UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

PAUL S. HUDSON, Case No. 00-11683

Debtor.

WASHINGTON 1993, INC.,

Plaintiff,

-against- Adversary No. 00-90091

PAUL S. HUDSON,

Defendant.

APPEARANCES:

PAUL S. HUDSON, ESQ.
Defendant *Pro Se*
2430 Vineyard Lane
Crofton, Maryland 21114

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South Shore Road
P.O. Box 568
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Richard Corvetti

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION & ORDER

Currently before the court is the motion by Paul S. Hudson for intradistrict transfer or, in the alternative, for recusal of the court in this adversary proceeding, now on remand to the court, and Mr. Hudson's underlying bankruptcy case. Mr. Hudson seeks recusal pursuant to 28 U.S.C. §§ 144, 455(a), 455(b)(1), and 455(b)(3) and intradistrict transfer pursuant to Local Bankruptcy Rule 1073.[1]

The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1), and 157(b)(2)(A).

Mr. Hudson filed a similar "suggestion for recusal" in or about February, 2002 seeking to have the court recuse itself in an adversary proceeding commenced by the Chapter 7 trustee against Mr. Hudson, Paul J. Hudson, William David Hudson, William B. Hudson,

[1]All references herein to a Local Bankruptcy Rule refer to the Local Bankruptcy Rules for the Northern District of New York unless otherwise specified.

as trustee of William David Hudson, an infant, and Stephen Hudson (Adv. No. 01-90322). Mr. Hudson's prior request for recusal was denied by Memorandum-Decision and Order dated March 12, 2002 (the "March 2002 Decision and Order"), which was not appealed and thus, is now a final order.

As the basis for his current motion, Mr. Hudson basically reiterates the same reasons upon which he based his prior "suggestion for recusal." (Hudson Mot. ¶¶ 17-25). For the reasons articulated in the March 2002 Decision and Order, the court declines to transfer this adversary proceeding or the underlying bankruptcy case or to recuse itself based upon the information contained in paragraphs "17" - "25" of the motion.

The court will, however, consider the events referenced by Mr. Hudson in support of his current motion which occurred after the March 2002 Decision and Order. These events are contained in paragraphs "26" - "29" of Mr. Hudson's motion. Familiarity with those allegations is assumed.

A proliferation of litigation has emanated from Mr. Hudson's bankruptcy case. This adversary proceeding and the underlying bankruptcy case have been difficult and protracted. In the adversary complaint, Washington 1993, Inc., a corporation controlled by Richard Corvetti, objected to the dischargeability of certain debts owed by Mr. Hudson pursuant to 11 U.S.C. § 523 (a)(2)(A), (a)(2)(B), (a)(4), and (a)(6) and to Mr. Hudson's discharge pursuant to 11 U.S.C. § 727 (a)(4). The court, by decision and order dated August 21, 2001 (the "August 2001 Decision and Order"), denied Mr. Hudson a discharge pursuant to 11 U.S.C. § 727 (a)(4). Mr. Hudson moved for reconsideration of the affirmance of this court's determination by the United States District Court based in part on an alleged settlement

reached with the bankruptcy trustee. The district court, on reconsideration, determined that the matter should be remanded for further determination. Specifically, the district court indicated:

> The potential settlement of his claims with the bankruptcy Trustee arguably constitutes "new evidence not previously available" to Hudson.
>
> [T]he bankruptcy court should be given the opportunity, in the first instance, to determine whether the settlement involving the Wrongful Death lawsuit affects the determination that the debtor should not be given a discharge.

Paul S. Hudson v. Washington 1993, Inc. and Richard Corvetti, No. 3:01-CV-1473, decision & order at 4 (N.D.N.Y. June 13, 2003), *as referenced in,* No. 3:01-CV-1473 (N.D.N.Y. October 3, 2003).

