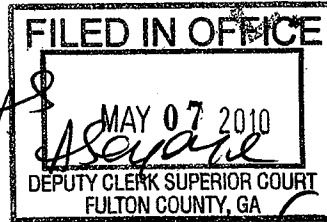


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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

ORIGINAL

W. PHILLIP McCURDY, III,
MICHAEL SHANE CAWTHON,
NELSON W. PICKLESIMER,
KENNETH CLOWDUS (as
Administrator for the Estate
of KENNETH LARRY CLOWDUS),
and THE BEST JEWELRY
MANUFACTURING COMPANY, INC.,
Individually and on behalf of all
others similarly situated,



Plaintiffs,

CIVIL ACTION FILE
NO. 2010CV179757

v.

FULTON COUNTY GEORGIA and
REED ELSEVIER, INC. d/b/a
LEXIS-NEXIS COURTLINK, INC.,

Defendants.

ORDER

This class-action lawsuit for damages as well as injunctive and declaratory relief, based on allegations an illegal scheme was enacted by the defendants to impose an unlawful mandatory e-filing system upon litigants in Fulton County State and Superior Court and to charge excessive and unauthorized fees in connection therewith, came before the court on the plaintiffs' contested motion for disqualification and recusal of all Fulton County State and Superior Court judges. U.S.C.R., Rule 25. Said motion is supported by an affidavit sworn on 6 January 2010 by Steven J. Newton, Esq. (hereafter, 'Newton affidavit').

Upon due consideration of all matters of record as well as oral

argument presented at the properly-noticed hearing, and for reasons that follow, the court **grants** said motion.

It appears from the record that the plaintiffs bringing the instant action had filed a prior action also based solely on state law claims in 2009CV169154 (hereafter, 'original action'), and that they had filed a motion for disqualification and recusal of all Fulton County State and Superior Court judges as well. The defendants in the original action contested said motion, arguing it was filed untimely pursuant to U.S.C.R., Rule 25.1. Before the recusal motion filed in the original action was decided, the plaintiffs voluntarily dismissed said action on 6 January 2010 and re-filed it on the same date (hereafter, 'present' or 'instant action'), along with the disqualification and recusal motion presently before this court (hereafter, 'recusal motion').

It should initially be noted that the timeliness of the recusal motion filing has not been raised as an issue in the instant action. Moreover, it has been repeatedly held that the intent of the legislature in enacting O.C.G.A. § 9-11-41(a) was to give plaintiffs the opportunity to escape untenable positions and re-litigate the case, and there is no bad faith exception to the right to dismiss and later re-litigate, despite whatever inconvenience and irritation this may cause the defendants. *See, Mc-Kesson Corp v. Green*, 286 Ga. App.110, 114 (2007). The court finds the

plaintiffs had the right to dismiss and re-file the original action and will thus consider on its merits the recusal motion filed in the instant action.

Thus it appears from the Newton affidavit, submitted by the plaintiffs in support of their complaint and based in pertinent part upon the affiant's personal knowledge regarding the e-filing system at issue and related matters, that the Fulton County State and Superior Court judges (hereafter collectively, 'the judges') are alleged to have participated in a scheme enacted by the defendants to impose a *mandatory* e-filing system upon litigants in Fulton County state and superior courts, charging certain fees in connection therewith; that the judges have participated in this scheme by promulgating a pilot program (hereafter, 'the pilot program') or otherwise issuing administrative orders authorizing co-defendant Lexis-Nexis Courtlink, Inc.'s (hereafter, 'Lexis') mandatory e-filing scheme and charge of fees connected therewith. *See*, Newton affidavit, paras. 2 and 3. More specifically, said affidavit provides that pursuant to the expanded pilot program, effective 1 June 2006, co-defendant Fulton County ordered that certain classes of cases are subject to mandatory e-filing in Fulton County State Court, such cases being asbestos, fen phen, mercury/lead, silicosis, welding rod litigation, medical and legal malpractice, any civil action with four or more plaintiffs, any civil action with four or more defendants, any civil action where damages sought (exclusive of interest

and attorney fees) exceed \$50,000.00, all tort cases, all personal injury cases, and any case where the claim value information of the summons is left blank or marked as 'TBD' ('to be determined'), *i.e.*, the vast majority of cases filed in Fulton County State Court. *See, id.*, para. 4. In addition, on 31 May 2000 and 16 October 2001, Fulton County similarly imposed mandatory e-filing for all litigants for asbestos and silicosis damage claims filed in the Superior Court of Fulton County. *See, id.*, para. 5.

The Newton affidavit provides further that Fulton County, through the pilot program, authorized its 'Electronic Filing Service Provider' (hereafter, 'EFSP'), Lexis, to implement and control the e-filing system and to collect statutory filing fees on behalf of the courts. *See, id.*, para. 6. In addition, said affidavit provides Fulton County also authorized Lexis to charge 'usage' fees to litigants in addition to the statutory filing fees for e-filed documents, which usage fees, allowing access to and use of 'File and Serve', range from a minimum of \$7.00 to as much as \$12.00 for each e-filed document and are charged in addition to usage fees for service of pleadings and other documents. *See, id.*, paras. 7 and 8.

