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FOR PUBLICATION

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

COLUMBA IL CHUL CHONG,

Plaintiff,

v.

**HOTEL NIKKO SAIPAN, INC. &
TOKIO MARINE AND FIRE
INSURANCE CO., LTD.,**

Defendants.

CIVIL ACTION NO. 03-0443D

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECUSAL**

HOTEL NIKKO SAIPAN, INC.,

Third Party Plaintiff,

v.

**KUME ARCHITECTS-ENGINEERS, &
BLACK MICRO CORPORATION,**

Third Party Defendants.

This matter was last before the Court on January 25, 2005 on Plaintiff's Motion for Recusal (the "Motion"). Appearing at oral arguments and/or on the briefs were: William Fitzgerald for Plaintiff Columba Il Chul Chong ("Plaintiff"); Robert O'Connor for Defendant Tokio Marine and Fire Insurance Co., Ltd. and Defendant/Third Party Plaintiff Hotel Nikko Saipan, Inc.; Thomas C. Sterling for Third Party Defendant Black Micro Corporation; and Eric S. Smith for Third Party

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Defendant Kume Architects-Engineers.

Although the Notice of Motion does explicitly refer to the statutory basis for Judge Lizama’s recusal, Mr. Fitzgerald clarified at oral arguments that the Motion was brought under 1 CMC §3308(a) (recusal based on appearance of impropriety). Because the Motion is based on §3308(a), it may be decided on by this Court. *See e.g.* Com.C.Judic. Cond. Canon 3(D)(c); *Hofschneider v. Demapan-Castro* Civ. No. 04-0523, CNMI Superior Court Order Concerning Defendant MPLA’s Motion for Recusal, slip op. page 2, Note 1. (June 22, 2005)(Lizama, J.).¹ Based on a careful evaluation of the briefs, arguments, and the Court’s own knowledge of the material facts, the Court denies the Motion.

I. FACTUAL BACKGROUND

This case, initiated in Judge Lizama’s Court on September 15, 2003, concerns the personal injury of Plaintiff at the Hotel Nikko Saipan. Plaintiff was referred to Attorney Bruce Berline by her close friend, who is also the wife of Judge Lizama. Mr. Berline has been a friend of the Lizamas for many years. In the course of this litigation Mr. Berline has disclosed these facts to other parties in the case.

On December 22, 2003, Plaintiff submitted an at-issue memorandum to set the case for trial. At some point prior to that date, William Fitzgerald joined the case as additional counsel for Plaintiff.

At a December 13, 2005 scheduling conference, at which Mr. Fitzgerald was not present, Mr. Berline suggested that Judge Lizama recuse himself due to a perceived bias against Mr. Fitzgerald. Mr. Berline referred to the case *Health Professional Corporation v. Bank of Guam*, No. 00-0172, in

¹ Compare with §3308(b)(1) (recusal based on bias), which must be decided by a judge who is not the object of the motion. Com.C.Judic. Cond. Canon 3(D)(c).

1. which Mr. Fitzgerald served as counsel for the plaintiff. As the judge in that case, Judge Lizama
2. denied many of Mr. Fitzgerald's motions. At the scheduling conference, Mr. Berline suggested that
3. Plaintiff's lack of success in the *Bank of Guam* case was due to hard feelings coming out of an
4. earlier collaboration between Judge Lizama, Mr. Berline, Mr. Fitzgerald, Lana Buffington, and Lee
5. Nelson. That collaboration ended several years ago with some disagreement about the division of
6. \$30,000 fees earned in a case shared by the five attorneys.
7.

8. In a conference in chambers held in conjunction with the December 13, 2005 scheduling
9. conference, Judge Lizama firmly stated that he held no grudge against Mr. Fitzgerald or Mr. Berline,
10. and that the *Bank of Guam* case had no impact whatsoever on the instant proceedings. The parties
11. also discussed the case *EIE International Service Corp., v. Shinsei Bank, Ltd.*, No. 01-0368, decided
12. by Judge Lizama in 2004. Mr. Fitzgerald's client recovered a substantial settlement in that case.
13. Although *EIE International* likewise followed the disagreement over attorneys' fees, Mr. Fitzgerald
14. did not see fit to move for Judge Lizama's recusal.
15.

