Pa.1967). The negligence of one party to the contract in failing to recognize the error in executing the agreement does not prevent that party from later asserting mutual mistake. *See* *General Electric Credit Corp. v. Aetna Cas. & Sur. Co.,* 437 Pa. 463, 263 A.2d 448, 457 (Pa.1970) ("if all of the elements necessary for the reformation of a written contract are present, mere negligent conduct on the part of one of the parties thereto in failing to discover the mistake will not bar reformation in the absence of prejudice or a violation of a positive legal duty").

***4** To satisfy the clear and convincing standard in reformation cases, the movant must provide evidence by "two witnesses, or one witness and corroborating circumstances." *Blair v. Manhattan Life Ins. Co.,* 692 F.2d 296, 303 (3d Cir.1982) (citing *Easton v. Washington County Ins. Co.,* 391 Pa. 28, 137 A.2d 332, 337 (Pa.1957)). The witnesses presented

> must be found to be credible, that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct, weighty, and convincing as to enable the [finder of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.

Lessner v. Rubinson, 527 Pa. 393, 592 A.2d 678, 681 (Pa.1991) (citing *In re Estate of Fickert,* 461 Pa. 653, 337 A.2d 592, 594 (Pa.1975). Importantly, "the most trustworthy form of corroboration" is the surrounding circumstances. *Broida v. Travelers' Ins. Co.,* 316 Pa. 444, 175 A. 492, 494 (Pa.1934); *see* *General Electric,* 263 A.2d at 456 (witness' testimony was "enhanced by the very substantial corroborating circumstances"). As a general rule, parol evidence may also be introduced to demonstrate the existence of mutual mistake.[2] *Bugen,* 184 A.2d at 501.

Under Pennsylvania law, whether the evidence meets the "clear and convincing" burden of proof is a question of law and is therefore subject to plenary review by the appellate court. *See Blair,* 692 F.2d at 299 ("the sufficiency of the evidence to meet ... the 'clear and convincing' standard is a question of law"); *Commonwealth v. Sanford,* 580 Pa. 604, 863 A.2d 428, 431 (Pa.2004) (whether the Commonwealth met its burden of proof by producing clear and convincing evidence was a question of law); *Easton,* 137 A.2d at 337 ("[w]hether the plaintiffs' evidence met this [clear, precise and indubitable] standard ... is again a question of law for the court"); *Titusville Trust Co. v. Johnson,* 375 Pa. 493, 100 A.2d 93, 97 (Pa.1953) ("[w]hether the evidence meets [the clear and convincing] standard (or any other prescribed standard) of proof is always a question of law for the Court"); *Aliquippa Nat. Bank v. Harvey,* 340 Pa. 223, 16 A.2d 409, 414 (Pa.1940) ("[w]hether the evidence is true is a question of fact ...; but whether it meets the required standard ... is always a question of law ..."); *but see* *Pocono Manor Investors, LP v. Pa. Gaming Control Bd.,* 592 Pa. 625, 927 A.2d 209, 229 n .14 (Pa.2007).[3]

The bankruptcy court held an evidentiary hearing and concluded that Wells Fargo did not prove by clear and convincing evidence that "the absence of the residential property from the property description was the result of a mutual mistake by Crossland and debtor." (Appellant's App. at 323.) After considering debtor's statements, the collection of documents available to the parties at closing, and the surrounding circumstances, this court concludes the evidence is sufficient to establish clearly and convincingly that the failure to include the residential property description in the mortgage was the result of mutual mistake.

***5** It should be noted that each piece of evidence found by the bankruptcy court should not be viewed in isolation; rather, the court must consider the evidence collectively to determine whether Wells Fargo met its burden. *See Daddona supra; Bolinger,* 299 A.2d at 742 (affirming the trial court's decision to reform the contract based upon mutual mistake after considering all the evidence, including the actions

of the parties, witness statements, and the circumstances surrounding the contract's formation).

The documents available to the parties and signed or initialed by debtor at the closing are significant because they share a common "residential" theme. Each document lists the "property" or "subject property" address of 688 Maple Drive, Monongahela, Pennsylvania 15063 as the relevant mailing address identified with the parcel of land subject to the mortgage. Tellingly, the loan application, Occupancy Declaration, Appraisal Report and the mortgage all use the terms "residence" or "single family" or "single family residence" in conjunction with 688 Maple Drive —the property address subject to the mortgage.[4] This language clearly demonstrates debtor's intent to convey, and Crossland's intent to receive, an interest in residential property containing a single family dwelling as consideration for the loan. The single place in the record that mentions *only* the adjacent property is the property description attached to the mortgage. Considering the evidence collectively, however, the property description is not determinative of the parties' intent when compared to the "residential" language used repeatedly in the closing documents.

It should be noted that the appraisal report is also instructive in the court's analysis. The report is entitled "Appraisal Report of Single Family Residence at 688 Maple Drive Monongahela, PA 15063 as of 8/17/99". The bankruptcy court found, and the parties do not dispute, that the appraisal report was "conducted in connection with the 1999 loan application." (Appellant's App. at 324.)

The appraisal contains an addendum that lists "custom features" inside the residence, including a central vacuum system, security system, Jacuzzi tub in the master bathroom, wallpaper, brick fireplace, and tennis court. The appraisal also contains a subject photo addendum that provides front and rear pictures of a house that is identified as the subject property with an address of 688 Maple Drive. Finally, the appraisal incorporates a sketch addendum that identifies, among other things, a dining room, snack bar, foyer, porch, two-car garage, den, deck, covered patio, master bedroom, walk-in closet, and laundry. The appraisal report illustrates that the value of debtor's residence and its various "custom features" were used to calculate the amount of the loan in August 1999. It follows that the parties intended the mortgage to encumber the residential property based upon its appraised value.

***6** In discerning the parties' intent, it is relevant that the $240,000 loan was used to satisfy an existing mortgage covering the residential and adjacent properties. *See* *Trachtenberg v. Glen Alden Coal Co.*, 354 Pa. 521, 47 A.2d 820, 823 (Pa.1946) (holding as a preliminary matter that the trial court properly found the mortgage failed to include both properties based upon mutual mistake and reformed the document; reasoning that evidence showing "proceeds of the mortgage loan were used to pay a debt secured by a then existing mortgage covering both lots" supported the trial court's decision to reform the instrument). The use of the proceeds of the August 1999 loan and the corroborating documents provides clear and convincing corroborating evidence that the parties intended to use the residential property as collateral for a new loan to satisfy the previous mortgage that encumbered the residential property.

