

2 Civil B194120

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA**

SECOND APPELLATE DISTRICT
(DIVISION 4)

**HUB CITY SOLID WASTE SERVICES, INC., a California
corporation; and MICHAEL ALOYAN**

Petitioners,

vs.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

Respondent,

CITY OF COMPTON,

Real Party in Interest

**Los Angeles Superior Court Case No. BC 323801
Hon. Joanne O'Donnell, Judge of the Superior Court**

**REAL PARTY IN INTEREST'S PRELIMINARY
OPPOSITION TO PETITION FOR WRIT OF
MANDATE, PROHIBITION OR OTHER
APPROPRIATE RELIEF**

[EXHIBIT]

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1. INTRODUCTION

Petitioners Hub City Solid Waste Services, Inc.'s and Michael Aloyan's (collectively, "Petitioners") petition for writ of mandate must be denied because it was filed more than ten (10) after notice to the parties of the decision striking Petitioners' Statement of Disqualification. As such, it is untimely pursuant to California Code of Civil Procedure Section

170.3(d),¹ and this Court therefore lacks jurisdiction to consider the issues set forth in the Petition.

As a separate and sufficient ground for denial of Petitioners' writ petition, on its face the petition demonstrates that the trial court's order striking Petitioners' Statement of Disqualification was in all respects proper. Accordingly, Petitioners are not entitled to any relief even if the writ petition is considered on the merits.

2. LEGAL DISCUSSION

A. THE COURT LACKS JURISDICTION TO CONSIDER THE WRIT BECAUSE IT WAS NOT TIMELY FILED

Petitioners filed their Statement of Disqualification on September 11, 2006. [Writ Petition, Ex. "D."] On September 18, 2006, the trial court issued its Order Striking Statement of Disqualification. [Writ Petition, Ex. "E."] That same day, the clerk mailed a copy of the Order to the parties. (A true and correct copy of the clerk's "Certificate of Mailing of Copy of Court's Order Striking Statement of Disqualification" is attached hereto as "Exhibit "1".)

The clerk's Certificate of Mailing evidences that "notice to the parties of the decision," was given on September 18, 2006. This notice triggered the 10 day time limit to seek writ review of the trial court's order striking Petitioners' Statement of Disqualification. *Code of Civil Procedure* § 170.3(d). As notice to the parties was given on September 18, 2006, any writ petition challenging that order had to have been filed no later than **September 28, 2006**. Petitioners did not file the instant writ petition until October 3, 2006; it is thus untimely.²

¹ All statutory references are to the California *Code of Civil Procedure*, unless otherwise stated.

² This likely explains Petitioners' failure to include the clerk's Certificate of Mailing as an exhibit to the writ petition, and failure to state in the petition the date on which "notice to the parties of the decision" was given. Had they done so, it would have immediately revealed as false Petitioners' representation that "[t]his petition has been filed within ten days of the notice to the parties of the decision by Respondent court striking Petitioners' statement of disqualification." Petition, 5:10.

Because Petitioners' petition was untimely filed, this Court is without jurisdiction to consider it on the merits. *See People v. Sup. Ct.* (1992) 2 Cal. App. 4th 675, 683 [“Where a statute sets forth a specific time limit within which a writ petition must be filed, the failure to file a petition within that time has been held to be jurisdictional.”]; *See also, Bensimon v. Sup. Ct.* (2003) 113 Cal. App. 4th 1257, 1259; *Eldridge v. Sup. Ct.* (1989) 208 Cal. App. 3d 1350, 1355. Indeed, failure to seek a writ within the time provided by statute constitutes a waiver of the right to seek relief from the trial court's allegedly erroneous refusal to disqualify itself. *Guedalia v. Sup. Ct.* (1989) 211 Cal. App. 3d 1156, 1165. In that case, the court of appeal found petitioners' writ petition untimely where the petition was not filed within 10 days after the trial court announced in open court that the petitioners' peremptory challenge was denied. The court found that no written notice of any sort was necessary to trigger the 10 day time limit to petition for writ of mandate pursuant to Section 170.3(d). *Id.* at 1163.

