

## 'Why Didn't She Recuse Herself'? NY's Top Judge Sided With Her Own Greenberg Traurig Lawyer

At the time the decision came down, Greenberg Traurig was representing the judge in litigation over the court system's decision to force out dozens of older jurists due to a budget cut.

By **Ryan Tarinelli** | April 26, 2021 at 05:07 PM



*Chief Judge Janet DiFiore, left, and Henry "Hank" Greenberg, right. Photos: David Handschuh/NYLJ photo*

Questions are being raised after New York's top judge sided with a nonprofit client represented by prominent Albany lawyer Henry Greenberg in a split 4-3 decision last December.

That vote is now causing a stir because Greenberg was representing Chief Judge Janet DiFiore—in her official capacity—in two separate lawsuits at the time the state's highest court issued the decision.

DiFiore was not being represented by Greenberg in her personal capacity.

Last December, judges on the Court of Appeals handed down a split decision in a case tied to the New York City Zoning Resolution, reversing a decision from a mid-level appeals court.

At the time the decision came down, DiFiore was being represented by Greenberg in litigation over the court system's decision to force out dozens of older judges due to a budget cut.

Despite that connection, DiFiore weighed in on the zoning resolution case and ruled in favor of Jewish Home Lifecare, a nonprofit Greenberg had represented in the case. DiFiore was one of four judges in the majority opinion.

A spokesman for the Court of Appeals did not answer questions from the Law Journal for this story. The official referred to a previous statement that said judges exercise a "personal recusal" if they determine they have a conflict of interest.

### **No Notification?**

Jewish Home Lifecare, which was one of multiple appellants, wanted to build a nursing home on a piece of land in Manhattan, according to court documents in the case.

Dean Heitner, a community resident who opposes the construction of the nursing home, was on the losing end of the ruling and told the Law Journal he was shocked to hear about the connection between DiFiore and Greenberg. Heitner, a retired real estate attorney, said it was "upsetting" to hear and he first learned of the connection this month.

"Why didn't she recuse herself? I don't understand that. I just don't," he said, theorizing that the court would have landed in a 3-3 tie if DiFiore had stepped down from the case.

Heitner said his side thought the case was almost a "slam dunk."

"Then to wind up with this kind of a decision, and then find out that there's this kind of a strange connection is troublesome," he said.

"I don't know what can be done in retrospect after the fact when something like that happens," he said. "I don't know that our case can be reviewed in any way."

Attorney John Low-Ber, who represented a group of community members that opposed the nursing home construction, said he did not know about DiFiore's connection to Greenberg when the

decision was handed down. The chief judge did not notify him of that connection at any time, he said.

Having this information would have allowed him to look into whether it was appropriate for DiFiore to still decide the case, he said.

### **Other Representation**

DiFiore, along with Chief Administrative Judge Lawrence Marks and the court system's Administrative Board, were sued last year after the court system decided to oust dozens of older judges. The judges were denied what's called certification, which allows state judges to continue on the bench after they reach 70 years old.

On Dec. 2, Greenberg started representing DiFiore and the other respondents in two lawsuits over the certification decision, according to court system spokesman Lucian Chalfen.

Greenberg made his first appearance in the certification litigation on Dec. 16, according to Chalfen. Then on Dec. 18, Greenberg argued before a Suffolk County judge while representing DiFiore and the other respondents, court documents show.

The Court of Appeals issued their decision in the zoning resolution case Dec. 17 after hearing arguments weeks before in mid-November.

Greenberg did not argue before the court in the zoning resolution matter, but he had represented Jewish Home Lifecare in the case. Two Court of Appeals briefs identified him as an attorney for the nonprofit and Greenberg's name is listed on the first page of the Dec. 17 decision.

Greenberg works at the international law firm Greenberg Traurig.

The chief judge did not respond to a request for an interview, and did not provide a comment to the Law Journal.

DiFiore is being represented in her official capacity in the certification lawsuits, said Chalfen in a past statement.

The Office of Court Administration's counsel selected Greenberg Traurig after the state attorney general's office declined to represent DiFiore and Marks, Chalfen said in the past statement.

The state attorney general's office had certified that both officials could be represented by private counsel, he reported previously.

Chalfen, in the statement, said payment to Greenberg Traurig "is in accordance with the State Comptroller's fee schedule."

"There is a one-year contract that has been submitted to the Comptroller for approval. And to this point, GT hasn't been paid anything," Chalfen said in a statement provided on April 15.

Gary Spencer, a spokesman for the Court of Appeals, declined to answer questions provided by the Law Journal. Instead, Spencer pointed to a past statement released on April 15.

"The Court of Appeals does not address these matters through 'disclosures.' If judges find they have a conflict of interest in a particular case, they exercise a personal recusal and step off of the case," he said in the past statement. "When they are not recused, they do not discuss whether any potential conflicts were considered."

It's not the first time DiFiore's connection to Greenberg Traurig has raised eyebrows.

Earlier this year, DiFiore did not disclose that she was being represented by Greenberg as two lawyers from Greenberg Traurig appeared before the Court of Appeals for arguments, according to transcripts of the virtual proceedings.

Two attorneys, who were opposing counsel to Greenberg Traurig, told the Law Journal they had no idea of DiFiore's connection to the law firm at the time. The lawyers said they only learned of the connection weeks after the cases had been decided.

Several legal ethics experts said DiFiore should have disclosed that connection in some form.

In response to that article, Chalfen issued a statement on April 15 saying: “When a private law firm represents a judge in his or her official capacity, owing to the fact that the Office of the Attorney General has declined to do so, there is no obligation for the judge to recuse from hearing an unrelated case in which such private law firm appears on behalf of another client.”

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