IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

LAWRENCE P. GILLEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**C.A. N10C-05-090 PRW**
	)	
CONTINENTAL POWER CORPORATION, and EDWARD HENRY KIMMEL,	)	
	)	
	)	
Defendants.	)	

Submitted: January 7, 2014
Decided: April 7, 2014

MEMORANDUM OPINION AND ORDER

Upon Plaintiff's Motion for New Trial,
DENIED.

Lawrence P. Gillen, *pro se.*

George R. Tsakataras, Esquire, Blakely, Gregory & Pappoulis, LLC, Wilmington, Delaware, Former Attorney for Plaintiff.

Michael C. Hochman, Esquire, Monzack, Mersky, McLaughlin and Browder, P.A., Attorney for Defendants.

WALLACE, J.

I. INTRODUCTION

Plaintiff, Lawrence P. Gillen, filed this breach of contract action *pro se* in May 2010. The matter finally proceeded to trial in December 2013 after numerous changes in Mr. Gillen's legal representation. At trial – where Mr. Gillen was represented by counsel – a defense verdict was returned. Mr. Gillen is now again before this Court *pro se* with a motion for a new trial alleging: (1) that the trial judge should have recused himself; (2) that there were evidentiary rulings that comprised reversible legal error; and (3) that the jury was improperly instructed.

For the reasons stated herein, the Motion for New Trial is **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND

Mr. Gillen is a resident of the State of Delaware and Defendant Continental Power Corporation ("Continental Power") is an S Corporation incorporated under Delaware law. Mr. Gillen met Edward H. Kimmel for the first time in 2007 at a hotel in Harrisburg, Pennsylvania. Mr. Kimmel is founder and President of Continental Power, a small company[1] providing power conditioning systems for homes and industry that he started in 1992. Power conditioning systems are small devices installed in residential and

[1] By "small," the Court means that Continental Power was primarily a one-man operation described as being run from the kitchen of Mr. Kimmel's Greensburg, Pennsylvania home.

commercial properties that help eliminate waste of electricity caused by inductive motors, provide surge and spike protection for electrical systems, and help reduce noise that deteriorates electronics over time. Mr. Gillen had been involved in the sale of similar equipment when they met and the two began to work collaboratively.

Plaintiff Gillen brought this action in April 2010, asserting claims of breach of a partnership contract which he said entitled him to receive 50% of the profits from the sale of energy savings devices, tortuous interference with business relationships, fraud and defamation. All of Plaintiff's claims other than the breach of the alleged partnership agreement were disposed of by motion for summary judgment.[2] The contract claim remained for trial.

Trial ran for three days in early December 2013. And the trial, which was the liability-only proceeding of a bifurcated trial, resulted in a Defendantss verdict. That verdict was based on the jury's answers to the following two interrogatories:

> (1) Do you find that there was a contract formed in October 2007 through which Plaintiff Lawrence Gillen and the Defendant Edward Henry Kimmel entered into a partnership whereby they agreed to be 50/50 partners in the distribution and installation of energy saving devices in residential and commercial properties?

[2] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Herlihy, J. (Jan. 16, 2013) (Ltr. Opin.) (D.I. 170).

(2) Do you find that there was a contract formed in October 2007 through which Plaintiff Lawrence Gillen and the Defendant Continental Power Corporation entered into a partnership whereby they agreed to be 50/50 partners in the distribution and installation of energy saving devices in residential and commercial properties?

The jury answered the above interrogatories in the negative and by the understanding of both parties, there would be no further proceedings in this matter.

Mr. Gillen[3] filed a timely Motion for New Trial, and Defendants answered shortly thereafter. Each of the Plaintiff's grounds for new trial must be reviewed to determine whether that ground misled or prejudiced the jury causing it to reach an erroneous answer to those interrogatories or whether the jury's verdict is tainted by legal error related to the judge's failure to *sua sponte* disqualify himself.

III. STANDARD OF REVIEW

Upon motion for new trial, "[t]he jury's verdict is presumed to be correct,"[4] though "Delaware Courts will [] order a new trial when the jury's

[3] The motion for new trial was filed by Mr. Gillen's trial counsel who was thereafter permitted, with the agreement of both Mr. Gillen and the Defendants, to withdraw.