The Newton affidavit points out that in the past litigants had the option of mailing pleadings to the Fulton County clerk's office in advance of the filing deadline, but that pursuant to the pilot program Fulton County no longer accepts paper filings in cases designated for e-filing,

wherefore mailing paper filings is no longer an option; as well, pleadings can now only be filed via Lexis' on-line 'File & Serve' system or through the so-called 'free' public access terminals ('PATs') located in the clerk's office of the Fulton County State and Superior Court in downtown Atlanta; litigants represented by legal counsel are not 'authorized users' of 'File & Serve' pursuant to Fulton County's e-filing rules and, thus, do not qualify for the 'free' option of using the PATs to file pleadings themselves. Moreover, pursuant to Lexis' 'File & Serve' agreement, attorneys may not provide their clients with direct access to the system, wherefore represented litigants can only access the PATs to view public file, not file pleadings and other documents. *See, id.*, para. 9 and 10.

The affiant points out that in order to file pleadings in cases designated for mandatory e-filing, litigants represented by counsel must either subscribe to Lexis' electronic on-line 'File & Serve' system by and through their counsel, and incur Lexis' usage fees for filing pleadings and documents, or incur additional attorney fees and costs in having their respective counsel - or courier employed by such counsel - travel to and from the courthouse to use the PATs. Thus, the expenses for represented litigants respecting a single transaction are far greater than those of *pro se* litigants, the latter of whom can either subscribe to Lexis' on-line filing system, incurring afore-mentioned fees, *or* use the PATs located in the

clerk's office of the Fulton County State and Superior Court in downtown Atlanta. *See, id.*, paras. 11 through 13. The affiant stresses, however, that even for *pro se* litigants the use of the PATs can be costly as those of them who cannot afford Lexis' usage fees must incur time and expense to travel to the downtown Atlanta courthouse, and the line to get into the courthouse can take as much as an hour. *See, id.*, para. 14. Moreover, subscribers who fail or refuse to pay Lexis' usage fees are locked out of 'File & Serve' and effectively barred from prosecuting or defending their cause of action in Fulton County State and/or Superior Court until they pay such fees, and that once 'locked out' of the 'File & Serve' system, Lexis does not permit the usage of the PAT, giving litigants and/or their attorneys, once they have subscribed to the 'File & Serve' system, no choice but to pay the fees. *See, id.*, para. 16.

In their complaint, the plaintiffs contend pertinently the scheme enacted by defendants Fulton County and Lexis, which, commencing with the current pilot program, imposes the mandatory e-filing system at issue upon litigants in both Fulton County State and Superior Court, is illegal in that it is contrary to O.C.G.A. § 15-5-40 (letter-sized paper to be accepted); O.C.G.A. § 15-6-77(k) (no fees, assessments, or other charges may be assessed or collected except as authorized in this Code section or some other general law expressly providing for same); O.C.G.A. § 50-29-12(b)

(authorization for state agencies to establish pilot projects which shall be approved by the Georgia Technology Authority); U.S.C.R., Rule 1.2 (authority to enact rules which deviate from the Uniform Superior Court Rules), section (B), respecting judges' authority to make and amend rules; and the Georgia Constitution, Art. 1, § 1, Para. XII, which demands that no person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state", as well as the constitution's Art. 1, § II, Para. III, which demands the separation of powers, in that the defendants' mandatory e-filing scheme and allegedly excessive fees charged in connection therewith are in conflict with said paragraph as the Georgia Legislature has not authorized the e-filing scheme at issue and the fees associated therewith. Moreover, the plaintiffs' complaint contains claims of fraud and misrepresentation against Lexis.

Most relevant to the resolution of the plaintiffs' instant motion presently before the court, by way of which the plaintiffs request that all sitting Fulton County State and Superior Court judges be disqualified and recused, is that the plaintiffs contend it would be virtually impossible for any sitting Fulton County judge, regardless whether State or Superior court, to render fair and impartial decisions in this case. More particularly, they contend that although the individual Fulton County

State and Superior Court judges have not been named as defendants in the instant action, they are all directly involved in the implementation of the pilot program at issue, which forms the basis of said action, and/or have a direct and immediate interest in the outcome of this litigation which makes it impossible for any of these judges to render a fair and impartial decision with regard to this action; and as the plaintiffs also seek to enjoin defendant Fulton County from continuing with the pilot program and from the refusal to accept paper filings, the relief they seek will have a direct effect on the administration of filings of numerous pleadings in Fulton County State and Superior Courts of which the judges have more than a *de minimis* interest that could be substantially affected by the current proceedings. *See also*, Newton affidavit, paras. 21 and 23 (the latter erroneously designated as para. 7 in said affidavit).

Additionally, the plaintiffs submit that one or more of the sitting Fulton County State and/or Superior Court judges may be identified as a material witness in this matter due to their alleged involvement in, or their knowledge of, implementation of the pilot program at issue and/or their knowledge of or involvement in what the plaintiffs contend appears to be conspiracy involving Fulton County and Lexis to charge allegedly unauthorized and excessive fees in connection with the e-filing system. *See also*, Newton affidavit, para. 22.