16. On January 12, 2006, after more than two years of litigation in the instant case, Mr.
17. Fitzgerald moved for Judge Lizama's recusal. The motion was based in part on Mr. Fitzgerald's
18. understanding that Judge Lizama's statements during the December 13, 2005 conference suggested
19. bias.²

20. At the January 24, 2006 hearing on the Motion, Judge Lizama eloquently expressed his lack
21.

22. 2 The Court questions Counsel's reliance on out-of-court statements made during an in-chambers conference.
23. The purpose of these meetings is to facilitate frank dialogues between a judge and all of the attorneys involved in a
24. matter. As such, there is a general understanding that sensitive issues raised in these conversations should remain off
25. the record. See *United States v. Moody*, 746 F. Supp. 1090, 1093 (D.Ga.1990) (there is no right of access to in-
chambers communications between counsel and the court, particularly when those communications involve evidence
which the court determines to be inadmissible and which, if disclosed, could deprive the defendant of the fair trial by
an impartial jury that the Constitution guarantees); *United States v. Miranda*, 746 F.Supp. 1546, 1548 (D.Fla.1990)
(courts have traditionally held the authority to conduct in camera proceedings and conferences in chambers, at least
to the extent that they are distinct from trial proceedings.) Out-of-court statements should remain off the record

1. of hard feelings for Mr. Fitzgerald or any of the other attorneys before the Court. Mr. Fitzgerald
2. accepted Judge Lizama’s conviction that the judge harbored no grudge against Mr. Fitzgerald, but
3. suggested that the appearance of impropriety arising from their former disagreement was sufficient
4. to warrant recusal. Mr. Fitzgerald referred to comments allegedly made during the *Bank of Guam*
5. case by the late Justice Pedro Atalig, a friend of both Mr. Fitzgerald and Judge Lizama, regarding
6. Judge Lizama’s alleged grudge against Mr. Fitzgerald. Mr. Fitzgerald suggested that an outside
7. observer could conclude from Justice Atalig’s comments that Judge Lizama carried a grudge against
8. Mr. Fitzgerald. For the record, Mr. Fitzgerald indicated that his client, Ms. Chong, believed that
9. Judge Lizama could fairly try the case.
10.

11. Two of the other counsel present, Mr. O’Connor and Mr. Smith, expressed their confidence
12. in Judge Lizama’s ability to fairly decide the case regardless of Mr. Fitzgerald’s claim, *and* in spite
13. of the relationship between the Plaintiff and Judge Lizama’s wife. Mr. Sterling remained neutral.
14.

15. II. ANALYSIS

16. A. Standard for Recusal Based on Appearance of Impropriety

17. The standard for a recusal based on the appearance of impropriety is what a reasonable
18. person “with knowledge of all the facts” would conclude. *Bank of Saipan v. Superior Court*, 2002
19. MP 16 ¶ 29, 6 N.M.I. 453, 460. *Cf. Powell v. Anderson*, 660 N.W.2d 107, 114, 116 (Minn.2003);
20. *see also United States v. Cowden*, 545 F.2d 257, 265 (1st Cir.1976). The reasonable person standard
21. is “employed to prevent [judge]-shopping and to ensure” that a judge does not, “at the mere sound of
22. controversy,” abdicate his or her duty to preside over cases assigned to him or her, including the
23. most difficult cases. *Id.* A judge has as much of an obligation *not* to recuse when there is no
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25. unless and until the parties stipulate otherwise.

1. occasion to do so, as to recuse when there is cause for recusal. *McKinley v. Iowa Dist. Court*, 542
2. N.W.2d 822, 827 (Iowa 1996).

3. Our judicial system presumes that judges are capable of setting aside collateral knowledge
4. they possess and are able to “approach every aspect of each case with a neutral and objective
5. disposition.” *Liteky v. United States*, 510 U.S. 540, 561-62, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)
6. (Kennedy, J., concurring). Further, the “acquired skill and capacity to disregard extraneous matters
7. is one of the requisites of judicial office,” as judges are expected to make decisions based solely on
8. the merits of cases before them. *Id.* at 562, 114 S.Ct. 1147 (Kennedy, J., concurring); *see also Lee v.*
9. *State*, 735 N.E.2d 1169, 1172 (Ind.2000) (“the law presumes that a judge is unbiased and
10. unprejudiced in the matters before him”).

12. While there is a constitutional right to a neutral and detached judge, mere speculation as to
13. judicial bias is not sufficient to prove grounds for recusal. *Iowa v. Mann*, 512 N.W.2d 528, 532
14. (Iowa 1994). The movant has the burden of supporting the motion with sufficient facts to allow a
15. Court to rule. *Saipan Laulau Development, Inc. v. Superior Court*, 2000 MP 15, ¶ 17, 6 N.M.I. 153,
16. 157-158 (2000). The determination of whether to recuse himself or herself is committed to the
17. judge's discretion. *In re Marriage of Clinton*, 579 N.W.2d 835, 837 (Iowa Ct.App.1998).

19. **B. The Motion Appears to Be Untimely**

20. The Court's December 15th Order stated that the “Court will not consider those
21. circumstances of which the movant had knowledge but failed to timely and properly raise.” *Id.* at
22. para. 6. However, Mr. Fitzgerald did not state when he first learned of Judge Lizama's alleged
23. grudge. Nor has Mr. Fitzgerald shown good cause for any delay in bringing this matter before the
24. Court.

