

In Part 5 of the Supreme Court of the State of New York, held in and for the County of New York, on the _____ day of September, 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Hon. Barbara Jaffe

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In the Matter of the Application of
The Honorable Lee L. Holzman,

Index No. 108251/11

**ORDER TO SHOW
CAUSE**

Petitioner,

-against-

The Commission on Judicial Conduct,

**Oral Argument is
Requested**

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules
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UPON, the annexed affirmation of David Godosky, Esq., dated September 9, 2011, and the affidavit of Michael Lippman, sworn to on September 9, 2011 and, the proceedings had herein,

IT IS HEREBY ORDERED, that the Respondent, The Commission on Judicial Conduct (hereinafter "Commission") or counsel, Show Cause at the Part _____ of the Supreme Court, New York County, located at 60 Centre Street, New York, New York, on the 21 day of Sep, 2011, at ^{2:30}~~9:30~~ o'clock in the forenoon of that day, or as soon as thereafter the matter may be heard why an Order should not be entered granting Petitioner's application:

1. Pursuant to Article 78, directing the State Commission on Judicial Conduct to Dismiss the Complaint filed against Petitioner, without prejudice to re-file upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceedings against Petitioner pending the conclusion of a related criminal trial;

2. That pending the hearing and determination of this application, the Respondent, The Commission on Judicial Conduct be enjoined from proceeding with the prosecution of the Petitioner;
3. That the papers in this matter be sealed pursuant to §216.1 of the Uniform Rules for New York State Trial Courts and Judiciary Law §44(4).
4. For such other, further and different relief as this Court may seem just, proper and equitable.

IT IS FURTHER ORDERED, that pending a hearing on this application for a stay of the proceedings before the Commission that a temporary stay of the proceedings set to commence on Monday, September 12, 2011 is issued until such time as this application is fully and finally determined; and

IT IS FURTHER ORDERED that the Respondent be enjoined and restrained from proceeding with the matter before the Commission against the Petitioner, and,

IT IS FURTHER ORDERED that this proceeding and all papers submitted for the court's consideration be permanently sealed as it relates directly to a matter before the Commission which is sealed unless a finding against the Petitioner is made therein. That the Clerk of the Court is to restrict the Court file to everyone except the parties, their attorneys and Court personnel.

This is a special proceeding for a Writ of Mandamus and/or a Writ of Prohibition.

LET service of a copy of the Order, the Petition and Supporting documents upon which it is granted by _____, upon the Commission On Judicial Conduct at 61 Broadway, New York, NY, and Eric Schneiderman, The Attorney General at 120 Broadway, New York, NY, on or before 9/16/11, 2011 be deemed good and sufficient service.

A previous application for the relief demanded herein has been made to this court and Judge who determined that said application was premature. It is no longer premature as per the Order of Judge Barbara Jaffe annexed hereto.

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X Index No. 108251/11

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

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

-----X

DAVID GODOSKY, an attorney duly admitted to the practice of law in the courts of the State of New York, affirms the following under the penalties of perjury:

1. I am an attorney associated with the firm of Godosky & Gentile, P.C., attorneys for the petitioner herein. I submit this affirmation in support of the Order to Show Cause seeking a temporary stay of the matter pending in the Commission.

2. As per this Court's Order dated September 8, 2011, (attached hereto as Exhibit "A") the application made in the initial petition was premature in that Michael Lippman had not as of then invoked his Fifth Amendment right not to testify on matters that might tend to incriminate himself.

3. In following the Court's decision, it would appear that Mr. Lippman's attorney's affirmation does not suffice to meet the standard necessary to establish that Mr. Lippman would in fact assert his Fifth Amendment rights at the hearing before the commission.

4. As such, rather than wait until Mr. Lippman actually takes the stand at which time the prejudice to the petitioner would have already occurred, I have followed the Court's prior

Order and I am submitting an affidavit of Mr. Lippman.

5. I am submitting herewith and annexed hereto, an affidavit of Michael Lippman indicating that he has, in fact, elected to assert his Fifth Amendment right not to incriminate himself at the hearing conducted by the Commission. Exhibit "B".

6. Under these circumstances and in conformity with this Court's decision, it is respectfully submitted that the issue is now ripe for determination by the Court.

7. Attached hereto as Exhibit "C" is the initial Petition and supporting documentation.

8. Attached hereto as Exhibit "D" is the opposition submitted on behalf of the Respondent.

9. For the reasons set forth in the Petition and consistent with this Court's Order of September 8, 2011, this application is ripe and ought to be heard. Additionally, a temporary injunction restraining the commission from proceeding with the hearing on Monday, September 12, 2011, should be issued.

WHEREFORE, it is respectfully submitted that the application be granted, that a temporary stay be Ordered enjoining and restraining the hearing from proceeding and that a briefing schedule on a permanent stay be issued.

Dated: New York, New York
September 9, 2011


DAVID GODOSKY

EXHIBIT A

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]).

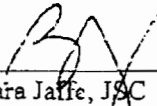
In light of this result, I need not consider the parties' remaining arguments.

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

EXHIBIT B

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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In the Matter of the Proceedings Pursuant
to Section 44, subdivision 4, of the
Judiciary Law in Relation to

LEE L. HOLZMAN,

AFFIDAVIT OF
MICHAEL LIPPMAN

a Judge of the Surrogate's Court,
Bronx County.


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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL LIPPMAN, being duly sworn, deposes and says:

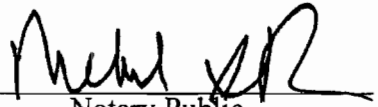
1. I have been subpoenaed by counsel to Surrogate Holzman to testify in the above-captioned matter.

2. I am electing to and will assert my constitutional rights to remain silent and not answer questions under the Fifth Amendment to the United States Constitution and under the relevant provisions of the Constitution of the State of New York.



MICHAEL LIPPMAN

Sworn to before me this
9th day of September 2011



Notary Public

MICHAEL S. ROSS
NOTARY PUBLIC-STATE OF NEW YORK
No. 02RO4796233
Qualified in Nassau County
My Commission Expires January 02, 2014