Section 1013 does not save Petitioners' petition from being deemed untimely, because the rules regarding time extensions for notice served by mail applies only “in the absence of a specific exception provided for by this section or other statute or rule of court.” *Code of Civil Procedure* § 1013(a). Here, Section 170.3(d) specifically excepts writ petitions from the scope of matters to which the 5-extra-days-for-notice-served-by-mail rule applies, because it provides that the exclusive means to seek review of an order striking a Statement of Disqualification is by a petition for writ “sought within 10 days of notice to the parties of the decision....” *Code of Civil Procedure* § 170.3(d). This language has been interpreted not to require formal written notice in order to trigger the 10 day limit for filing a writ petition, and therefore Section 1013(a) does not apply to extend Petitioners' time to contest the denial of its effort to disqualify the trial judge. *See Guedalia v. Sup. Ct.* (1989) 211 Cal. App. 3d 1156, 1163-1165; *Citicorp North America, Inc. v. Sup. Ct.* (1989) 213 Cal. App. 3d 563, 567-568 [§ 1013 extension applies only where prescribed time period triggered by “service.”]

B. THE PETITION FOR WRIT SHOULD BE DENIED
BECAUSE THE TRIAL COURT PROPERLY ORDERED
THE STATEMENT OF DISQUALIFICATION STRICKEN

Code of Civil Procedure Section 170.4(b) provides:

Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.

Petitioners' Statement of Decision was filed September 11, 2006, and on its face discloses no legal grounds for disqualification. Accordingly, the trial court properly ordered it stricken and retained jurisdiction for the remaining phase of trial of the above-entitled action, which is set to commence on October 18, 2006.

1. The Only Grounds Petitioners State for Disqualification are Adverse Rulings

Section 170.2 states, "It shall not be grounds for disqualification that the judge:...(b) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding..." All of the grounds asserted by Petitioners to demonstrate purported judicial bias relate to the trial court's expression of its views on legal or factual issues in the proceeding. Accordingly, as a matter of law they are insufficient to evidence bias or lack of impartiality justifying disqualification of the trial judge.

The nine so-called "grounds" Petitioners itemize in their Statement of Disqualification all relate to the trial court's rulings and/or expressions of view on legal and factual issues presented in the action. Specifically, the focus of Petitioners' complaints can be summarized as follows:³

³ Real Party in Interest disputes the accuracy of each of Petitioners' allegations of alleged error or wrong-doing by the trial judge. However, it is unnecessary here to refute Petitioners misrepresentations and

1. The trial court's exercise of its discretion to decline to rule on Petitioners' oral Motion for Judgment at the close of Real Party's evidence on alter ego liability in phase 1 of trial;
2. The trial court's denial of Petitioners' motion for discovery sanctions;
3. The trial court's (true) representation that it executed a Statement of Decision regarding alter ego liability on July 21, 2006;
4. The court's ruling (or alleged) failure to rule on a motion in limine;
5. The trial court's alleged statement in a related action about the fact that Aloyan's alter ego liability had been adjudicated in the instant action;
6. The trial court's alleged statement regarding the legal effect of the adjudication of Aloyan's alter ego liability in phase 1 of trial;
7. The trial court's ruling on Compton's reconsidered Motion for Summary Adjudication;
8. The trial court's denial of Petitioners' ex parte application for a trial continuance; and
9. The trial court's refusal to respond to Petitioners' counsel's uninformed interrogation regarding the court's ruling in an unrelated action.

In short, Petitioners' claim of bias is premised on nothing more than their dissatisfaction with the court's adverse determinations on a number of legal, factual and evidentiary issues, some of which relate back nearly five months. Recently, the California Supreme Court once again rejected this as a basis for disqualifying a trial judge. In *People v. Guerra* (2006) 37 Cal.

mischaracterizations of the proceedings and rulings of which they now complain. Even if Petitioners' complaints were true, none demonstrate judicial bias sufficient to justify disqualification of the trial judge here. If the Court is considering issuing an alternative writ notwithstanding the limited matters discussed in this Preliminary Response, Real Party requests an opportunity to submit additional opposition briefing responding to the merits of Petitioners' writ petition.