[4] *Galindez v. Narragansett Housing Assoc., L.P.*, 2006 WL 3457628, at *1 (Del. Super. Ct. Nov. 28, 2006) ("The standard of review on a motion for new trial is well-

verdict is tainted by legal error committed by the trial court before or during the trial."[5] In considering a motion for new trial, the Court ascribes "enormous deference" to the jury's verdict and to the jury's role as the ultimate finder of fact.[6] "Thus the Court will not disturb a jury's verdict unless the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[7]

IV. DISCUSSION

A. The Plaintiff never made a timely request for recusal and there was no reason for the trial judge to disqualify himself *sua sponte*.

For the first time, in this motion for new trial, Mr. Gillen makes an express claim that the trial judge should have disqualified himself from hearing this matter.[8] Mr. Gillen now complains that "the Court refused recusal even though the presiding Judge prosecuted Plaintiff on several

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settled."); *Kelly v. McHaddon*, 2002 WL 388120, at *4 (Del. Super. Ct. Feb. 28, 2012) (same).

[5] *Galindez*, 2006 WL 3457628, at *1 (internal citations omitted).

[6] *Crist v. Connor*, 2007 WL 2473322, at *1 (Del. Super. Ct. Aug. 31, 2007).

[7] *Id*. (internal quotation marked omitted).

[8] This matter was reassigned to the undersigned in June 2013 upon the retirement of the previously assigned judge.

charges in Delaware which presented at the very least an appearance of impropriety."[9]

The issue of recusal was first broached by the Court during a hearing on the Plaintiff's application to prevent admission of evidence of Mr. Gillen's prior convictions.[10] The motion to preclude had been filed by Mr. Gillen's counsel who had just a month before entered his appearance and obtained a trial continuance. The Defendants sought to use any and all of Mr. Gillen's prior criminal convictions to impeach his trial testimony. During the pendency of the motion the undersigned judge discovered through a review of criminal docket sheets that his name appeared as the assigned Deputy Attorney General in two cases in which Mr. Gillen was a defendant.

Those matters, which occurred in 1990 and 1994, resulted in a plea to a suspended license charge[11] and the entry of a *nolle prosequi* on misuse of

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[9] Mot. for New Trial at ¶ 3.

[10] *See* D.R.E. 609(a) ("For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of the punishment.")

[11] *See State v. Gillen*, Del. Super., Cr. ID No.89006679DI (Oct. 15, 1990) (Docket) (D.I. 3). While the docket sheet lists this judge as the assigned prosecutor, it appears

credit card counts.[12] There was no chance either could be used as impeachment evidence. [13] And as the Court notified the parties at the time of the Rule 609 hearing, this judge had (and still has) absolutely no present recollection of ever being assigned to a matter in which Mr. Gillen was a criminal defendant some two decades earlier. Given the manner in which the matter arose, however, the Court granted the parties leave to file a timely motion for recusal.[14] Neither did.

Several weeks later Mr. Gillen's attorney was permitted to withdraw and he was again *pro se*. At that hearing Mr. Gillen made a verbal motion to continue the trial date which was denied. Mr. Gillen was, however, granted leave to file written objections to the pre-trial stipulation, written motions to reargue the Court's pre-trial evidentiary rulings, and to file a recusal motion if he wished.[15] None followed.

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another Deputy Attorney General actually handled the matter at the time of the plea and sentencing. *See id.* at D.I. 6.

[12] *See State v. Gillen*, Del. Super., Cr. ID No.9411014050 (Feb. 15, 1996) (Docket) (D.I. 6).

[13] *See generally* D.R.E. 609 (only actual convictions for felonies or crimes of dishonesty can be considered for admission).

[14] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Sept. 23, 2013) (Bench Ruling & Judicial Action Form) (D.I. 193).

[15] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Oct. 14, 2013) (Judicial Action Form) (D.I. 198).

A new attorney entered his appearance and moved for a continuance of the trial date. Over the Defendants' objection, the Court granted this second continuance to allow new counsel the opportunity to properly prepare.[16] But the Court would not reopen the time for filing motions *in limine* or for filing motions to reconsider prior evidentiary rulings.[17] No further mention of recusal was made.

Plaintiff now claims that this judge "refused recusal" which is necessitated in his view because the circumstances outlined above "presented at the very least an appearance of impropriety." In truth, Mr. Gillen never made an express application for recusal invoking the well-established standard governing such. Instead it seemed he would allude to judicial disqualification only when he either received a ruling with which he did not agree or was in the process of seeking more time. These are no valid bases for recusal and the circumstances of this case weighed against it.[18]

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[16] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Oct. 21, 2013) (Superceding Scheduling Order) (D.I. 209).

[17] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Oct. 21, 2013) (Bench Ruling & Judicial Action Form) (D.I. 208).