The plaintiffs base their prayer for the grant of their instant motion most particularly upon Canon 3(E)(1)(c)(iii) of the Code of Judicial Conduct. Said Canon, at subsection (E), titled disqualification, provides in (1)(c)(iii) that “[j]udges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where... (C) the judge... (iii) is known by the judge to have a more than *de minimis* interest that could be substantially affected by the proceeding.” Additionally, subsection (E)(c)(iv) provides judges shall also disqualify themselves if, to their knowledge, they are likely to be material witnesses in the proceedings at issue.

The Judicial Code also mandates, in Canon 2, that judges avoid not only actual impropriety, but that they avoid even the appearance of impropriety. *See, Georgia Transmission Corporation v. Dixon*, 267 Ga. App. 575, 576(1) (2004).

“An appearance of impropriety exists in situations in which reasonable minds might perceive that a judge’s ability to carry out his or her responsibilities with impartiality, integrity and/or competence is impaired.” *Id.*, citing to Canon Two of the Judicial Code. “Simply stated, the public must believe in the absolute integrity and impartiality of its judges.” *Id.*

As was observed in *Henderson v. McVay*, 269 Ga. 7 (1998), cited in

Brewer v. Waldroup, 259 Ga. 479, 480 (2003), “[i]t is as much the duty of a judge not to grant the motion to recuse when the motion is legally insufficient *as it is to recuse when the motion is meritorious*.” (Emphasis added.) *Id.*, at 9. In that case, the court determined that even assuming the allegations in the affidavit at issue were true, said affidavit was legally insufficient. *See, id.* In contrast, the court finds that the Newton affidavit submitted in the case at bar is legally sufficient in that it is relevant to the resolution of the instant motion and, at minimum, as to its relevant portions is based upon the personal knowledge of the affiant.

In light of the contents of the complaint to the extent it is supported by this legally sufficient affidavit, and bearing in mind the Supreme Court’s admonition regarding the importance of granting a motion to recuse when such motion is meritorious, the court finds there exists at least an appearance of impropriety, *i.e.*, a situation in which reasonable minds might perceive that the ability of one of the Fulton County State of Superior Court judges to carry out his or her responsibilities respecting the instant action with impartiality, integrity and/or competence is impaired.

As it has been stressed that it is paramount that the public be able to believe in the absolute integrity and impartiality of its judges (*see, Georgia Transmission Corporation v. Dixon, supra*), and as even without a

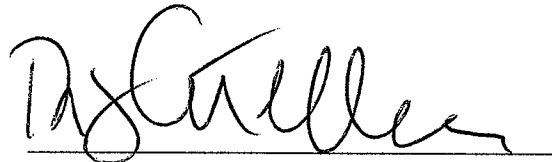
Brewer v. Waldroup, 259 Ga. 479, 480 (2003), “[i]t is as much the duty of a judge not to grant the motion to recuse when the motion is legally insufficient *as it is to recuse when the motion is meritorious*.” (Emphasis added.) *Id.*, at 9. In that case, the court determined that even assuming the allegations in the affidavit at issue were true, said affidavit was legally insufficient. *See, id.* In contrast, the court finds that the Newton affidavit submitted in the case at bar is legally sufficient in that it is relevant to the resolution of the instant motion and, at minimum, as to its relevant portions is based upon the personal knowledge of the affiant.

In light of the contents of the complaint to the extent it is supported by this legally sufficient affidavit, and bearing in mind the Supreme Court’s admonition regarding the importance of granting a motion to recuse when such motion is meritorious, the court finds there exists at this point at least an appearance of impropriety, *i.e.*, a situation in which reasonable minds might perceive that the ability of one of the Fulton County State of Superior Court judges to carry out his or her responsibilities respecting the instant action with impartiality, integrity and/or competence is impaired.

As it has been stressed that it is paramount that the public be able to believe in the absolute integrity and impartiality of its judges (*see, Georgia Transmission Corporation v. Dixon, supra*), and as even without a

showing of actual bias, prejudice or unfairness, the public's belief in the integrity of the Fulton County court system is likely to be undermined due to an appearance of impropriety if any one of the Fulton County State or Superior Court judges were to preside over the instant class-action lawsuit, the court finds it mandatory to grant the plaintiffs' recusal motion as to all sitting Fulton County State and Superior Court judges.

SO ORDERED, this 4th day of May, 2010.



Robert J. Castellani, Judge
Superior Court of DeKalb County
Stone Mountain Judicial Circuit

cc: Hon. Doris Downs; Robert D. Ware Esq.
Steven J. Newton, Esq.; Shuli L. Green, Esq.
William K. Whitner, Esq.; Candice V. Wilson, Esq.
Irwin W. Stolz, Jr., Esq.; James W. Hurt, Esq.
Jerolyn W. Ferrari, Esq.; Y. S. J., Esq.