Debtor argues that he always considered 688 Maple Drive to be the address of the adjacent property as well as the residential property, and therefore that the closing documents mentioning 688 Maple Drive may be a reference to either property. It is clear, however, that, collectively, the mortgage documents refer to the "subject property" address in conjunction with the terms "residence", "single family", and "single family residence". These terms when used with 688 Maple Drive indicate that debtor intended to convey an interest in the residential property bearing the 688 Maple Drive address. *See supra* p. 8, note 6.

Debtor submits that he fulfilled the occupancy requirements by "occupy[ing] the [adjacent] property as a yard and ha[s] made improvements to it, including a tennis court." (Appellee's Br. (Civil Action No. 10–449, Docket No. 3) at 5.) Debtor's argument that the landscaping and tennis court on the adjacent property qualify as occupation for purposes of the occupancy declaration and other closing documentation is inconsistent with his signing the occupancy declaration form at closing and checking the box affirming that he would "occupy the subject property as my ... principal residence ...." (Appellant's App. at 255.) Debtor's argument cannot stand for the proposition that he intended to convey an interest only in a vacant lot and occupy that lot as his principle residence when his home—his residence—was standing just a short distance away. Such a conclusion is detached from reality and the plain meaning of the term "residence" as it is used in the occupancy declaration and other closing documents.

Debtor's argument that he intended to convey an interest only in the adjacent property is negated by his admissions during the bankruptcy court hearing. Debtor stated that, at the closing, he "thought" that the residence was consideration for the loan. He also admitted that he "assumed" the mortgage encumbered the residential property in light of the appraised values of the properties and the loan amount approved by Crossland. These statements show debtor's intent at closing and reflect a mistaken belief that the mortgage encumbered his residence, when in fact the description in the mortgage was the adjacent property. *See Daddona,* 749 A.2d at 479, 488–89 (after considering witness testimony and corroborating circumstances, the court upheld the trial court's determination that "a mutual mistake existed in the execution of [a] right of way agreement, in that the parties to the agreement intended to include [an] existing driveway within the metes and bounds of the right of way described in the agreement").

***7** Leach submits that Wells Fargo should be denied relief because Crossland (its successor in interest) did not properly execute the closing documents and failed to recognize the omission of the residential property description. Debtor's argument ignores *General Electric* 's holding that negligence on the part of one party to a contract does not preclude that party from later requesting reformation based upon mutual mistake. *General Electric,* 263 A.2d at 457. There is no evidence in the record of prejudice to Leach or a violation of a legal duty by Crossland or Wells Fargo in failing to discover the error in the property description. Crossland's negligence in preparing the closing documents or failure to discover the omission of the residential property in the mortgage do not impair Wells Fargo's right to correct the mutual mistake by having the mortgage reformed. The negligence alleged by debtor will not preclude the court from reforming the mortgage to reflect the true intent of the parties.

Wells Fargo argues that the mortgage should be reformed to include both properties. Debtor counters that only the adjacent property should be encumbered by the mortgage. Debtor testified under oath during the bankruptcy court hearing that, prior to closing, he gave Crossland the option to secure the mortgage with either the residential property or the adjacent property, but not both. (Hr'g Tr. at 19.) Debtor concludes that mutual mistake therefore cannot exist because Crossland attached the metes and bounds description of the adjacent property instead of the residential property. In other words, debtor argues that even if he intended to convey an interest in the residential property at closing, Crossland chose to encumber the adjacent property and there was no mutual mistake of a common material fact. There is no documentation or other corroborating evidence to support debtor's position.

The evidence is clear and convincing that at a minimum, a mutual mistake was made and the mortgage must be reformed to include the residential property. The court cannot discern, however, whether the bankruptcy court discredited debtor's statements regarding Crossland's option to secure only one property. The bankruptcy court's memorandum opinion does not reference debtor's statements regarding the option. If the bankruptcy court considered debtor's statements and found they were not credible, then the mortgage would be reformed to include both properties. If the bankruptcy court considered the statements and found them credible, then debtor's intent to convey only one property at closing may be given appropriate weight to determine whether the adjacent property should remain in the mortgage. The court will remand the case for the purpose of having the bankruptcy court determine whether the statements regarding debtor's intent to convey only one property at closing were credible. Having concluded that the mortgage must be reformed, on remand the bankruptcy court may reconsider whether relief from the automatic stay should be granted.

Conclusion

***8** Viewed collectively, the evidence found by the bankruptcy court is of sufficient weight to clearly and convincingly establish that debtor and Crossland mistakenly believed that the mortgage encumbered the residential property. The documents, statements, and surrounding circumstances discussed *supra* reference the residential property as consideration for the loan. While a valid contract was formed at the real estate closing, the parties mistakenly believed that the property description included the residential property.

The court holds that, as a matter of law, Wells Fargo produced evidence that clearly and convincingly establishes a mutual mistake existed at closing and the mortgage should be reformed to include an accurate metes and bounds description of the residential property at 688 Maple Drive, Monongahela, PA 15063. The bankruptcy court's order dated February 23, 2010 will be reversed to the extent it is inconsistent with this opinion. The matter will be remanded in order for the bankruptcy court to determine whether debtor's statements regarding his intent to convey only one property at closing

were credible and to consider whether the automatic stay should be lifted to allow Wells Fargo to pursue its remedies in state court.

All Citations

Not Reported in F.Supp.2d, 2010 WL 3038794

Footnotes

1 Black's Law Dictionary defines mistake as "[a]n error, misconception, or misunderstanding; an erroneous belief." BLACK'S LAW DICTIONARY 1022 (8th ed.2004). *See* RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1979) ("The word 'mistake' is used to refer to an erroneous belief. A party's erroneous belief is therefore said to be a 'mistake' of that party. The belief need not be an articulated one, and a party may have a belief as to a fact when he merely makes an assumption with respect to it, without being aware of alternatives.").

2 *See* RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. a (1979) ("[t]he parol evidence rule does not preclude the use of prior or contemporaneous agreements or negotiations to establish that the parties were mistaken").

3 In *Pocono,* the Pennsylvania Supreme Court declined to accept petitioner's argument that its claim involved an "error of law". *Pocono*, 927 A.2d at 229. The court suggested that even if it were to address such an inquiry, it was unclear what standard of review would apply. *Id.* The court explained in dicta the petitioner's theory that the error of respondent (a government agency) in applying the facts to a clear and convincing standard raised a mixed question of law and fact, as opposed to strictly a question of law. *Id.* at 229 n. 14. The court took the position that "some mixed questions are more heavily weighted toward fact, while others are more heavily weighted towards law. The more fact intensive a determination is, the more deference a reviewing court should give the conclusion below." *Id.*

4 In the context of single family living, Black's Law Dictionary defines residence as "[a] house or other fixed abode; a dwelling." BLACK'S LAW DICTIONARY 1335 (8th ed.2004). For a discussion of the term "family", *see* 12 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 79C.04(2)(b), at 79C–99 (2008) ("Generally, a minimum requirement is that the occupants of a single-family dwelling live together as a single housekeeping unit."). For an explanation of residential zoning, *see* JACQUELINE P. HAND & JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS § 8.01, at 182 (1988) ("At the highest point [of residential zoning] are detached, single-family homes, often with minimum lot sizes that are quite large. Other residential zones permit smaller lots, duplex houses, townhouses, and apartment buildings.").

