

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

GO4PLAY, INC., d/b/a Bendover, a)
Delaware corporation, and 5455 DUPONT)
HIGHWAY, LLC, a Delaware limited) C.A. No. K21A-01-003 NEP
liability company,)
)
Petitioners,)
)
v.)
)
THE KENT COUNTY BOARD OF)
ADJUSTMENT,)
)
Respondent.)

OPINION AND ORDER

Submitted: May 3, 2021

Decided: June 15, 2021

On Petitioners' Motion for Disqualification

DENIED

John W. Paradee, Esquire, Stephen A. Spence, Esquire, Brian V. DeMott, Esquire,
Baird Mandalas Brockstedt, LLC, Dover, Delaware, *Attorneys for Petitioners.*

Fred A. Townsend, III, Esquire, Hudson Jones Jaywork & Fisher LLC, Lewes,
Delaware, *Attorney for Respondent.*

Primos, J.

Petitioners Go4Play, Inc., d/b/a Bendover, and 5455 DuPont Highway, LLC (“Petitioners”), seek recusal of this judge because he previously represented Respondent Kent County Board of Adjustment (“Respondent”) in unrelated matters. Petitioners have filed a Motion for Disqualification (the "Motion"), which is before the Court. For the reasons set forth below, Petitioners’ Motion is **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2020, the Kent County Department of Planning Services through its Division of Inspection and Enforcement (the “Department”) cited Petitioners for allegedly violating various provisions of the Kent County Code. In July of that year, the Department deemed Petitioners’ use of certain property an “adult entertainment establishment,” which required conditional use approval under the Kent County Code. In August 2020, Petitioners appealed the Department’s determination to Respondent. In November 2020, Respondent held a hearing and upheld the Department’s decision.

Petitioners filed this appeal of Respondent’s decision. The appeal was originally assigned to another judge in this Court and later reassigned to this judge. Through the Motion, Petitioners argue that this judge is disqualified from hearing their appeal. Because the Motion is based upon this judge's prior professional relationship with Respondent, a brief discussion of that relationship follows.

Before joining the bench, this judge practiced law in Delaware for over 24 years, representing numerous clients, one of which was Respondent. Prior to June 1, 2017, the date this judge assumed the bench, representation of all clients, including Respondent, ceased.

PARTIES’ CONTENTIONS

Petitioners assert that, because this judge served as legal counsel to Respondent prior to joining the bench, he may find it difficult to avoid bias or

prejudice, which would favor Respondent’s decision below. Although not citing to any particular rules, Petitioners appear to argue for this judge’s disqualification under Rules 1.2 (“Promoting Confidence in the Judiciary”) and 2.11 (“Disqualification”) of the Delaware Judges’ Code of Judicial Conduct (the “Code of Judicial Conduct”).

Respondent, citing to Rule 2.7 of the Code of Judicial Conduct (“Responsibility to Decide”) contends that there is an overarching duty for this judge to preside over matters assigned to him. Respondent also argues that to disqualify this judge would encourage “judge shopping” and threaten the orderly administration of justice. Citing the Delaware Supreme Court’s decision in *Los v. Los*,¹ Respondent asserts that the public interest requires that judges not be intimidated, out of an abundance of caution, into granting motions to disqualify.

Both sides agree that under Delaware law, the Court must engage in a two-part subjective and objective analysis, established in *Los*, to determine whether this judge is disqualified from hearing the case. The Court concurs, and it will conduct that analysis following its discussion regarding this judge’s responsibility to decide matters coming before him.

DISCUSSION

I. This Judge Has a Duty to Sit, Which Is as Strong as the Duty to Recuse or Disqualify Oneself.

A. The Duty to Sit.

As this Court recognized in *State v. Desmond*, the “duty to sit” is integral to a judge’s role.² That duty requires a judge “to hear and decide cases in the absence of

¹ 595 A.2d 381 (Del. 1991).

² 2011 WL 91984, at *9 (Del. Super. Jan. 5, 2011).

a reason to recuse”³ and is codified in Rule 2.7 of the Code of Judicial Conduct: “(A) A judge should hear and decide matters assigned, unless disqualified. (B) A judge should not use disqualification to avoid cases that present difficult, controversial or unpopular issues.”⁴ The duty to sit is one that a judge must not take lightly.⁵ In fact, the duty is complementary to a judge’s obligation to recuse himself or herself when the situation presents itself—the two duties are equally strong.⁶ As another Delaware trial court has noted, “[t]he judicial system would be ‘paralyzed’ were the standards for recusal too low.”⁷

The Court in *Desmond* may have stated best the approach judges should take when presented with motions to recuse:

Delaware judges should carefully consider the decision to recuse or disqualify and should be genuinely convinced that the analysis set forth in *Los v. Los* requires recusal or disqualification. The decision to recuse or disqualify must not be made lightly, because to do so is contrary to the Delaware Judges’ Code of Judicial Conduct and inevitably “[leaves the] case as one of [the recused or disqualified judge’s] colleague’s problems to deal with, thereby invariably impinging on [his or her] ability to address the many other matters already pending on [his or her] docket.”⁸

To relieve a judge of his or her duty to sit, there must be a showing of “some kind of probative evidence” that creates a “reasonable factual basis to cause doubt about

³ *Id.*

⁴ Code of Judicial Conduct Canon 2 § 2.7 (2008).