1. Timeliness in bringing a motion to recuse is an important factor to be considered by the
2. Court in deciding whether to grant or deny a Motion under § 3308(a). *See Bank of Saipan v.*
3. *Superior Court* 2002 MP 16, ¶ 15, 6 N.M.I. 453, 458 (2002): “Disqualification under either section
4. requires that the movant seek disqualification in a timely manner.” *Cf. Santos v. Santos*, 3 N.M.I.
5. 39, 55-56 (1992). The *Bank of Saipan* court held that a “party waives the disqualification issue by not
6. raising it at the first available opportunity.” *Id.* at ¶ 18 (citation and internal punctuation omitted).

7. The court listed four factors to consider in determining whether a motion is timely:
8.

9. (1) The extent of movant’s involvement in the proceeding;
10. (2) Whether recusal would result in waste of judicial resources;
11. (3) Whether the motion was made after entry of judgment; and
12. (4) Whether movant can demonstrate good cause for delay.

13. Proceedings in the instant case have been going on for more than two years. Mr.
14. Fitzgerald has served as counsel for Plaintiff for at least two years. Significantly, the Motion was
15. filed only *after* Defendant Nikko Hotel moved for Summary Judgment. *See Bank of Saipan*, 2002
16. MP 16, ¶ 16: “A disqualification motion filed after the proceedings have commenced *or just shortly*
17. *before a motion is to be heard are deemed untimely, especially where the proceedings are so far*
18. *along* that the grant of recusal and assignment of a new judge would delay the proceedings.”
19. (emphasis added).

20. Because the motion appears to be untimely, it must be denied.

21. **C. The Motion Is Not Supported By Adequate or Admissible Proof**

22. The affidavit of Mr. Fitzgerald submitted in support of the motion does not meet the statutory
23. requirements for affidavits. It is not a sworn statement nor is it stated to be made under penalty of
24. perjury as required by 7 CMC §§ 3305. It does not specifically state the grounds for
25.

1. disqualification. as required by 1 CMC § 3309(b) Further, the allegations in Mr. Fitzgerald's
2. affidavit are based on third-party statements rather than personal knowledge.

3. In paragraph 3 of his affidavit, Mr. Fitzgerald claims that his client, "received
4. information" from an unnamed source that Judge Lizama "harbored a grudge" against Mr. Fitzgerald.
5. He should have obtained an affidavit from his client or preferably from the person who actually
6. heard the alleged "complaint." Mr. Fitzgerald then states that unnamed lawyers confirm that Judge
7. Lizama had complained to them about some unspecified "unfair treatment." *Id.* at ¶ 4. An affidavit
8. by the unnamed lawyers making such statements is the appropriate way to put evidence of such a
9. serious charge before the Court. *See Bank of Saipan v. Superior Court*, 2002 MP 16, ¶ 29, p. 471
10. (denying the Government's Motion to Disqualify under § 3308(a) as the movant had made only
11. allegations and had failed to submit "adequate proof").
12.

13. Mr. Fitzgerald concludes that Judge Lizama has made complaints that have been "repeated to
14. members of the public," yet he fails to provide any evidence, admissible or otherwise, to support this
15. conclusion. *See* ¶ 6.
16.

17. In *Bank of Saipan v. Superior Court*, our Supreme Court stated that: "when an affidavit does
18. not meet the requirements imposed by law, the judge has an obligation *not to disqualify himself.*"
19. 2002 MP 17, ¶ 15, 6 N.M.I. 464 (quoting with approval *United States v. Anderson*, 433 F.2d 856,
20. 860 (8th Cir. 1970)(emphasis added).³

21. Because there is insufficient admissible evidence to support the motion, it must be denied.
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24. ³ Although a Motion under § 3308(a) does not require an affidavit, this Court's Order dated December 15 did
25. require an affidavit at least as to the issue of forum-shopping.

1. **D. The Actions Alleged in the Motion Are Insufficient to Warrant Recusal under**
2. **§3308(a).**

3. Even if Judge Lizama (as opposed to Justice Atalig) *had* expressed some misgivings about an
4. extra-judicial transaction with Mr. Fitzgerald, Judge Lizama should not be forevermore disqualified
5. from any case involving Mr. Fitzgerald.

6. 1. An unspecified “grudge” would not cause a reasonable person in a small town to
7. suspect bias against him or her.