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Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

H. Gunther PERDIGAO
v.
DELTA AIR LINES, INC, Paul Baird

No. Civ.A. 03–0376.
|
May 19, 2003.

Order and Reasons [1]

BERRIGAN, J.

***1** This matter comes before the Court on motion to remand filed by plaintiff and motion to dismiss filed by defendant Delta Air Lines (Delta). Having considered the record, the memoranda of counsel, and the law motion to remand is GRANTED for the following reasons. [2]

BACKGROUND
This action, removed from Louisiana State Court to this Court, concerns tort law claims seeking damages relating to injuries allegedly sustained by the plaintiff while on board a Delta plane on January 2, 2002. Plaintiff alleges that he boarded a Delta plane in New Orleans, flew to Atlanta and transferred to a different Delta flight bound for Florida. While the passengers were aboard, the flight was delayed in Atlanta at the gate and on the runway for approximately eight hours, throughout which time the passengers were admonished not to leave their seats even to stretch their legs or use the restroom. Allegedly as a result of this long period of immobility, a blood clot developed in the left leg of the plaintiff. The blood clot later became dislodged and traveled to the plaintiff's lung where it developed into a pulmonary embolus, requiring hospitalization.

The plaintiff filed the lawsuit in state court in December of 2002. The sheriff's return of service of process indicates service on Janet Robert (Robert) with Corporation Service Company (CSC), Delta's agent for service of process, occurred on January 7, 2003. Delta filed and served a notice of removal on February 7, 2003, thirty one days after service of process. Plaintiff moves to remand, alleging untimely removal, lack of federal question jurisdiction, and lack of diversity jurisdiction.

Motion to Remand—Untimely Removal
The defendant opposes the motion to remand by disputing the actual date of service. Delta claims service occurred on January 8, making the February 7 removal timely. The sheriff's return of service indicates January 7 as the date of service, and the deputy sheriff who gave service confirmed this date in a sworn affidavit of service. The defense provides an affidavit by Richard Selwood, service of process manager with CSC, stating that CSC records indicate that CSC was personally served on January 8, on behalf of Delta. That record was prepared by Robert, whose sworn statement was not provided.

"A notice of removal may be filed within thirty days after receipt by the defendant, though service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or may become removable" 28 U.S.C. § 1446(b). *See T.H. Inc. v. Investors,* 42 F .3d 235 (5th Cir.1995) (held notice of removal filed more than thirty days after receipt by of copy of initial pleading was untimely under general removal statute). If service occurred on January 7, then the thirty days had expired before February 8, the date the defendant filed a Notice of Removal. As the defendant notes in its opposition to the motion to remand, a sheriff's return is presumed to be *prima facie* correct, though "the court, at any time and upon such terms are just, may allow process or proof of service to be amended." Louisiana Code of Civil Procedure art. 1292. Defendant also cites Louisiana case law holding that while the "return of a sheriff is given great weight," it can be overcome by clear and convincing evidence, and a return cannot be overcome by the uncorroborated testimony of a single witness." *Citibank (South Dakota) N.A. v Keaty,* 599 So.2d 500, 501 (La.App. 3 Cir.1992). This implies that corroborated testimony of a non-party could be sufficient.

***2** This Court is not persuaded by Defendant's argument that CDC's affidavit is "clear and convincing," nor does it find that *Keaty* is applicable. The service date of January 7 is supported not only by the sheriff's return of service, which is *prima facia* correct, but also by the affidavit of the deputy sheriff who served CDC. These are two testaments of service provided by a disinterested sheriff with personal

knowledge. By contrast, the affidavit of CDC was provided not by Robert in the Baton Rogue office who received service and prepared the record, but rather by the CSC manager, a resident of Delaware. The CDC affidavit relies not on personal knowledge but on "our records," and makes no attempt to explain how or why the deputy sheriff could be mistaken about when service occurred. This evidence is not "clear and convincing" and thus cannot overcome the *prima facia* correctness of the January 7 date given in the sheriff's return of service.

The facts of this case are not analogous to *Keaty*. In *Keaty*, the sheriff's return of service indicated that Keaty was served at her home in Lafayette. Keaty claimed she was with an acquaintance in New Orleans on the alleged day of service, and the acquaintance corroborated that claim. That court found this testimony sufficient to overcome the presumption of correctness of the sheriff's return. Counsel for defendant argues that CDC's affidavit corroborates the claim of defendant Delta that service did not occur until January 8, and thus the rule in *Keaty* should apply. These facts are distinguishable, however. *Keaty* involves two statements by the defense—one statement by the party served, and a second corroborating statement by a witness. Here, the defense provides only one statement—that of CDC. Furthermore, CDC cannot possibly be a corroborating witness because it is the agent that receives service on behalf of Delta. In other words, CDC cannot be a corroborating witness to service upon itself. The affidavit is therefore insufficient under *Keaty*. (A sheriff's return of service "cannot be impeached by the uncorroborated testimony of the party upon whom service is stated to have been made by the officer." *Id.*) For *Keaty* to be analogous, a witness separate from CDC would have to testify that service occurred on January 8, 2003. The defense offers no such evidence. [3]

The defense argues that the plaintiff is estopped from asserting that removal is untimely. On January 23, 2003, midway between the thirty day window for filing for removal, counsel for Delta corresponded with plaintiff's counsel regarding an extension of time to respond to the lawsuit. In this correspondence, counsel for Delta stated that the date of service was January 8, and counsel for plaintiff did not correct this "error." Therefore, the defendant argues, the plaintiff must be estopped from claiming that service occurred on January 7 and must not be allowed to "lay in wait" and then take advantage of the error. The Court is not persuaded by this argument. The correspondence at issue was about the response to the complaint, not removal; the plaintiff cannot be said to "lay in wait" for untimely notice of removal when the defendant gave no indication it would seek removal.

***3** Over thirty days passed between the date of service indicated on the sheriff's return and the date of filing of a notice of removal. The correctness of the sheriff's return of service is not overcome by clear and convincing evidence, and equity does not demand that the plaintiff be estopped from asserting that removal is untimely. [4] In so ruling, the court is mindful that removal jurisdiction is strictly construed. *See:* *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Butler v. Polk*, 592 F.2d 1293 (5th Cir.1979).

Accordingly,

IT IS ORDERED that the motion for remand filed by plaintiff is GRANTED. This matter is hereby REMANDED to the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21181510

Footnotes

1 John S. Goehring, a third year law student at Tulane Law School, assisted in the research and preparation of this decision.