⁵ *Desmond*, 2011 WL 91984, at *9.

⁶ *Id.*

⁷ *Reeder v. Del. Dept. of Ins.*, 2006 WL 510067, *17 n.86 (Del. Ch. Feb. 24, 2006) (quoting *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482, 491 (1st Cir. 1989)).

⁸ *Desmond*, 2011 WL 91984, at *9 (alterations in original) (quoting *Reeder*, 2006 WL 510067, at *23); see also *Pazuniak Law Office, LLC v. Pi-Net Int’l, Inc.*, 2017 WL 656766, at *2 (Del. Super. Feb. 17, 2017) (agreeing with the *Desmond* Court that the decision to recuse should not be made lightly, because doing so would violate the Code of Judicial Conduct and unreasonably burden other judges).

the impartiality or fairness of the tribunal.”⁹ “[J]udges 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.”¹⁰ Furthermore, “[t]he unnecessary transfer of a case from one judge to another is inherently inefficient and delays the administration of justice.”¹¹

B. Application of the Foregoing Principle to This Case.

Here, in the absence of a genuine reason to disqualify himself, this judge has a duty to preside over this matter. To recuse himself when no basis for disqualification exists would delay this matter and cause another judge to be burdened with an additional case on his or her docket. Although the matter may present “difficult, controversial or unpopular issues,” that does not relieve this judge from hearing the case. Moreover, as explained below, the mere fact that this judge represented Respondent prior to joining the bench is not a ground for disqualification.

II. Application of the Relevant Standards Leads This Judge to the Conclusion That He Should Not Disqualify Himself from Presiding Over the Case.

“Judicial impartiality is a ‘fundamental principle of the administration of justice.’”¹² To ensure impartiality of judicial officers, specific instances where a judge should disqualify himself or herself have been codified in the Code of Judicial Conduct.¹³ Petitioners’ Motion implicitly relies upon two rules from the Code of Judicial Conduct in requesting this judge’s disqualification: Rule 1.2, which

⁹ *Desmond*, 2011 WL 91984, at *9 (quoting *Blizzard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir.1979)).

¹⁰ *Reeder*, 2006 WL 510067, at *17.

¹¹ *Id.* at *17 n.86 (quoting *United States v. Snyder*, 235 F.3d 42, 46 (1st Cir. 2000)).

¹² *Jones v. State*, 940 A.2d 1, 17 (Del. 2007) (quoting *Los*, 595 A.2d at 383).

¹³ *See* Code of Judicial Conduct Canon 2 § 2.11 (setting forth specific instances when a judge should disqualify himself or herself).

requires a judge to act in a manner promoting public confidence in the impartiality of the judiciary, and Rule 2.11, which calls for a judge’s recusal where the judge’s impartiality may reasonably be questioned.¹⁴ The catch-all provision of Rule 2.11—“A judge should disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where . . . [the] judge has a personal bias or prejudice concerning a party”¹⁵—requires a two-step analysis established by the Delaware Supreme Court in *Los*. Delaware courts continue to apply the *Los* test when deciding motions to recuse.¹⁶

A. The *Los* Test.

Under *Los*, “[t]he first step requires the judge to be subjectively satisfied that she [or he] can proceed to hear the cause free of bias or prejudice.”¹⁷ Even if the judge determines that he or she may subjectively hear the case free of bias or prejudice, “the second step requires the judge to examine objectively whether the circumstances require recusal because there is an appearance of bias sufficient to cause doubt as to the judge’s impartiality.”¹⁸ “Under the objective portion of the test, for the judge to be disqualified, ‘the alleged bias or prejudice of the judge “must stem from an *extrajudicial source* and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.’”¹⁹

A number of courts have held that a judge’s prior representation of a party while the judge was an attorney does not *per se* disqualify the judge from presiding over a

¹⁴ *Id.* at 1 § 1.2, 2 § 2.11(A).

¹⁵ *Id.* at 2 § 2.11(A).

¹⁶ *See, e.g., Swan v. State*, 2021 WL 776744, at *26-27 (Del. Mar. 1, 2021) (applying the *Los* analysis in reviewing a trial judge’s decision not to recuse himself).

¹⁷ *Gattis v. State*, 955 A.2d 1276, 1281 (Del. 2008) (quoting *Jones*, 940 A.2d at 18).