4th 1067, 1111-1112, the Court reconfirmed the long-standing principle that **“a trial court's numerous rulings against a party--even when erroneous--do not establish a charge of judicial bias, especially when they are subject to review.”** (citing *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal. 3d 781, 795-796; *McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11.) (Emphasis added.) Here, each of the Court's rulings of which Petitioners complain are reviewable on appeal, and Petitioners complain of nothing other than reviewable rulings of the trial judge.

None of the alleged “grounds” for disqualification asserted by Petitioners supports the conclusion that their Constitutional rights will or are likely to be violated if the trial judge does not disqualify herself. To the contrary, Section 170.2(b) specifically precludes Petitioners from relying on any of their complaints about the trial court's prior rulings as a basis for disqualification. As such, the Court properly struck Petitioners' Statement of Disqualification pursuant to Section 170.4(b).

2. The Court's Adverse Assessment of Credibility of a Party or Attorney Does Not Justify Disqualification of the Trial Judge

To the extent Petitioners' distrust of the Court's impartiality is premised on the Court's assessment of credibility of Petitioners or their attorney in the first phase of trial, disqualification would be wholly improper.

[W]hen the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evidence given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party.

The opinion thus formed, being the result of a judicial hearing, does not amount to that bias and prejudice contemplated by section 170, subdivision 5 of the Code of Civil Procedure....

(See also *People v. Yeager*, 55 Cal. 2d 374, 391 [10 Cal. Rptr. 829, 359 P.2d 261].)

People v. Tappan (1968) 266 Cal. App. 2d 812, 816.

Indeed, to permit Petitioners to disqualify the trial judge simply because the court made adverse rulings would sanction impermissible gamesmanship. ““A party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result.”” *Tappan, supra* at 817 (quoting *In re Cavanaugh* (1965) 234 Cal. App. 2d 316, 321. That is exactly what Petitioners are attempting to do here. Having willingly submitted the alter ego phase of trial to Judge O’Donnell, but being disappointed in the outcome, Petitioners now seek to disqualify the trial judge by accusing her of bias. However, Petitioners’ evidence of bias is nothing more than their contention that the trial court incorrectly failed to rule in his favor on several evidentiary, procedural and substantive matters.

Nor does Petitioners’ baseless apprehension of the trial court’s attitude toward Petitioners’ counsel’s behavior provide a ground for disqualification. As observed recently in *People v. Guerra, supra* at 1111-1112:

Section 1044 provides that a trial court has the duty to control the trial proceedings. (See also *People v. Carpenter* (1997) 15 Cal. 4th 312, 397.) When an attorney engages in improper behavior, such as ignoring the court's instructions or asking inappropriate questions, it is within a trial court's discretion to reprimand the attorney, even harshly, as the circumstances require. (*People v. Snow* (2003) 30 Cal. 4th 43, 78.) Mere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not

demonstrate a bias. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal. App. 4th 1210, 1219-1220; see also *People v. Farnam* (2002) 28 Cal. 4th 107, 193-195.)

3. **CONCLUSION**

Petitioners' petition for writ of mandate was untimely filed. Accordingly, this Court lacks jurisdiction to consider the petition on its merits. Further, it is manifest from the face of Petitioners' petition that no valid ground for disqualification exists, and that the trial court properly issued an order striking Petitioners' Statement of Disqualification.

Dated: October 5, 2006

Respectfully submitted,

GOODSTEIN & BERMAN LLP

By: _____
GARY J. GOODSTEIN
Attorneys Real Party in Interest
City of Compton

VERIFICATION

I, Gary J. Goodstein, verify and declare as follows:

I am the attorney representing Real Party in Interest City of Compton in this action.

I have read the foregoing Preliminary Opposition to Petition for Writ of Mandate, Prohibition or Other Appropriate Relief and the attached exhibit hereto, and know the contents thereof to be true of my own personal knowledge.

The reason the foregoing opposition is verified by me and not Real Party is that the facts contained herein are within my personal knowledge based upon my personal involvement in the action in my capacity as legal representative of Real Party.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on October 6, 2006, at Los Angeles, California.

Gary J. Goodstein

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 14(c)(1), the undersigned, counsel for Real Party in Interest City of Compton, hereby certifies that this Preliminary Opposition to Petition for Writ of Mandate is 2,757 words in length, including footnotes. The undersigned has relied on the word count feature of the computer word processing program used to prepare this document.

Gary J. Goodstein

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