2 In light of the remand, the motion to dismiss filed by Delta is not ruled on.

3 The Court does not find that even had a corroborating witness been provided that that necessarily would have overcome the prima facia correctness of the sheriff's return.

4 Because removal is untimely, the court declines to rule on the issues of federal question jurisdiction and diversity jurisdiction.

End of Document

618 B.R. 380
United States Bankruptcy Court, D. Connecticut,
New Haven Division.

IN RE: Sheri SPEER, Debtor
Seaport Capital Partners, LLC, Movant
v.
Sheri Speer, Respondent

Case No.: 14-21007 (AMN)
|
Signed June 12, 2020

Synopsis

Background: Secured creditor moved to hold Chapter 7 debtor in contempt for allegedly collecting rents constituting the creditor's cash collateral in violation of order entered while case was proceeding under Chapter 11.

The Bankruptcy Court, Ann M. Nevins, J., held that creditor failed to demonstrate, by requisite clear and convincing evidence, that Chapter 7 debtor had collected rents.

Motion denied.

Procedural Posture(s): Motion for Contempt; Motion for Contempt Sanctions.

Attorneys and Law Firms

***381** Donna R. Skaats, Esq., 210 West Town Street, 2nd Floor, Norwich, CT 06360, Counsel for Movant, Seaport Capital Partners, LLC

Sheri Speer, 151 Talman Street, Norwich, CT 06360, Respondent/Debtor Proceeding Pro Se

Re: ECF No. 1121

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR CONTEMPT

Ann M. Nevins, United States Bankruptcy Judge District of Connecticut

I. INTRODUCTION

****1** Before the court is a motion filed by a secured creditor, Seaport Capital Partners, ***382** LLC ("Seaport") seeking to hold the Chapter 7 debtor, Sheri Speer ("Debtor"), in contempt for violating an Order [1] prohibiting her use of cash collateral ("Contempt Motion"). ECF No. 1121. Specifically, Seaport requests a sanction requiring the Debtor to pay $26,600.00 – an amount allegedly equal to rent received from April 2015 through August 2016 plus a security deposit including last month's rent for property located at 12 Rogers Avenue, Norwich, Connecticut ("Roger Avenue Property"). ECF No. 1158. After consideration of the docket of this case and the parties' evidentiary submissions and arguments, I find Seaport failed to meet its burden to show it is entitled to sanctions by clear and convincing evidence pursuant to 11 U.S.C. § 105(a).

II. PROCEDURAL HISTORY

The court assumes the parties' familiarity with the long and complicated history of this Chapter 7 case and provides only a brief summary of the events relevant to consideration of the Contempt Motion.

On May 20, 2014, creditors, Michael Teiger, M.D., SLS Heating, LLC, and Clipper Realty Trust commenced this bankruptcy case by filing an involuntary Chapter 7 petition (the "Involuntary Petition") against the Debtor. The court (Dabrowski, J.) granted Seaport's motion to join the Chapter 7 case a co-petitioning creditor, but excluded it from prosecuting the Involuntary Petition. ECF No. 219, p. 5. After several hearings regarding the Involuntary Petition, the court (Dabrowski, J.) entered an Order for Relief on November 11, 2014. ECF Nos. 219, 220. [2]

Slightly less than two months later, on January 5, 2015, the court (Dabrowski, J.) granted the Debtor's motion seeking conversion of her involuntary Chapter 7 case to a case under Chapter 11. ECF Nos. 297, 306. During the Chapter 11 phase of this case, on March 3, 2015, Seaport moved for an order prohibiting the Debtor from using of any of its cash collateral [3] – in the form of rents received – from tenants of the Rogers Avenue Property. [4] ECF No. 447. After a hearing, the court (Dabrowski, J.) granted Seaport's request and prohibited the Debtor's use of cash collateral relating to the Rogers Avenue Property – entering the Cash Prohibition Order – on March 27, 2015. ECF No. 479.

Around the same time in March of 2015, Seaport filed a motion seeking to reconvert the case to a Chapter 7 case,

asserting the Debtor's unauthorized use of cash collateral as one basis for conversion. ECF No. 457. Over the Debtor's objection requesting dismissal, the court reconverted her case to Chapter 7 on April 24, 2015, and Thomas Boscarino was appointed as Chapter 7 Trustee ("Trustee"). ECF No. 515.[5] ***383** A month after the conversion to Chapter 7, on May 29, 2015, Seaport initiated adversary proceeding Case No. 15-2031 challenging the Debtor's right to a discharge pursuant to 11 U.S.C. §§ 727(a)(2)(A), 727(a)(2)(B), 727(a)(4), and 727(a)(5). That adversary proceeding was resolved by a final, non-appealable order that deprived the Debtor of her bankruptcy discharge. *See*, Case No. 15-2031, ECF No. 641.

Seaport & Chapter 7 Trustee Negotiations

****2** Shortly after being appointed in 2015, the Trustee filed a notice proposing to abandon the bankruptcy estate's interest in twenty-nine (29) properties – including the Rogers Avenue Property – pursuant to 11 U.S.C. § 554(a). ECF No. 529. Seaport objected asserting the Trustee should refrain from abandoning certain properties because certain creditors were interested in purchasing the bankruptcy estate's interest in those properties. ECF No. 577. Seaport unabashedly acknowledged it wanted to acquire the estate's interest in order to eliminate the Debtor's interest and cut off her ability to participate – and delay – certain state court foreclosure proceedings. ECF No. 577.[6] After negotiations between Seaport and the Trustee, Seaport withdrew its objection to abandonment of certain properties, and on July 24, 2015, the Trustee abandoned sixteen (16) properties, which, as relevant here, did not include the Rogers Avenue Property.[7] ECF Nos. 660, 662, 663.[8]

On August 28, 2015, the Trustee moved for approval of a settlement with Seaport that compromised the bankruptcy estate's interest in the Debtor's claims against, among others, Seaport. ECF No. 725. Specifically, the Trustee proposed dismissing the Debtor's claim pending in an adversary proceeding against Seaport and its managing member, Steven Tavares, and stipulating to judgment in favor of Seaport and against the Debtor as to her counterclaims asserted in nine (9) superior court cases. *See*, ECF No. 725, P. 8; Adv. Proc. No. 15-2003. As part of the settlement, the Trustee agreed to quit claim the Rogers Avenue Property to Seaport. ECF No. 725, P. 7. In exchange, Seaport agreed to pay the bankruptcy estate $20,000, to bear the cost of all taxes and fees incurred as a result of the title transfer, and to cap its claim for administrative expenses. ECF No. 725. On November 10, 2015, the court granted the motion to compromise (the "Seaport Compromise"). ECF No. 851.