[18] *See Gattis v. State*, 955 A.2d 1276, 1286 (Del. 2008) ("Judicial rulings alone, such as the denial of a motion to recuse or disqualify or of a request to increase the time limitation on the briefing schedule or the length of the briefs, are insufficient bases for recusal."); *see also Reeder v. Delaware Dept. of Ins.*, 2006 WL 510067, at *17 (Del. Ch. Feb. 24, 2006) ("The Supreme Court also has noted that there is a compelling policy

A judge determines whether disqualification is appropriate using Delaware's well-established two-part inquiry:

> First, the judge must be satisfied, "as a matter of subjective belief," that he or she can proceed to hear the matter free of bias or prejudice. Second, even if the judge believes that he or she is free of bias or prejudice, the judge must objectively examine whether the circumstances require recusal because "there is an appearance of bias sufficient to cause doubt as to the judge's impartiality."[19]

After a careful examination of the record, this judge is satisfied, as a matter of subjective belief, that he could and did proceed to hear this matter free of bias or prejudice. And in these circumstances no objective observer would entertain reasonable questions about this judge's impartiality.[20]

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reason for a judge not to disqualify himself or herself unnecessarily, and in the absence of genuine bias, a litigant should not be permitted to 'judge shop.' . . . it is also recognized that judges who too lightly recuse shirk their official responsibilities, imposing unreasonable demands on their colleagues to do their work and risking the untimely processing of cases.").

[19] *Stevenson v. State*, 782 A.2d 249, 255 (Del. 2001) (quoting *Los v. Los*, 595 A.2d 381, 384-85 (Del. 1991)); *see also Weber v. State*, 547 A.2d 948, 951-52 (Del. 1988) (quoting the Delaware Code of Judicial Conduct).

[20] *See generally* Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 11.4 at 290-98 (2d ed. 2007) (no *per se* rule requiring recusal even when judge was former prosecutor and new matter is criminal prosecution).

B. Mr. Gillen has waived any claim that the Court's *in limine* ruling permitting certain prior convictions to be used as impeachment evidence was legal error requiring a new trial.

Mr. Gillen argues he is due a new trial because the Court erred when it ruled *in limine* that the Defendants would be permitted to introduce his 1992 Florida convictions for credit card fraud and felony larceny to be introduced as impeachment evidence at trial. Prior to trial, Mr. Gillen moved to preclude the use of the prior criminal convictions he had amassed in Delaware and Florida. The Court held a hearing on this motion *in limine* and in an thorough bench ruling granted Mr. Gillen's motion as to all of his Delaware criminal convictions.[21] The Court would permit the use of Mr. Gillen's 1992 Florida convictions for credit card fraud and felony larceny. [22] Notwithstanding his attempts to have the Court reconsider this *in limine* ruling, Mr. Gillen decided to introduce the Rule 609 evidence himself through his opening statement and his own direct testimony. Having reviewed its *in limine* ruling, the Court can discern no legal error. But even

[21] Most, if not all, of Mr. Gillen's Delaware convictions were pardoned in 2008. *See* D.R.E. 609(c) (setting forth the effect of a pardon on the admissibility of a prior conviction).

[22] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Sept. 25, 2013) (Order) (D.I. 194); *see also* D.R.E. 609(b) (setting forth the time limit for prior conviction evidence and exception thereto).

if the Court did err when making its *in limine* ruling, Mr. Gillen has waived any claim of such error.

As the Delaware Supreme Court has held, where a party himself introduces evidence of his prior convictions, he waives any objection to the admissibility of that evidence.[23] Accordingly, since Mr. Gillen introduced this evidence himself for his own strategic reasons, "he waived any challenge he might otherwise have [had] to its use against him."[24]

Lastly, Mr. Gillen now complains in his new trial motion that "[t]he court compounded the [Rule 609] error by not instructing the jury as to the purpose of the conviction and how the jury was to use the conviction which should have been for a limited purpose."[25] Mr. Gillen fails to mention that he made no request for such an instruction at trial.

The long-accepted general rule in Delaware is that when a jury is instructed as to the general principles applicable to the case or to a particular issue "a party desiring further or more specific instructions should request them, and in the absence of such a request he cannot complain of omissions .

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[23] *Hamilton v. State*, 1995 WL 12015 (Del. Jan. 3, 1995).

[24] *Shavico v. State*, 1995 WL 622423 (Del. Sept. 29, 1995) (internal quotations and citations omitted).