8. The authorities upon which the Motion relies in support of recusal have facts which are more
9. egregious than the unspecified, unsupported “grudge” alleged here. In *Town Centre of Islamorda,*
10. *Inc. v. Overby*, 592 So.2d 774, 775 (Fla. Ct. App. 1992), conduct arising to the level that warrants
11. recusal is described as follows:

12. Where the judge “directs base vernacular towards an attorney . . . in open court,”
13. *Olszewska v. Ferro*, 590 So.2d 11 (Fla. 3d DCA 1991); the judge says he will “deal
14. with” attorney for having “gone over” his head, *Lamendola v. Grossman*, 439 So.2d
15. 960 (Fla. 3d DCA 1983); the judge states that client’s attorney “should not be in this
16. case.” *Hayslip v. Douglas*, 400 So.2d 553 (Fla. 4th DCA 1981); the judge delivers a
17. tirade about the lawyer’s opposition to the judge’s appointment to other judicial
18. positions, *McDermott v. Grossman*, 429 So.2d 393 (Fla. 3rd DCA 1983); or where
19. attorneys for petitioners had testified against the judge at impeachment proceedings
20. brought against the judge. *Brewton v. Kelly*, 166 So.2d 834 (Fla. 2d DCA 1964).

21. The Motion does not allege that Judge Lizama has been involved in any such conduct. It simply
22. refers to a grudge.

23. In determining whether the alleged grudge is a reasonable basis for recusal, the Court
24. “cannot neglect to take into account the geographical location and the population of the
25. Commonwealth. The size of a jurisdiction is clearly relevant to the issue because what might be
reasonable on the island of Manhattan may not be reasonable on the island of Saipan and vice

1. versa.” *CNMI v. Jin Xiong*, Crim. No. 01-0028T (NMI Super. Ct. Jan. 16, 2002)(Order Denying
2. Recusal)(quoting *Borja v. Tenorio*, 97-1127A (NMI Super. Ct Nov. 26, 1997)(Order Denying
3. Recusal)). The NMI Supreme Court has held that since Saipan is a close-knit community, there is
4. nothing that creates an appearance of impropriety if a judge forms “acquaintanceships” with a party
5. and in fact such relationships should be “encouraged”. *Bank of Saipan* 2002 MP 16, at ¶ 36 and 34.

6. Such social relationships between a judge and an attorney inevitably have their ups and downs and
7. given our small community. A complaint of the nature recited by Mr. Fitzgerald would not cause a
8. reasonable person to suspect bias against him or her.

9. In small communities like ours, the knowledgeable observer is *less likely* to perceive bias
10. arising from those common circumstances, because the circumstance is so common. *Id.* at ¶ 34.
11. The appearance is less significant within the confines of the reasonable person test. *Id.*

12. 2. Dissatisfaction with a Ruling is Not Grounds for Recusal.

13. It appears to the Court that the Motion is based at least in part on Mr. Fitzgerald’s
14. dissatisfaction with Judge Lizama’s ruling in the *Bank of Guam* case. Dissatisfaction with a ruling
15. and displeasure with the Court are not grounds for recusal. Any alleged bias must be based on extra-
16. judicial conduct, which does *not* concern a judicial decision. *Bank of Saipan* 2002 MP 16 at ¶ 29.

17. In our small community, a reasonable person would not necessarily conclude that a judge
18. would be biased because of extra-judicial financial transaction with a lawyer under the facts as
19. stated.

20. **E. Recusal May Not Be Used as a Method of Forum Shopping.**

21. It is widely accepted that forum shopping should not be promoted in a judicial system.
22. Allowing a recusal based on an unsubstantiated “grudge” could take forum shopping to another
23. 24. 25.

level. Should an attorney find himself or herself losing motions halfway through the litigation, he or she might be tempted to collaborate with additional counsel against whom the court is “prejudiced.”

The attorney could then seek recusal and move to a “friendlier” court.

The Court is concerned that Mr. Fitzgerald’s motion for recusal, brought two years after the initiation of litigation, is simply a tactic to manipulate the judicial system to gain a more favorable verdict. Using a minor “tiff” as an excuse to forum-shop is expressly forbidden. *Bank of Saipan* 2002 MP 16 at ¶ 29. The Court cannot decline to exercise jurisdiction in such a situation.⁴

III. CONCLUSION

Plaintiff’s Motion to Recuse is DENIED on grounds that it is procedurally defective, untimely, fails to sufficiently set forth facts, and does not demonstrate that a reasonable person on Saipan would question the Court’s impartiality.

SO ORDERED this 13th day of February 2006.

/s/ _____
Juan T. Lizama
Associate Judge, Superior Court

⁴ No litigant in our judicial system is entitled to have his or her case tried before a particular judge. On the contrary, each litigant must have an equal opportunity to appear before one of several impartial judges. Justice demands a process that safeguards fairness, and upholds the ethical standards of our legal community. The courts and the clerk’s office should be mindful of this policy in the assignment of cases.