In her customary fashion, the Debtor moved for reconsideration of the Seaport Compromise, which the court denied. ECF Nos. 858, 1198. She then sought – through multiple filings and amendments – reconsideration of the denial of the motion to reconsider. *See*, ECF Nos. 1246, 1265, 1271, 1287, 1397, 1402, 1412, 1417. All in all, the last Order denying the Debtor's several motions to reconsider the Seaport Compromise entered on July 28, 2017. ECF No. 1417.

384** ***Motion for Order to Show Cause & Sanctions

Shortly after the court approved the Seaport Compromise, on December 12, 2016, Seaport filed the instant Contempt Motion seeking an order directing the Debtor to show cause why sanctions should not be assessed against her for allegedly collecting rents in contravention of the Cash Prohibition Order. ECF No. 1121. Even though the case had been converted to Chapter 7, Seaport sought enforcement of the Cash Prohibition Order which entered during the Chapter 11 phase of the case. The Debtor objected asserting no rents had been collected or used since the entry of the Order. ECF No. 1135. An evidentiary hearing to determine if there was a sufficient basis to order the Debtor to show cause was held on January 17, 2017 (the "Initial Evidentiary Hearing").[9] ECF No. 1159.

****3** During the Initial Evidentiary Hearing, Seaport presented evidence in the form of testimony by Cordelia Feliciano (the "Tenant"). The Tenant testified she resided at the Rogers Avenue Property paying a monthly rent of $1,400.00 to the Debtor or to a Mr. Carlos Rivera on the Debtor's behalf during the time period of May 2015 through August 2016. ECF No. 1159 at 00:40:24 – 00:40:29; 00:42:36 – 00:43:00; 00:45:00 – 00:46:50. The Tenant further testified she signed a lease in April 2014 and paid the Debtor a total amount of $4,200 for first and last month's rent and a security deposit ($1,400.00 each). ECF No. 1159 at 00:40:57 – 00:41:19; 00:45:00 – 00:46:50. Despite testimony that she paid rent every month of 2015 and until August 2016, the Tenant admitted she was late some months and had no records reflecting any payments. ECF No. 1159

at 00:45:30 – 00:46:30, 00:46:30 – 00:46:45; 00:48:25 – 00:48:30. The Debtor failed to present evidence during the Initial Evidentiary Hearing.

Following the Initial Evidentiary Hearing, Seaport filed a statement summarizing the Tenant's testimony and indicating the rent paid to the Debtor from April 2015 through August 2016 totaled $23,800.00. ECF No. 1158.

Two days later, on January 19, 2017, Attorney Vincent Fazzone, counsel appearing on behalf of the Debtor,[10] contended the scope of her defense would be she never collected any rent and all the money went to the Chapter 7 Trustee. Attorney Fazzone indicated he would present evidence from the Debtor's accountant and the Debtor. However, the Debtor refused to testify except by affidavit due to an unspecified medical condition. The court directed Attorney Fazzone to provide medical records substantiating the Debtor's inability to testify in person and to file a motion to seal any medical records by March 15, 2017. ECF No. 1160.

Shortly thereafter, on January 24, 2017, the court issued a Scheduling Order and Order directing the Debtor to show cause (the "Show Cause Order") why she should not be held in contempt for violating the Cash Prohibition Order, and providing her with an opportunity to pursue her stated defenses. ECF No. 1164. The Show Cause Order scheduled an evidentiary hearing for April 6, 2017 (the "Show Cause Order Hearing"), set a discovery deadline of ***385** March 15, 2017 and a deadline of March 15, 2017 for any motion seeking a determination of the Debtor's unavailability due a medical condition. ECF No. 1164.

A little over a week later, on February 6, 2017, Attorney Fazzone filed his first motion to withdraw as counsel for the Debtor, which was denied for procedural deficiencies. *See*, ECF Nos. 1167, 1170. His second motion to withdraw was superseded by a third amended motion, which the court ultimately granted on April 21, 2017. *See*, ECF Nos. 1184, 1242, 1259.

The Show Cause Order Hearing did not proceed on April 6, 2017. The court extended the discovery deadline to May 4, 2017[11] and continued the hearing to May 16, 2017.[12] The Show Cause Order Hearing was further continued to June 13, 2017 upon the request of the Debtor, now proceeding *pro se*, for additional time to retain new counsel. *See*, ECF Nos. 1273, 1274.

****4** Thereafter on June 2, 2017, the Debtor again sought an extension of all deadlines and hearings for a period of sixty (60) days while she sought new counsel. The court denied these requests and later denied all of the Debtor's subsequent requests to vacate and/or reconsider the orders denying such requests. *See*, ECF Nos. 1317, 1318, 1322, 1323, 1329, 1330, 1346, 1347, 1361, 1362, 1380, 1381, 1385, 1386, 1405, 1406.

The day before the Show Cause Hearing, the Debtor requested yet another continuance based upon unspecified and unsubstantiated medical grounds. ECF No. 1340. The court denied the request. ECF No. 1352. During the Show Cause Hearing, Seaport noted it provided $20,000 to the Trustee and the deed transferring title of the Rogers Avenue Property to Seaport had been recorded pursuant to the Seaport Compromise.[13] ECF No. 1341 at 00:12:20 – 00:13:25. Despite obtaining title to the Rogers Avenue Property, Seaport confirmed that it still sought sanctions against the Debtor for her receipt of rents for the period of April 2015 through August 2016 and that it was resting on the evidence presented during the Initial Evidentiary Hearing. ECF No. 1341 at 00:15:44 – 00:17:00; 00:23:58 – 00:24:20. In response to the court's questioning regarding what effect, if any, the conversion to Chapter 7 had on its request for sanctions, Seaport was unsure and acknowledged that, upon the conversion, the rents might be considered property of the estate. ECF No. 1341 at 00:17:00 – 00:19:12. Following the Show Cause Hearing, a Scheduling Order entered providing Seaport and the Debtor with deadlines for any additional memoranda of law in support or opposition to the Show Cause Order. ECF No. 1358.

In its memorandum in support of sanctions, Seaport requested a sanction totaling $26,600.00 representing the rent from April 2015 through August 2016 and including the Tenant's payment of a security deposit and last month's rent. ECF No. ***386** 1367, p. 8. Seaport acknowledged it never sought relief from the automatic stay in order to pursue its state law remedies as to the Rogers Avenue Property. ECF No. 1367, p. 5. In her opposition memorandum, the Debtor repeated her unproven defense that she never received any rent from the Rogers Avenue Property. ECF No. 1379. Seaport replied asserting the Debtor's arguments should be disregarded due to her failure to present evidence despite numerous opportunities to do so. ECF No. 1401.