¹⁸ *Id.*

¹⁹ *Id.* at 1282 (emphasis in original) (quoting *Los*, 595 A.2d at 384 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966))).

matter where the party later comes before the judge regarding an unrelated matter.²⁰ To support a request for disqualification, a petitioner must “specifically allege[] facts clearly showing that the trial judge should be disqualified.”²¹ In *Weber v. State*,²² the Delaware Supreme Court refused to find that disqualification by the trial judge was required where the defendant “did not point to any incident . . . to support a claim of bias.”²³ “In the absence of genuine bias, a litigant should not be permitted to ‘judge shop’ through the disqualification process.”²⁴

B. Application of the *Los* Test to This Case.

1. Subjective Analysis

Under the first prong of the *Los* test, this judge has no feelings of bias or prejudice for or against either party. This judge unequivocally believes that he can hear the case in a fair and impartial manner and will, inherent in his duty to sit, decide all submissions to the Court in accordance with the applicable legal standards. Although this judge represented Respondent prior to joining the bench, he has no prior knowledge of the issues that have brought this matter before the Court. Indeed,

²⁰ See, e.g., *Bass v. State*, 1987 WL 65059, at *1 (Del. 1987) (“[A] claim of disqualification must be based upon more than the mere fact that a judge had previously represented a defendant”); *In the Matter of the Petition of Fred Tyson for a Writ of Mandamus*, Del.Supr., No. 141, 1984, at 3-4 (Del. Aug. 15, 1984) (ORDER) (finding that disqualification was not required even though the judge had previously represented the defendant as a public defender in a similar matter); *Stigars v. State*, 577 A.2d 755 (TABLE), 1990 WL 43491, at *1 (Del. 1990) (“[T]he mere fact that a lawyer prosecuted the defendant many years ago in an unrelated case is not a basis for disqualification.”); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir.), cert. denied, 359 U.S. 992 (1959) (finding recusal unwarranted even though the judge had represented the defendant in unrelated matters three or four years prior); *Jenkins v. Bordenkircher*, 611 F.2d 162, 166 (6th Cir. 1979) (finding recusal of the judge unwarranted even though that judge had prosecuted the same defendant when he was a prosecutor five to 13 years prior to the trial).

²¹ *Matter of Abdul-Akbar*, 567 A.2d 418 (TABLE), 1989 WL 136978, at *2 (Del. 1989).

²² 547 A.2d 948 (Del. 1988).

²³ *Id.* at 952.

²⁴ *Los*, 595 A.2d at 385.

the only knowledge this judge has regarding this matter is that obtained from the submissions to the Court as part of Petitioners' appeal. Since Petitioners have failed to identify any specific facts that would interfere with this judge's ability to decide this case in a fair and impartial manner, the Court finds that the first part of the *Los* analysis does not require disqualification.

2. Objective Analysis

Under the second prong of the *Los* test, the Court does not find any objective appearance of bias that would require this judge's disqualification from hearing this case. None of the specific situations listed in Rule 2.11 of the Code of Judicial Conduct that call for a judge's recusal are applicable to this judge. Rule 2.11(A)(4) calls for a judge's recusal where the judge (1) "served as a lawyer in the matter in controversy," (2) "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter," (3) "the judge or such lawyer has been a material witness concerning" the matter, or (4) "the judge was associated in the practice of law within the preceding year with a law firm or lawyer acting as counsel in the proceeding."²⁵ None of these scenarios apply.

Moreover, the Delaware Supreme Court has held that a judge's previous representation of a party as an attorney does not automatically disqualify the judge from hearing a matter that later comes before him or her.²⁶ Petitioners make the conclusory statement that there is an appearance of bias or prejudice based upon the sole fact that this judge previously represented Respondent, but that fact alone does not warrant disqualification. Petitioners have not pointed to any specific facts, as required, that would cause a reasonable observer to believe that this judge would

²⁵ Code of Judicial Conduct Canon 2 § 2.11(A)(4).

²⁶ See cases cited *supra* note 20.

have any bias or prejudice towards or against either party in this action or that his impartiality might reasonably be questioned.

This judge assumed his current position on June 1, 2017. Prior to that date, his representation of Respondent ceased. Petitioners brought this action before the Court on January 19, 2021, and the case was reassigned to this judge on April 19, 2021, almost four years after he ceased his representation of Respondent. These facts require the conclusion that no reasonable person could question this judge's impartiality.

As the Delaware Supreme Court has determined, there are compelling policy reasons for a judge's refusal to disqualify himself or herself without a basis for doing so. If this judge were to disqualify himself in the absence of either genuine or apparent bias, he would impose upon his colleagues an unnecessary burden. Moreover, an unwarranted disqualification would encourage litigants to "judge shop," which would hamper the administration of justice.

CONCLUSION

Petitioners have not presented any facts supporting their proposition that this judge's impartiality "might reasonably be questioned."²⁷ Furthermore, given that he has a duty to sit pursuant to Rule 2.7 of the Code of Judicial Conduct unless disqualified, this judge must preside over this matter.

WHEREFORE, for the reasons stated above, Petitioners' Motion for Disqualification is **DENIED**.

IT IS SO ORDERED.

/s/ Noel Eason Primos
Judge

²⁷ Code of Judicial Conduct Canon 2 § 2.11(A).