

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 2018CA001216XXXXMB

CREDIT CORP. SOLUTIONS, INC.,
Petitioner,

v.

SAMINA CHOWDHURY,
Respondent.

Amended¹ Opinion filed: MAY 10 2018

Petition for Writ of Prohibition from County Court in and for Palm Beach, County, Florida.

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Petitioner, Credit Corp. Solutions, Inc., filed the instant Petition for Writ of Prohibition, seeking to prohibit trial court judge, the Honorable Dana Santino, from further presiding over the case. In support, Petitioner asserts that the trial judge erred by denying Petitioner's motion to disqualify as legally insufficient; by failing to stay the proceedings before ruling on the motion to disqualify; and by challenging the facts alleged in the motion to disqualify at a hearing held on January 4, 2018.

On December 21, 2017, Petitioner and Respondent appeared before the trial court for a

¹ This Amended Opinion corrects a minor scrivener's error in the spelling of the Petitioner's name in the case style.

hearing on a motion relating to discovery matters. The hearing began with a brief conversation between the trial court and Respondent's counsel regarding the motion at issue. This conversation occurred prior to Petitioner's counsel appearing at the hearing telephonically, and we find that it was substantive in nature and pertaining to the pending motion. The discussion was paused when the Court Call phone operator notified the trial court that Petitioner's counsel was calling in to appear telephonically. Once Petitioner's counsel appeared, the trial court resumed the hearing and eventually entered an order on the motion in favor of Respondent.

On January 3, 2018, Petitioner filed the motion to disqualify, alleging that the judge should disqualify herself due to Petitioner's fear that it will not receive a fair trial and ruling because the judge has a bias or prejudice in favor of Respondent. This fear was based on allegations that the judge and Respondent's counsel had taken part in ex-parte communications at the December 21, 2017 hearing. In particular, Petitioner alleged that the judge permitted Respondent's counsel to make ex-parte argument regarding the discovery motion.

On January 4, 2018, at a hearing on two of Respondent's discovery motions, Petitioner's counsel argued that the trial court should not rule on the pending discovery motions until the Motion to Disqualify had been ruled on. The following discussion ensued:

THE COURT: What's the basis for the motion to disqualify?

PETITIONER: - - I don't know if it could be reset or continued to a different day after that motion's been dealt with.

THE COURT: Okay, motion to disqualify, what's the basis?

PETITIONER: And, Judge, the basis for the disqualification is based on the record for the last hearing we had. There were some apparent communications between opposing counsel and yourself before I was in the hearing.

...

THE COURT: It was housekeeping. It was nothing to do with the case.

...

THE COURT: I think this Court would be perfectly aware of what is and is not permitted communication ex-parte, and, it if its housekeeping and its scheduling, if it's anything such as that, it's not - - it's not of the basis for a disqualification.

After further discussion, the trial court held that it would reserve ruling on the motion to disqualify and moved forward with the hearing. On January 8, 2018, the trial court denied the motion to disqualify as legally insufficient, which is the basis for the instant Petition.

A trial court's denial of a motion to disqualify is "reviewed under a *de novo* standard as to whether the motion is legally sufficient as a matter of law." *Peterson v. Asklepious*, 833 So. 2d 262, 263 (Fla. 4th DCA 2002). In determining whether a motion to disqualify is legally sufficient, a court must evaluate whether the facts alleged, which must be assumed to be true, would prompt a party to have a "well-founded fear of prejudice." *Michaud-Berger v. Hurley*, 607 So. 2d 441 (Fla. 4th DCA 1992). The facts alleged must create an actual foundation for such prejudice, such that a reasonably prudent person would be prompted to fear that he or she could not get a fair and impartial trial. *Kline v. JRD Mgmt. Corp.*, 165 So. 3d 812, 813 (Fla. 1st DCA 2015); *Peterson*, 833 So. 2d 262, 263 (Fla. 4th DCA 2002).

