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February 7, 2013

Hon. John A. Michalek, JSC
Supreme Court Chambers
25 Delaware Avenue, 5th Floor
Buffalo, New York 14202-2721

Re: Affinity Elmwood Gateway Properties LLC v. AJC Properties LLC et al.
Sup. Ct., Erie Co. I 2011-3883 (Hon. John A. Michalek)

Dear Justice Michalek:

I am writing, with all due respect, regarding the following statement made by the Court during its February 1, 2013 colloquy:

> ...
> *But we'll stop here because there's been some inference against my – one of my court clerks concerning an ex parte communication. Now, again, this is another –* ***Court resents the tone and the inference thereby. As counsel all know, counsel contacted one of my clerks, it's not ex-parte. Counsel knows that.*** *And if counsel asks my court clerk for a conference, this Court has made it clear by its own rules that it will easily and liberally give those… So, again, this inference or the intrusion or whatever that this is somehow ex parte and improper is rejected.* [Emphasis added.]
> ...

The above quote, and, in particular, the words in bold print, were spoken in a harsh, if not hostile, manner. For that reason, I wish to provide the Court with my perspective regarding both the "ex parte communications" between opposing counsel, Brendan H. Little, Esq., and Court Attorney Anne Rutland, and the Court's apparent displeasure with me:

(1) An ex parte conversation did take place. Mr. Little's January 25, 2013 letter to the Court states the following:

> *… Pursuant to my conversation with the Court's confidential law clerk, Anne Rutland, Esq., I respectfully request that the parties meet on February 21, 2013, the return date for Plaintiff's motion to strike Defendants' errata sheets, to settle the Order.*

I was not present when Mr. Little and Ms. Rutland had the conversation referred to in his letter. It is my understanding that an "ex parte communication" is a conversation

between one party and a judicial officer without the other party being present. Therefore, contrary to the Court's statement, I believed when I spoke the words in court, and I continue to believe, that the communication was, in fact, "ex parte."

(2) The question, as I understand the ethical obligation, is whether the ex parte communication was proper, under the circumstances. I certainly am aware that a communication by one lawyer to the court, for scheduling purposes, is not, in and of itself, improper. As reflected at 22 NYCRR 100.3(B)(6)(a) of the rules of judicial conduct, the propriety of a conversation with the court in the absence of the other party's lawyer depends on the answers to the following questions:

> *(a) Does the communication "affect a substantial right of any party"?*
>
> *(b) Does the judge/court personnel "reasonably believe that no party will gain a procedural or tactical advantage as a result of the ex parte communication"?*
>
> *(c) Did the judge/court personnel "make provision for prompt notification of other parties or their lawyers of the substance of the ex parte communication and allow an opportunity to respond"?*

[See 22 NYCRR 100.3(B)(6)(a).]

(3) Had the Court inquired into the reasons that I had "inferred" that the ex parte telephone conversation was improper, I would have provided the following explanation:

(a) To delay settling the order implementing the Court's 1/8/13 Memorandum Decision (a ruling that enjoins my speech and concludes that I have somehow violated a lawyer's responsibilities) directly and adversely affects my rights to promptly take an appeal from the order, and/or to file a motion to reargue and/or renew. I cannot take any of these steps until the order is finalized, entered, and served. As a result of the Court's 11/20/12 TRO, and its two subsequent extensions, my speech has already been enjoined for more than ten (10) weeks.

(b) Both Mr. Little and Ms. Rutland were well aware of the fact that I wished to expedite the settlement process. Mr. Little sent me his proposed order on 1/11/13. On the following day, January 12, 2013, I sent the Court and Mr. Little defendants' proposed order, and described the requested changes in a transmittal letter.

(c) On January 15, 2012, Ms. Rutland sent the following email message to Mr. Little and me advising the parties to follow the process set forth at 22 NYCRR 202.48(c) if we could not reach agreement:

> *Counsel:*
> *The court ordered Plaintiff to submit an order "on notice to defendants" which, in this part, requires the parties to attempt to settle the form of the order between themselves before sending the dispute to the court to resolve. The parties have followed this*

procedure several times before in this case. Please attempt to do so, and ***if you are unable to agree to a form of order, submit applications to settle the order, on a special term date, under 22 NYCRR 202.48 (c).*** [Emphasis added.]
Thank you.
Anne S. Rutland, Court Attorney

(d) Rather than follow Ms. Rutland's 1/15/13 instructions to use the process set forth at 22 NYCRR 202.48(c), which provides for "notice of settlement" on five-day notice, Mr. Little contacted Ms. Rutland ex parte on or before January 25, 2013. That discussion took place within days of the Court learning of my motion requesting recusal. As a result of that conversation, February 21, 2013 was set as the date for the parties to meet "with the Court and/or Ms. Rutland to settle the Order after the Plaintiff's motion returnable on February 21, 2013."

(e) February 21, 2013 was chosen for the settlement "meeting," without consultation with me, despite the fact that: (a) the parties were scheduled to be before the Court on February 1, 2013, regarding plaintiff's default judgment motion and defendants' disqualification motion; (b) February 14, 2013 is a Special Term date; and, (c) the parties were scheduled for a February 15, 2013 status conference with Ms. Rutland.

(f) I was <u>not</u> promptly notified of the ex parte communications between Ms. Rutland and Mr. Little. On January 30, 2013, at 10:41 AM, I sent an email to Mr. Little, with a "cc" to Ms. Rutland, and asked the following question:

What is the status of the proposed Order regarding the 1/8/13 Memorandum Decision? I have not heard from you since emailing defendants' red-line changes to your 1/17/13 proposed order (with comments in the margin). Have you taken formal steps to settle the order? If you have, I have not received notice of same.