[25] Mot. for New Trial at ¶ 3.

. . unless it plainly appears that the jury were misled by such omissions."[26] "The giving of instructions that are clearly and materially wrong and prejudicial, or the refusal to give proper instructions, when asked for, is usually error, but in most cases the failure to give either general or specific instructions that might have been proper, but which were not requested, is not error or a ground for a new trial."[27] Put more plainly, here "error cannot be assigned of what was not said by the trial judge, without a request to so charge." [28]

C. The non-specific claims regarding certain rulings limiting trial evidence do not warrant a new trial.

Mr. Gillen claims that the Court erred by: (1) "prevent[ing] the testimony of Leo Ramunno, Esq. which would have established the partnership with testimony about the numerous phone calls between Plaintiff and the Defendant and himself;" and (2) "exclud[ing] evidence of emails and letters written by the Defendant and published to several people admitting the partnership."[29] While this Court's Rule 59(b) provides that a motion for

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[26] *Greenplate v. Lowth*, 199 A. 659, 662-63 (Del. Super. Ct. 1938) (internal quotations and citations omitted).

[27] *Id.*

[28] *Id.*

[29] Mot. for New Trial at ¶ 3.

new trial "shall briefly and distinctly state the grounds therefor," mere assertions of error with no record citation or support are insufficient. The Plaintiff recognized as much when he stated he would "supplement the instant motion once the transcripts of the Trial, which upon information and belief, have been ordered, are prepared and [would] further present written argument with appropriate cites to the transcripts once available."[30] Mr. Gillen has not supplemented his motion.

The Defendants filed a motion *in limine* to exclude Mr. Ramunno's testimony. The Court reserved decision on the motion until an adequate factual record regarding Mr. Ramunno's relationship to the parties and the specific communications that Mr. Gillen sought to introduce[31] was developed.[32] The Court heard Mr. Ramunno's testimony outside the jury's

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[30] Mot. for New Trial at ¶ 5. The Court's review of the record reveals no effort on the Plaintiff's part to have the transcript prepared.

[31] The Court required the same for the emails and letters that Plaintiff sought admission of. Numerous of those were admitted as Plaintiff's trial exhibits. *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090 (Dec. 6, 2013) (Trial Worksheet) (D.I. 217). Mr. Gillen has failed to specify which documents' exclusion constitutes error warranting a new trial.

[32] *Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Sept. 25, 2013) (Order) (D.I. 194); *Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Oct. 21, 2013) (Superceding Scheduling Order) (D.I. 209).

presence and ruled accordingly. Mr. Gillen has failed to identify any legal error in the reasons set forth on the record at trial.

D. The jury was properly instructed on the questions of liability.

Throughout the litigation of this case, Mr. Gillen has claimed that the Defendants breached a contract through which he formed a partnership with them. There is one passing averment at paragraph 13 of his Complaint in which he states he "is also entitled to commission on other residential jobs that were sold and installed in different locations."[33] There is no further explanation of the source of this commission obligation.

Throughout the pretrial proceedings the Court denied Defendants' attempts to limit Mr. Gillen's claim to one based solely on proof of a written contract.[34] But – as set forth in Mr. Gillen's complaint and consistent averments and arguments – the jury was required to find that there was either an oral or written contract entered into in October 2007 that formed a partnership between the parties. The jury was properly instructed in a

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[33] *See* Complaint at ¶ 13.

[34] *See, e.g.*, *Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Herlihy, J. (Jan. 16, 2013) (Ltr. Opin.) (D.I. 170) (denying motion for summary judgment on the breach of contract claim); *Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Sept. 25, 2013) (Order) (D.I. 194) (denying motion to exclude breach of contract claim and parol evidence).

manner that permitted it to intelligently perform its duty to determine whether an agreement existed between the Plaintiff and one or both Defendants, and what the terms of that agreement were.[35] Mr. Gillen's recasting of his liability claims is unavailing and unworthy of a grant of new trial.

V. CONCLUSION

AND NOW, for the reasons stated above, Lawrence P. Gillen's Motion for New Trial is **DENIED**.

SO ORDERED this 7TH day of April, 2014.

/s/ Paul R. Wallace
PAUL R. WALLACE, JUDGE

Original to Prothonotary
cc: Counsel via File and Serve
Mr. Lawrence P. Gillen, *pro se*

[35] *See Gillen v. Continental Power Corp.*, Del. Super., C.A. No. N10C-05-090, Wallace, J. (Dec. 6, 2013) (Jury Instructions) (D.I. 216).