

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
In the Matter of the Application of
The Honorable Lee L. Holtzman.

Index No. 108251/11

Petitioner,

Mot. Subm.: 8/12/11

Mot. Seq. No.: 001

- against -

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules.

-----X
BARBARA JAFFE, JSC:

For petitioner:

David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway
New York, NY 10006
212-742-9700

For respondent:

Monica Connell, AAG
Michael Siudzinski, AAG
Eric T. Schneideman
Attorney General of the State of NY
120 Broadway, 24th Fl.
New York, NY 10271
212-416-8965/8552

By order to show cause dated July 29, 2011, petitioner brings this Article 78 proceeding seeking an order directing respondent to dismiss the complaint filed against him without prejudice to re-filing it upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceeding against him pending the conclusion of the trial. Respondent opposes.

I. BACKGROUND

By Notice of Formal Written Complaint dated January 4, 2011, respondent charged petitioner, Judge of the Surrogate's Court, Bronx County, with judicial misconduct as follows:
(1) from 1995 to April 2009, petitioner approved legal fees payable to Michael Lippman,

Counsel to the Bronx Public Administrator's Office, in numerous cases based on insufficient boilerplate affidavits of legal services and without consideration of statutory factors; (2) in 2005 and 2006, despite knowing that Lippman had taken unearned advance legal fees without court approval and/or excessive fees, petitioner failed to report Lippman to law enforcement authorities or the Appellate Division, First Department Disciplinary Committee and continued to award Lippman legal fees; and (3) from 1997 to 2005, petitioner failed to supervise the work of court staff and appointees adequately, including but not limited to Public Administrator Esther Rodriguez, resulting in (a) Lippman improperly taking advance legal fees, (b) delays in the administration of estates, (c) numerous individual estates with negative balances, (d) estate funds being placed in imprudent and/or unauthorized investments, and (e) the Public Administrator's employment of a close acquaintance who billed estates for services that were not rendered and/or overbilled estates. (Petition, dated July 19, 2011 [Pet.]).

Lippman was indicted on criminal charges related to the allegations against petitioner. The criminal matter against Lippman will next be heard on September 20, 2011 in Supreme Court, Bronx County. (*Id.*, Exh. C).

By decision and order dated March 21, 2011, respondent denied petitioner's motion to dismiss the disciplinary proceeding against him or stay it pending Lippman's criminal matter. (*Id.*, Exh. A). A disciplinary hearing is scheduled for September 12, 2011. (*Id.*).

II. CONTENTIONS

Petitioner alleges that respondent's decision to proceed with the disciplinary hearing against him notwithstanding the pendency of the criminal action against Lippman deprives him of his constitutional right to mount a defense, as he is unable to access documents and evidence

within the control of the prosecution in the criminal action, and to confront or cross-examine Lippman, who he alleges is the actual wrongdoer. According to petitioner, Lippman will invoke his right against self-incrimination if called as a witness in the disciplinary proceeding, as evidenced by the affidavit of Lippman's attorney, who states that if Lippman is called to testify in the disciplinary proceeding, he "would advise [Lippman] to exercise his constitutional rights to refuse to answer any such questions under the Fifth Amendment." (Pet., Exh. E). Petitioner also asserts that as his term will not expire until December 2012, respondent will have ample time to conclude the proceeding and will thus not be prejudiced by a limited stay, whereas he will be severely prejudiced if the disciplinary proceeding is not stayed. (*Id.*).

Respondent maintains that petitioner's claim is premature as it has made no decision that actually harms him; that Lippman may not assert his fifth amendment right before he is called as a witness, and that in the event Lippman refuses to testify, respondent will then be able to fashion an appropriate remedy to protect petitioner's rights. It denies that petitioner will be unable to present a defense absent Lippman's testimony as the charges against petitioner relate to his conduct and not Lippman's. (Mem. of Law, dated July 28, 2011).

III. ANALYSIS

Generally, a witness may only invoke the privilege against self-incrimination when asked a potentially incriminating question, and thus the privilege may not be invoked in advance. (*People v Laino*, 10 NY2d 161 [1961], *lv denied and cert denied* 374 US 104 [1963]; *Application of Waterfront Commn. of New York Harbor*, 245 AD2d 63 [1st Dept 1997], *lv denied* 93 NY2d 931 [1999]; *Figueroa v Figueroa*, 160 AD2d 390 [1st Dept 1990]).

In *Britt v Intl. Bus Servs., Inc.*, the court observed that a compelling factor in determining whether to stay a civil action pending the resolution of a related criminal action is where a defendant in the civil action will invoke his or her right against self-incrimination. (255 AD2d 143 [1st Dept 1998]). There, a bus passenger sued the bus owner and bus driver for negligence. Criminal charges pended against the driver, and the driver's attorney "indicated that [the driver] clearly intends to invoke his right against self incrimination given the severity of the pending criminal charges against him." Based on the affirmation, the court found that the defendant bus owner demonstrated that without the driver's "critical and necessary" testimony, he would be unable to present an adequate defense, and thus a stay of the civil action was warranted.

Here, petitioner has not shown that Lippman will refuse to testify if called as a witness absent an affidavit from Lippman and given Lippman's attorney's affirmation in which he states only that he will advise Lippman not to testify, not that Lippman will in fact refuse to testify. Thus, petitioner's application is premature.

Moreover, it has been held that a disciplinary or administrative proceeding need not be stayed pending the conclusion of a related criminal proceeding. (*See Chaplin v New York City Dept. of Educ.*, 48 AD3d 226 [1st Dept 2008]; *Matter of Watson v City of Jamestown*, 27 AD3d 1183 [4th Dept 2006]; *Matter of Mountain*, 89 AD2d 632 [3rd Dept 1982]; *Espada 2001 v New York City Campaign Fin. Bd.*, 15 Misc 3d 647 [Sup Ct, New York County 2007], *aff'd* 59 AD3d 57 [1st Dept 2008]; *In re Geary*, 80 Misc 2d 963 [Sup Ct, Westchester County 1975]).

While petitioner relies on *Access Capital, Inc. v DeCicco*, for the proposition that "[i]n the context of civil litigation, a discretionary stay is appropriate to avoid prejudice to another party that would result from the assertion of the privilege against self-incrimination by a

witness." the proposition constituted only dicta as the issue decided therein was whether the defendant was entitled to a stay of the plaintiff's motion for summary judgment against him while criminal proceedings pended against him. (302 AD2d 48 [1st Dept 2002]).

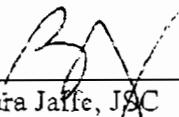
In light of this result, I need not consider the parties' remaining arguments.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied and the proceeding is dismissed.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 8, 2011
New York, New York

SEP 08 2011