While the Debtor failed to present evidence, the court takes judicial notice of its own docket and record. *See*, Fed.R.Evid. 201. During the Debtor's § 341 Meeting of Creditors[14] on

February 25, 2015, the Debtor testified she held three (3) security deposits for properties other than the Rogers Avenue Property. ECF No. 645, p. 28, 29. As to the Rogers Avenue Property, the Debtor testified it was a single-family home rented at a monthly rent of $1,350. ECF 645, P. 43. The Debtor testified the tenant at that time was late for the month of February 2015. ECF No. 645, p. 43-44.

Additionally, during a hearing held on June 4, 2015, the Trustee indicated the Debtor had turned over six (6) checks for rents paid in May of 2015 for various properties, but the properties were not identified. ECF No. 639, p. 34. The Trustee also testified during the trial in adversary proceeding case number 15-2031, that when he had asked the Debtor to turnover rent checks, she did. AP-ECF No. 629, p. 99, L. 5-7. However, the Trustee did not indicate the amount or source of the rent checks. The Debtor testified during the same trial that "[w]hen the Trustee took over the properties, every – everyone stopped paying the rent and then I had to do evictions. So they just didn't pay for the time, like a year straight." AP-ECF 629, p. 183, L. 19-22.

****5** Also, during a December 19, 2017 hearing in the Chapter 7 case, the Trustee indicated he was holding $15,242.29 originating from the Debtor's People's United Bank accounts he had closed in May of 2015 and from $5,800 in rent checks turned over by the Debtor from various tenants in May of 2015. ECF No. 1775, p. 44.

III. APPLICABLE LAW

Sanctions Pursuant to 11 U.S.C. § 105(a)

Section 105(a) of the Bankruptcy Code provides, in relevant part,

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code].[15] 11 U.S.C. § 105(a).

It is well established, "that [§] 105(a) limits the bankruptcy court's equitable powers, which must and can only be exercised within the confines of the Bankruptcy Code" and does not authorize a bankruptcy court "to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *In re Kalikow*, 602 F.3d 82, 96–97 (2d Cir. 2010). "[I]n exercising [its] statutory and inherent powers, a bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 421, 134 S.Ct. 1188, 188 L.Ed.2d 146 (2014). "Thus, § 105 does not itself create a private right of action, but a court may invoke § 105(a) if the equitable remedy utilized is demonstrably necessary to preserve a right elsewhere provided in the Code." *Bessette v. Avco Fin. Services, Inc.*, 230 F.3d 439, 444–45 (1st Cir. 2000), *amended on denial of reh'g* (Dec. 15, ***387** 2000)(*internal citations omitted*); *See also, In re Man Kit Ng*, 11-46867-CEC, 2018 WL 3956608, at *2 (Bankr. E.D.N.Y. Aug. 14, 2018)("§ 105 may provide a basis to impose sanctions, but only against bad-faith conduct and only when it is tied to a specific provision of the Bankruptcy Code, rather than to further the purposes of the Code generally ... and not merely [tied] to a general bankruptcy concept or objective.")(*quoting In re Smart World Techs., LLC*, 423 F.3d 166, 184 (2d Cir. 2005)). "The statutory contempt powers given to a bankruptcy court under § 105(a) complement the inherent powers of a federal court to enforce its own orders." *In re Kalikow*, 602 F.3d at 96 (*citing Int'l Union, UMWA v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994)). "[B]ecause of their very potency, inherent powers must be exercised with restraint and discretion." *In re Kalikow*, 602 F.3d at 97 (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)). "The party seeking to hold another in civil contempt has the burden of establishing a willful violation, which it must show 'by clear and convincing evidence.' " *In re TS Empl., Inc.*, 597 B.R. 494, 536 (Bankr. S.D.N.Y. 2019)(*citing In re Manchanda*, 2016 WL 3034693, at *4 (Bankr. S.D.N.Y. May 19, 2016)).

Cash Collateral & Post-Petition Rents

Section 363(a) defines "cash collateral" as "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest." 11 U.S.C. § 363(a). Cash collateral also includes proceeds, products, offspring, rents, or profits of property in which the entity has a security interest. *See,* 11 U.S.C. § 363(a); 3 *Collier on Bankruptcy* ¶ 363.03 (16th). In relevant part, §

363(c)(2) provides that a trustee or debtor in possession may not use, sell or lease cash collateral without either (1) the consent of the creditor with an interest in the collateral or (2) court authorization, granted after notice and a hearing. 11 U.S.C. § 363(c)(2); 3 *Collier on Bankruptcy* ¶ 363.03 (16th). In a Chapter 7 case, § 363(c)(4) requires a trustee to segregate and account for any cash collateral in the trustee's possession, custody or control and in the absence of authorization to use cash collateral, the trustee is responsible for maintaining the collateral. 11 U.S.C. § 363(c)(4); 3 *Collier on Bankruptcy* ¶ 363.03 (16th).

**6 As explained by the Second Circuit, property acquired after the commencement of the bankruptcy case is generally not considered property of the estate, but under § 541(a)(6), "after-acquired property will vest in the estate if it is derived from property that was part of the estate at the commencement of the bankruptcy." *Chartschlaa v. Nationwide Mut. Ins. Co.*, 538 F.3d 116, 122 (2d Cir. 2008)(internal quotation marks omitted). "[I]f the debtor retains an interest in the property generating post-petition proceeds, the proceeds from that property are likewise property of the estate." *In re S. Side H., LLC*, 474 B.R. 391, 405 (Bankr. E.D.N.Y. 2012); *In re Koula Enterprises*, 197 B.R. 753, 759 (Bankr. E.D.N.Y. 1996)("rents are [ ] property of the estate pursuant to 11 U.S.C. § 541"). [16]

*388 IV. DISCUSSION

In the instant request, Seaport seeks a $26,600.00 sanction against the Debtor for violating the 2015 Cash Prohibition Order entered while this was a Chapter 11 case. In support, Seaport relies solely upon the testimony of the Tenant, who testified she paid the Debtor [17] $1,400.00 a month from April 2015 through August 2016, when she then vacated the Rogers Avenue Property. [18] ECF No. 1367, p. 8.