(g) Approximately two hours after I sent the above email, Mr. Little emailed to me a pdf of his 1/25/13 letter to the Court and proposed order, with the following message:

See the attached that was sent to you on 1.25.13.

As I advised Mr. Little earlier this date, my office has never received, by mail or email, the correspondence he states was sent to me on 1/25/13. Note: Ms. Rutland did not respond to my 1/30/13 inquiry, or advise me in any fashion of her ex parte communications with Mr. Little on or before 1/25/13.

(h) Later on the afternoon of 1/30/13, an hour after receiving Mr. Little's email and indication that the settlement "meeting" was delayed until 2/21/13, I sent the following email message to Mr. Little, with a "cc" to Ms. Rutland:

Several quick points:

1. The January 25, 2013 correspondence to Justice Michalek regarding settlement of the proposed order that you indicate was sent to me on January 25, 2013 was never received by my office, either by email or by USPS. Thank you for forwarding it to me today.

2. Once again, you have failed to provide Karen Smith, Esq., with correspondence relating to the 1/8/13 decision.

3. I do not understand why you failed to follow the process set forth at 22 NYCRR 202.48(c) for settling an order, as Ms. Rutland instructed us to do if we could not reach an agreement on the proposed order: "…if you are unable to agree to a form of order, submit applications to settle the order, on a special term date, under 22 NYCRR 202.48 (c).

4. I should have been part of any conversation between you and the Court Attorney regarding the procedure and timetable for settling the order. You undoubtedly realize that defendants are anxious to determine whether to take an appeal, and/or to file a motion to reargue/renew. To delay a settlement conference to February 21, 2013, five weeks after my submission of defendants' proposed order to you, is troubling.

Neither Mr. Little, nor Ms. Rutland, replied to my expression of concern over the delay in addressing the proposed orders, and belief that I should have been a party to the conversation regarding the procedure and timetable for settling the order.

(i) As the Court most likely recalls, I raised the matter of the ex parte communications, not during my initial oral argument, but in response to Mr. Vacco's assertion that I should have taken a prompt appeal to the Fourth Department from the 1/8/13 Memorandum Decision, not waste the Court's time on what he characterized as a "frivolous" and "scurrilous" recusal motion. Failure to finalize the order prevents me from taking that step. To the extent that my tone was less than cordial, it was not directed at the Court, but at Mr. Vacco's posturing, and his colleague questionable actions.

Your Honor, in all frankness, I do not understand the Court's apparent animosity towards me. The Court needlessly admonished me in open court on November 30, 2012, "Do not play games with the Supreme Court Judge on a TRO," when for three dozen years as a lawyer I have consistently taken court orders seriously. On February 1, 2013, the Court did not ask me why I was displeased with a scheduling decision that was made without my knowledge and without prompt notification. Rather than allowing me an opportunity to explain, the Court expressed its resentment towards me in open court, and strongly implied that I was intentionally raising the specter of impropriety when I knew that nothing improper had occurred: "…[I]t's not ex parte. Counsel knows that." In fact, an important decision had been made by the Court Attorney that affects my rights and provides plaintiff a practical advantage without my input and without prompt notification.

What makes the Court's actions towards me most difficult to comprehend is Your Honor's failure to express frustration or resentment towards the attorneys at Lippes Mathias who, in my opinion, have repeatedly shown disrespect towards the judicial process and the Court by reckless disregard of the facts. Here are but a few examples:

1. From November 20, 2012 in chambers, through court appearances on November 30, 2012 and December 14, 2102, opposing counsel led this Court to believe that their client faced grave harm if the drastic remedy of a temporary restraining order was not used to enjoin my communications with Kaleida Health. In fact, email messages between Kaleida and Mark Chason between August 30th and November 16, 2012 clearly show that my communications with Kaleida in no way jeopardized the business relationship between the owner of the Gates Circle hospital site and Chason Affinity. When the existence of the Kaleida-Chason emails was brought to the Court's attention in defendants' disqualification motion, Messrs. Vacco and Little did not bother to acknowledge the discrepancy or to explain to the Court why plaintiff's application for injunctive relief against me lacked an affidavit from the client.

2. Despite the fact that sworn affirmations submitted by opposing counsel in support of plaintiff's motion for injunctive relief never alleged that my communications with Kaleida Health contained false statements, Mr. Vacco stood in open court and accused me of writing "scurrilous, untrue, no-factual-based things." Rather than expressing displeasure with a lawyer makes such a baseless claim against opposing counsel during oral argument, the Court used Mr. Vacco's allegation of falsehood as a springboard to addressing "restraint of libel" in its Memorandum Decision.

3. Without any basis in reality, and despite the fact that my clients have owned their respective homes for between 16 and 62 years and will be directly impacted by a six-story, 200,000-square-foot building adjacent to their backyards, Mr. Cross affirmed under oath in court papers that the answering defendants were not the true parties in interest, and that some unidentified (that is, imaginary) person was in fact paying my legal fees. The Court said nothing to discourage such accusations and such a waste of judicial time and energy.

Thank you for your kind consideration of the matters raised in this correspondence.

Respectfully yours,

Arthur J. Giacalone

cc: Dennis C. Vacco, Esq., Kevin J. Cross, Brendan H. Little, Esq.