IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4DCA#22- 2821

Lower Tribunal Case No. 50-2020-CC-005756-XXXX-MB

EVAN S. GUTMAN

Appellant,

vs.

CITIBANK, N.A.

Appellee

APPELLANT'S REPLY BRIEF

EVAN S. GUTMAN, CPA, JD
Appellant Pro Se
Member State Bar of Pennsylvania
Member District of Columbia Bar
Admitted to U.S. Tax Court Bar
1675 NW 4th Avenue, Apt. 511
Boca Raton, FL 33432
561-990-7440

TABLE OF CONTENTS

PAGE #

TABLE OF AUTHORITIES

CASES **Page**

RULES

CONSTITUTIONAL PROVISIONS

INTRODUCTION AND EXPLANATION OF REFERENCES

Appellant Evan Gutman will be referred to as Appellant. Appellee Citibank, N.A. will be referred to as Citibank. References to the record shall be designated as "R" followed by the page designation as set forth in the record on appeal transmitted by the Clerk of the lower Court. Leading Zeros for the page numbers are omitted.

References to the Appendix previously submitted by the Appellant and approved by this Court as well as with Consent of Citibank Counsel, shall be delineated as "A." Thus, A14 for example, refers to Page 14 of the Appendix previously submitted and on record.

References to Appellant's Initial Brief shall be delineated as "IB." Thus, IB15 for example, refers to Page 15 of the Appellant's Initial Brief.

APPELLANT'S REPLY BRIEF

ARGUMENT

Appellant, Evan S. Gutman respectfully presents this Reply Brief to Appellee Citibank's (hereinafter "Citibank") Amended Answer Brief (hereinafter "Answer Brief").

On May 30, 2023, this Court issued an Order cautioning Appellant against raising any new issues in this Reply Brief. Accordingly, in total and complete compliance and conformity with this Court's Order, Appellant does not raise a single new issue in this Reply Brief and limits discussion herein solely to those issues in his Initial Brief and Citibank's Answer Brief.

The First ground for Reversal in Appellant's Initial Brief is that Judge Garrison erroneously denied Appellant's Motion for Disqualification. (IB12-IB19). In response, Citibank asserted in its Answer Brief that Appellant's contention should be rejected by this Court. The crux of Citibank's position are assertions Appellant did not comply with the requisites of Florida Rule of Judicial Administration 2.330(c) and Appellant's Motion to Disqualify was not timely. Appellant responds to those assertions as follows.

Citibank Counsel simply misapprehended that Rule 2.330 is not the sole basis for judicial disqualification. More specifically, Rule 2.330 is a rule predicated only upon "Statutory Disqualification." However, principles

of "Constitutional Disqualification" under the 14th Amendment Due Process Clause, do not require any compliance with Rule 2.330. Pursuant to the Supremacy Clause of the U.S. Constitution (Article VI), as well as principles of Federalism, a State may provide greater protections than the U.S. Constitution, but may not allow for lesser protections. Thus, Judicial Disqualification requires an examination of constitutional principles under the 14th Amendment, in addition to Statutory principles under Rule 2.330.

These points have axiomatically been delineated in several judicial opinions. For instance, in Caperton v A.T. Massey Coal Co., Inc. 556 U.S. 868 (2009), the Court expressly held that the Due Process Clause required recusal under the circumstances of that case. The Court wrote as follows, in part (emphasis added):

> **"It is axiomatic that a "a fair trial in a fair tribunal is a basic requirement of due process. Murchison**, **supra, at 136**, 75 S. Ct. 623. As the Court has recognized, however, "most matters relating to judicial disqualification do not rise to a constitutional level. . . .
>
> The Tumey Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. . . .
> **. . .**
> **As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal**. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be **constitutionally tolerable**. . . .

. . .
The Court articulated the controlling princple:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the State and the accused, **denies the latter due process of law."**

Caperton, supra at 876-878 (2009)

One of the best cases explaining the distinction between Statutory Judicial Disqualification and Constitutional Judicial Disqualification is in the Oregon case of State v Garza, 865 P.2d 463 (1994). Although the Oregon disqualification statute is different than the Florida rule, the Court's reasoning is equally applicable to Florida as it focuses on the importance of Constitutional Judicial Disqualification regardless of statutory language. Accordingly, Appellant cites such as "Persuasive" authority. In Garza, supra, the Court wrote as follows in part (emphasis added):

> "We write only to address defendant's contention that the judge committed reversible error when he failed to disqualify himself. . . .
> **. . .**
> . . . Defendant concedes that he did not file an affidavit, as permitted by ORS 14.260, and that his motion to disqualify the judge was not filed "within five days after the matter is at issue," as required by ORS 14.260(2). **Thus, defendant cannot prevail in this case under Oregon's statutory law. That does not end the inquiry, however**.
>
> **The United States and Oregon constitutions ensure** that every person charged with a crime has a right to a fair and impartial trial. Essential to that protection is the requirement that the presiding judge

> maintain complete neutrality in the case. . . . **Many appellate courts, including this one, have held that, to ensure due process, a judge's actual or apparent bias must by necessity result in disqualification, even when the statutory requirements for recusal have not been, or, as here, could not have been followed. . . . .** "
>
> Garza, supra at 463-464 (Affirmed on other grounds)

Accordingly, whether Citibank Counsel is correct or incorrect in their interpretation of Rule 2.330 (**which itself is uncertain**), such pertains only to "Statutory Disqualification," and they failed to address in any manner "Constitutional Disqualification" required by the 14th Amendment.