However, the Tenant was unable to substantiate her testimony with any documentation. Additionally, she admitted she was often late in paying. In February of 2015 during the Debtor's § 341 Meeting, the Debtor stated the tenants at the Rogers Avenue Property were late in paying for that month. Additionally, the Debtor testified she only held three security deposits, which did not include a security deposit for the Rogers Avenue Property. ECF No. 645, p. 28, 29. After consideration of the Tenant's testimony and the other evidence in the record of this case, I am unpersuaded that Seaport has met the clear and convincing standard required for sanctions under § 105(a). While the testimony of one witness without any documentary support may have sufficed for entry of the Show Cause Order, it is insufficient for an award of sanctions pursuant to § 105(a). I remain troubled by the Tenant's credibility and the veracity of her paying over twenty-thousand dollars without any records. [19] I find there is a lack of convincing evidence that the Debtor received either the security deposit or all the rent from April 2015 through August 2016. Without clear and convincing evidence of the Debtor's receipt of the funds, I decline to enter a sanction under § 105(a). *In re TS Empl., Inc.*, 597 B.R. 494, 536 (Bankr. S.D.N.Y. 2019)("The party seeking to hold another in civil contempt has the burden of establishing a willful violation, which it must show by clear and convincing evidence."). Accordingly, I find Seaport failed to meet its burden demonstrating sanctions should be awarded for a violation of the Order Prohibiting Use of Cash Collateral.

**7 Besides the lack of evidence, the equities of this case do not compel the entry of sanctions. First, the Cash Prohibition Order entered during the Chapter 11 phase of the case and Seaport failed to address what, if any, effect the conversion to Chapter 7 had on this request for sanctions. *See*, ECF No. 1341 at 00:17:00 – 00:19:12. Specifically, Seaport failed to explain why, upon conversion, the rent from the Rogers Avenue Property would not be considered *389 property of the estate subject to the control of the Chapter 7 Trustee. *See*, *In re S. Side H., LLC*, 474 B.R. at 405 ("[I]f the debtor retains an interest in the property generating post-petition proceeds, the proceeds from that property are likewise property of the estate.").

After the reconversion to Chapter 7 in 2015, Seaport could have sought relief from the automatic stay in order to exercise whatever state law remedies it may have had against the Rogers Avenue Property, including enforcement of its mortgage or its assignment of rents. Or, Seaport could have arguably sought adequate protection regarding its interest in the ongoing, post-conversion rents. However, Seaport preferred to negotiate with the Trustee to obtain the Roger Avenue Property through the Chapter 7 process. Unfortunately, that process lasted from 2015 through 2017.

Given the unpersuasive nature of the evidence, and, the fact that Seaport chose its remedy by failing to seek relief from stay or other available relief after the conversion to Chapter 7, I am unpersuaded Seaport is entitled to further relief or

that the proper remedy is an award of sanctions. Under the circumstances of this case, I decline to impose sanctions for rent that may have been collected during this time particularly considering the lack of convincing evidence.

Given the protracted history of litigation between these parties and the failure of proof on the relevant issues raised by the Motion, I find there is no purpose to entering a monetary sanction against the Debtor, and that equity does not support it.

V. CONCLUSION

After careful consideration of the evidence, the record of the bankruptcy case, and the parties' arguments, I conclude Seaport has failed to meet its burden of proof to establish by clear and convincing evidence that a sanction should be imposed against the Debtor pursuant to 11 U.S.C. § 105(a). I have considered all other arguments raised by Seaport and conclude none are persuasive or supported by the record. Accordingly, Seaport's Contempt Motion is denied.

This is a final order subject to traditional rights of appeal, with a fourteen (14) day appeal period. *See*, Fed.R.Bankr.P. 8001, *et seq.*, Fed.R.Bankr.P. 8002(a)(1); *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, —— U.S. ——, 140 S.Ct. 582, 205 L.Ed.2d 419 (2020).

NOW THEREFORE, it is hereby

ORDERED: That, the motion seeking sanctions against the debtor, Sheri Speer, ECF No. 1121, filed by Seaport Capital Partners, LLC, is DENIED.

All Citations

618 B.R. 380, 2020 WL 3167690

Footnotes

1 On March 27, 2015, Judge Dabrowski granted Seaport's Motion to Prohibit the Use of Cash Collateral as it pertained to 12 Rogers Avenue, Norwich, Connecticut ("Cash Prohibition Order"). ECF No. 479.

2 The Debtor timely appealed the Order for Relief. ECF Nos. 236, 287. On February 18, 2015, following the conversion to Chapter 11, the District Court dismissed her appeal as moot. *See*, Case No. 3:14-cv-1912; ECF No. 408.

3 Seaport attached a copy of its mortgage containing an assignment of rents provision to its motion. ECF No. 447-2, p. 4 of 8.

4 At the time of the Order for Relief, it is undisputed the Debtor was the record owner of the Rogers Avenue Property.

5 The Debtor appealed the Order reconverting her case to Chapter 7. ECF No. 532. On June 18, 2015, the District Court dismissed her appeal, Case No. 3:15-cv-646, as premature because a motion to reconsider was pending. ECF No. 655. After reconsideration, on July 23, 2015, the court (Nevins, J.) granted – again – Seaport's motion to reconvert the case to Chapter 7. ECF No. 684. The Debtor also appealed this ruling. *See*, ECF No. 692, 740, 777; Case No. 3:15-cv-646. The District Court affirmed the ruling. *See*, ECF No. 1576.

6 In the objection to the Trustee's notice of abandonment, Seaport alleges the Debtor had a history of filing frivolous pleadings in order to delay state court foreclosure proceedings. ECF No. 577.

7 To be clear, at this point in time – July 2015 – no foreclosure action was pending by Seaport involving the Rogers Avenue Property. *See*, ECF No. 725, Par. 27.

8 Thereafter, the Debtor moved to compel the Trustee to abandon the remaining properties as the Trustee originally proposed. ECF No. 719. The motion to compel was denied. ECF No. 851.

9 During an initial hearing held on December 19, 2016, Seaport requested a continuance to allow it the opportunity to present evidence in support its motion. ECF No. 1136 at 00:06:20 – 00:10:57.

10 On August 2, 2016, the court granted Attorney Fazzone's motion seeking admission *pro hac vice* to represent the Debtor. *See*, ECF No. 1081, 1082. His representation of the Debtor terminated on April 21, 2017. ECF No. 1259.

11 Before his representation was terminated, Attorney Fazzone filed a motion seeking a three-week extension of the discovery deadlines and a notice indicating – again – the Debtor's defense would be she did not receive any rent after March 27, 2015. *See*, ECF No. 1188, 1189. The court extended the discovery deadline to May 4, 2017. ECF No. 1258.

12 On April 5, 2017, the day prior to the Show Cause Hearing, a hearing was held in the adversary proceeding, Case No. 15-2031. During that hearing, the court *sua sponte* continued the Show Cause Hearing to May 16, 2017. Attorney Skaats representing Seaport indicated it had no further evidence to present in support of the Show Cause Order. ECF No. 1228 at 00:26:40 – 00:30:40.

13 Following the Show Cause Hearing, Seaport filed a copy of the deed as recorded on the land records on May 19, 2017. ECF No. 1367-1.