Ex-parte communications may constitute a legally sufficient basis for a motion to disqualify a judge from presiding over the proceeding. *See Rose v. State*, 601 So.2d 1181, 1183 (Fla. 1992). Where the ex-parte communications at issue pertain to "purely administrative, non-substantive matters, such as scheduling," disqualification is not warranted. *Nudel v. Flagstar Bank, FSB*, 52 So. 3d 692, 694 (Fla. 4th DCA 2010); *see Rose*, 601 So. 2d at 1183; *Rodriguez v. State*, 919 So.2d 1252, 1274–75 (Fla. 2006). If an ex-parte communication concerns the merits of a pending motion or the case, however, such communication is basis for disqualification. *See*

FL ST CJC Canon 3 B(7); *Pasha v. State*, 225 So. 3d 688, 703 (Fla. 2017) *Nat'l Health Lab. v. Reasbeck*, 584 So. 2d 614, 615 (Fla. 4th DCA 1991) (Warner, J., dissenting).

In the instant case, we find that the trial court engaged in ex-parte communications with Respondent's counsel prior to Petitioner's counsel appearing by telephone at the hearing.² These ex parte communications were both substantive in nature and pertaining to the pending discovery motion that was eventually ruled upon in Respondent's favor. We find that such communications were sufficient to create a well-grounded fear of lack of impartiality, and thus Petitioner's Motion to Disqualify should have been granted as legally sufficient. Further, we find that the trial court erred by failing to immediately resolve the motion to disqualify, by reserving ruling on the motion, and by ruling on other pending motions. *See* Fla. R. Jud. Admin 2.330(f) (motions to disqualify should be granted or denied "immediately"); *Valdes-Fauli v. Valdes-Fauli*, 903 So. 2d 214, at 217-18 (Fla. 3d DCA 2005) (courts must rule on motion to disqualify "before resolving any other matters.").

Finally, even if the motion to disqualify was legally insufficient, we would nevertheless grant the Petition on the basis of the trial court's comments made regarding the motion at the January 4, 2018 hearing. It is well-established that a judge presented with a motion for his or her disqualification or recusal "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978). Where a judge "attempts to refute the factual assertions in a motion for disqualification, he or she is deemed to have taken an adversarial role in the matter, which itself warrants disqualification." *Frost v.*

² That is not to say that a party's failure to appear at a hearing necessarily transforms the discussions held at that hearing into ex parte communications. *See e.g.*, Fla. R. Civ. P. 1.200(c); Fla. R. Crim. P. 3.180(c). However, we find no indication that the trial court or Respondent's counsel were under the impression that Petitioner's counsel would not appear, and thus, under the facts presented in this case, we find that an ex-parte communication occurred.

Ward, 622 So. 2d 597, 598 (Fla. 4th DCA 1993). We find that the trial judge, in engaging in discussion about the motion to disqualify at the January 4, 2018 hearing, took an adversarial role by attempting to refute Petitioner's allegations and passing on the truth of the facts asserted in the motion. This alone would be basis for disqualification from the instant proceeding. *Bundy*, 366 So.2d 440 (Fla.1978); *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332 (Fla.1990); *Ellis v. Henning*, 678 So.2d 825 (Fla. 4th DCA 1996).

Accordingly, the Petition for Writ of Prohibition is GRANTED. The matter is remanded to the trial court with directions for the Clerk to re-assign the case to a different judge.

HAFELE, SMALL, and NUTT, JJ., concur.

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLATE DIVISION (CIVIL): AY
CASE NO: 502018CA001216XXXXMB
L.T. NO: 502017CC001649XXXXMB

CREDIT CORP. SOLUTIONS, INC.,

Opinion/Decision filed: **MAY 10 2018**

Petitioner,

Petition for Writ of Prohibition from the
County Court in and for Palm Beach County;
Judge Dana M. Santino

v.

SAMINA CHOWDHURY,

Petition filed: January 31, 2018

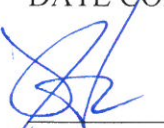


Respondent.

DATE OF PANEL: APRIL 16, 2018

PANEL JUDGES: HAFELE, SMALL, NUTT

GRANTED/DENIED/OTHER: PETITION GRANTED

PER CURIAM OPINION/DECISION BY: PER CURIAM

| DATE CONCURRING: |) | DISSENTING: |) | CONCURRING SPECIALLY: |) |
|---|---|----------------------|---|-----------------------|---|
| |) | With/Without Opinion |) | With/Without Opinion |) |
|  5/9/18 |) | |) | |) |
| J. |) | J. |) | J. |) |
|  5/9/18 |) | |) | |) |
| J. |) | J. |) | J. |) |
|  5/10/18 |) | |) | |) |
| J. |) | J. |) | J. |) |