Citibank Counsel also asserts the Motion for Disqualification was not timely. However, in Liljeberg v Health Services Acquisition Corp. 486 U.S. 847 (1988), the U.S. Supreme Court in Affirming the Federal Fifth Circuit Court of Appeals decision, held that even under principles of "Statutory Disqualification" pursuant to 28 USC 455(a), the issue of judicial disqualification could be first raised for the very first time Ten Months after the Judgment had become Final. (See Liljeberg, supra at 850-851). While Appellant concedes raising judicial qualification for the first time, ten months after a Judgment is final seems unusual to even himself, that is what the U.S. Supreme Court held in Liljeberg, supra. In any event,

Appellant's Motion was squarely raised prior to any trial and therefore the assertion it was not timely fails quite miserably.

As regards the specific issues warranting Disqualification, Appellant's Initial Brief supplements the Motion to Disqualify itself by citing to the trial transcript for the premise it was logistically impossible for Judge Garrison to have even read the Motion to Disqualify before ruling, unless he possessed superhuman abilities (IB13-IB19). At a bare minimum, Due Process mandates a Motion for Disqualification be read. Similarly, the trial transcript indicates that Citibank Counsel, Kenneth Curtin, Esq. falsely asserted that Citibank's Motion to Strike was not timely filed. (IB21 and A12). Additionally, Judge Garrison falsely indicated Appellant did not submit an Affidavit with the Motion to Disqualify, even though such is clearly on record as having been properly submitted (IB15 and A10-A11).

The Second ground for reversal presented in Appellant's Initial Brief is that trial should not have proceeded because the case was not "At Issue" (IB19-IB22). Citibank counters this contention by falsely asserting Appellant did not timely file his Objection on the issue and that by filing his exhibit list in preparation for trial on August 2, 2022; he effectively "waived" his objection on the issue. Citibank cites two cases in which the appellate court held that <u>when the attorney appeared and participated</u> at trial, the

Rule 1.440 objection was waived. However, those cases are not relevant because in this particular instance, Appellant specifically did NOT participate at trial at all and strategically decided to not even appear because of Rule 1.440 on the day of trial.

Accordingly, Citibank is seeking a massive expansion of the waiver rule pertaining to Rule 1.440, that would in fact negate the rule in its entirely. More specifically, if filing an Exhibit list on August 2, 2022, more than one month before a trial held on September 14, 2022 constitutes "participation" at trial according to Citibank, then any filing prior to trial could be deemed to constitute such. In fact, it could easily be contended by merely filing an "ANSWER" to a Complaint, such constitutes "Participation" at trial because the the very essence of adjudication is an expectation of a trial. That would mean this case was "At Issue" years ago without any declaration of a trial judge on the matter, and would obliterate Rule 1.440. Accordingly, Citibank's position on this issue should also be rejected.

All other matters delineated in Appellant's Initial Brief are sufficiently delineated therein and require no further exposition in this Reply Brief, other than noting they are incorporated by reference herein.

For the foregoing reasons, Appellant requests this Court Reverse the trial court's judgment, reinstate Appellant's Counterclaim, order that Judge

Edward Garrison have no further participation in the case upon remand, and order that monies already paid into the Court as a Cash bond be refunded in full to Appellant.

Submitted respectfully this 12th day of June, 2023.

Evan Gutman CPA, JD
Appellant Pro Se
Member State Bar of Pennsylvania
Member District of Columbia Bar
1675 NW 4th Avenue, Apt. 511
Boca Raton, FL 33432
561-990-7440

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished to opposing counsel by E-Mail and a follow up copy will be sent via US Mail, to Donald Allen Mihokovich, Esquire, of the law firm of ADAMS AND REESE, LLP addressed as follows:

ADAMS AND REESE LLP
Attn: Donald Allen Mihokovich, Esq.
100 North Tampa Street, Suite 4000
Tampa, FL 33602

Dated this 12th day of June, 2023.

Evan Gutman CPA, JD

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that to the best of my knowledge and belief, the foregoing comports with the Font and Spacing requirements of Fla. R. App. P. 9.210 and 9.045(b) and other applicable rules, and includes a word count of 1,578 (excluding words in a cover page, table of contents, table of authorities, certificate of service and certificate of compliance).

Evan Gutman CPA, JD