14 Seaport filed a copy of the § 341 Meeting Transcript on the docket as ECF No. 645.

15 The Bankruptcy Code is found in Title 11, United States Code.

16 *See also, Leeber Realty LLC v. Trustco Bank*, Docket No. 17-CV-2934 (KMK), 2019 WL 498253, at *7, 2019 U.S. Dist. LEXIS 20885, at *23 (S.D.N.Y. Feb. 8, 2019) ("An absolute assignment of rents prepetition does not necessarily mean that the estate has no interest in the rents for the purposes of a § 541 analysis. Even if the mortgagee had an absolute assignment, rather than a pledge which required further action, it would not follow that the debtor's interest in the rent was totally cut off.")(internal citations and quotations omitted); *See also, In re Vienna Park Properties*, 976 F.2d 106, 114 (2d Cir. 1992)("Because the Banks had not yet gained the right to enforce that security interest, they are not entitled to collect the rents. Rather, the rents should be sequestered and subject to protection as cash collateral under section 363 and the terms of the rent assignment clauses."); *See also, In Re Eternal Enterprises, Inc.*, Case No. 14-20292 (AMN), Opinion and Order Authorizing Use of Cash Collateral, ECF No. 308 (Bankr.D.Conn. December 15, 2015).

17 The Tenant also testified she paid a Mr. Carlos Rivera on the Debtor's behalf. The Tenant did not identify how much was paid directly to the Debtor versus Mr. Carlos Rivera.

18 The $26,000.00 figure also includes the Tenant's payment of last month's rent and a security deposit ($1,400.00 each). ECF No. 1367, p. 8.

19 I note the Tenant testified there were numerous issues with the Rogers Avenue Property including lack of electricity and that her family was forced to leave by the Norwich Health Department. *See*, ECF No. 1159 at 00:40:24 – 00:47:00. This testimony suggests a contentious relationship between the Tenant and the Debtor which may have biased the Tenant's testimony.

End of Document

PRESS RELEASE

Appeals Court Judge Reprimanded by Commission on Judicial Conduct

Appeals Court Judge Reprimanded by CJC

FOR IMMEDIATE RELEASE:

3/19/2004

Massachusetts Commission on Judicial Conduct

MEDIA CONTACT

Jill Pearson, Executive Director

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6177258050 (tel:6177258050)

BOSTON, MA — The Commission on Judicial Conduct has today reprimanded (with some conditions) Appeals Court Justice Joseph A. Trainor for having operated a motor vehicle while under the influence of alcohol in February of 2003. Justice Trainor has successfully completed his continuance without a finding in the Dedham District Court and his criminal case has been dismissed. The Commission is therefore closing Complaint Number 2003-31 as Informally Adjusted, pursuant to M.G.L. c.211C, section 8. Justice Trainor has agreed not to sit on any appeal involving a charge of operating under the influence until at least one year following the dismissal of his criminal case.

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Massachusetts Commission on Judicial Conduct

(/orgs/massachusetts-commission-on-judicial-conduct)

The Massachusetts Commission on Judicial Conduct (CJC) is the state agency responsible for investigating complaints alleging that a state court judge has engaged in judicial misconduct or has a disability preventing him or her from properly performing judicial duties.

The CJC is also responsible for pursuing, when it is appropriate, remedial action or discipline against state court judges.

More (/orgs/massachusetts-commission-on-judicial-conduct)

PRESS RELEASE

Judge Robert F. Murray Disciplined by the Commission on Judicial Conduct

Judge Robert F. Murray Disciplined by CJC

FOR IMMEDIATE RELEASE:

11/28/2005

Massachusetts Commission on Judicial Conduct

MEDIA CONTACT

Jill Pearson, Executive Director

Phone

6177258050 (tel:6177258050)

BOSTON, MA — As part of an Agreed Disposition with the Commission on Judicial Conduct, Judge Robert F. Murray, Justice of the Plymouth Juvenile Court, has agreed to a suspension for one year without pay and a $50,000 fine. During a six month period in 2004, Judge Murray engaged in inappropriate conduct directed toward two female employees of the Juvenile Court in Brockton. Judge Murray will not sit as a judge in any court during his suspension, and will forfeit all accumulated vacation time. Judge Murray will never again sit in any court in Plymouth County. Judge Murray will participate in appropriate treatment and will be monitored by the Commission.

Judge Murray agreed to make the following public statement regarding this matter: "I acknowledge and accept responsibility for my wrongful conduct. I am very sorry for the pain, anguish and apprehension I caused both court employees. I am very sorry for the embarrassment and expense to the Trial Court, and I apologize to my judicial colleagues for what I have done. I have already apologized to my family for the pain and anguish that has resulted

from this period of my life. During the period of this conduct, I labored with a number of medical problems and personal difficulties that led me to act in a way inconsistent with my prior life and conduct. I sought professional help. Currently, my health is stable. I am confident that the issues in my life during 2004 are no longer present and no longer exist."

Judge Murray has entered into this agreement with the Commission pursuant to G.L. c. 211 C, § 8, has waived his confidentiality with regard to the above terms of the agreement, and has waived his right to a public hearing in this matter.

###

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More (/orgs/massachusetts-commission-on-judicial-conduct)

PRESS RELEASE

Superior Court Judge Reprimanded by Commission on Judicial Conduct

Superior Court Judge Reprimanded by CJC

FOR IMMEDIATE RELEASE:

6/09/2010

Massachusetts Commission on Judicial Conduct

MEDIA CONTACT

Howard Neff, Executive Director

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(617) 725-8050 (tel:6177258050)

BOSTON, MA — The Commission on Judicial Conduct yesterday reprimanded (with some conditions) Superior Court Justice Christine M. McEvoy for having operated a motor vehicle while under the influence of alcohol on April 15, 2009 in violation of G.L. c. 90, sec. 24.

Judge McEvoy has successfully completed her continuance without a finding in the Concord District Court, including successful completion of a drivers' alcohol education program, and her criminal case has been dismissed.

The Commission is therefore closing Complaint Number 2009-45 as Informally Adjusted, pursuant to G.L. c. 211C, sec. 8.

The Commission's statute and Rules are available on the Commission's website: www.mass.gov/cjc.

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Massachusetts Commission on Judicial Conduct

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The CJC is also responsible for pursuing, when it is appropriate, remedial action or discipline against state court judges.

More (/orgs/massachusetts-commission-on-judicial-conduct)

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Michael P. Angelini, Esquire, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New, at size 12, 10.5 characters per inch, and contains 30, total non-excluded pages.

Respectfully Submitted,

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CERTIFICATE OF SERVICE OF APPELLEE

PAUL M. SUSHCHYK

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on April 15th, 2021, I have served two copies of Appellees' Brief and this Certificate of Service by electronic mail and first-class mail, postage prepaid, upon:

Mr. Howard D. Neff, III
Commission on Judicial Conduct
11 Beacon Street, Suite 525
Boston, MA 02108

Respectfully Submitted,

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