Argument

Mr. Hudson submits the court's recusal in the adversary proceeding and his bankruptcy case is required because the court's "impartiality might reasonably be questioned." (Hudson Mot. ¶2). In support of this conclusion, Mr. Hudson relies upon: (1) the court's denial of his request that the court order the appellate record in the adversary case be sent down for the court's consideration in connection with the remand ordered by the district court; (2) the belief that the court and the district court may be of opposite opinions with regards to the interplay between settlement and a discharge; and (3) statements and rulings made by the court in the context of judicial proceedings. (*See* Hudson Mot. ¶¶ 28-29). Mr. Hudson submits the statements and rulings he relies upon demonstrate the court's favoritism towards Mr. Corvetti because the court: (1) refused to enforce a 2002 settlement agreement and release between Messrs. Hudson and Corvetti which was approved by the district court (the "Settlement"); (2) encouraged Mr. Corvetti to file a new lawsuit against Mr. Hudson collaterally attacking the Settlement; (3) openly praised Mr. Corvetti and coached him; and (4) granted Mr. Corvetti standing in the remanded adversary proceeding.

Mr. Corvetti argues the motion should be adjourned in the first instance to allow his attorney an opportunity to commence an adversary proceeding for a determination as to whether the Settlement prohibits Mr. Corvetti from appearing in this court in connection with the remanded adversary proceeding. In the alternative, Mr. Corvetti argues that the motion should be denied. Mr. Corvetti asserts denial of the motion is appropriate based upon: (1) res judicata; (2) favoritism cannot be found to exist towards him when the court denied his motion; and (3) judicial economy warrants the adversary proceeding and the

underlying bankruptcy case remaining with the court for adjudication.

Discussion

Prior to addressing the substance of the recusal motion, the court will address the procedural matters raised by Mr. Hudson. Mr. Hudson requests that Mr. Corvetti's opposition to his motion be stricken and rejected. In support of his request, Mr. Hudson argues that because Mr. Corvetti is represented by Kenneth Varley, Esq., of Donohue, Sabo, Varley & Armstrong, P.C., with respect to the remanded adversary proceeding, and Mr. Corvetti is not admitted to the practice of law, he should not be permitted to file pro se opposition to Mr. Hudson's pending motion. Although the court has not been apprised of the details of Mr. Corvetti's retention of Attorney Varley, the court is unaware of anything prohibiting Mr. Corvetti from limiting Mr. Varley's representation to specific aspects of the remanded adversary proceeding. Mr. Corvetti's pro se opposition was signed by him in accordance with Fed. R. Bankr. P. 9011(a). In addition, Attorney Varley, by letter dated January 5, 2004 (Docket entry #124), concurred with the position taken by Mr. Corvetti in opposition to the motion. Mr. Corvetti is also a creditor in Mr. Hudson's underlying case, in which Mr. Hudson also seeks the court's recusal or intradistrict transfer, and Mr. Corvetti continues to represent himself in that capacity in the underlying case.

Mr. Hudson also voices concern over the form of the caption of the adversary proceeding Mr. Corvetti has included in his opposition papers.[2] Mr. Hudson lists Washington 1993, Inc. as "Appellee-Plaintiff," and Richard Corvetti "(as Assignee) claimed

[2]The court notes that both parties have included the district court appeal caption on their papers despite the fact that Mr. Hudson seeks relief from this court in the original adversary proceeding commenced in this court and now on remand.

Appellee." Mr. Corvetti lists only himself as "Appellee." Fed. R. Bankr. P. 7010, which incorporates Fed. R. Civ. P. 10(a), with the exception of the reference to the caption which shall conform to Official Form 16C,[3] governs the form of the caption on pleadings and other papers filed in an adversary proceeding. To the extent Mr. Hudson is arguing Mr.Corvetti has failed to conform his caption to the formal requirements of Fed. R. Bankr. P. 7010, the court will consider the same harmless error pursuant to Fed. R. Civ. P. 61, applicable to bankruptcy proceedings pursuant to Fed. R. Bankr. P. 9005.[4] Thus, the court declines to strike and reject the opposition to the motion filed by Mr. Corvetti.

Intradistrict Transer

Irrespective of case assignment, Local Bankruptcy Rule 1073-1(b) permits any judge "to transfer to another judge within the district any case, contested matter or adversary proceeding." (Local Bankr. R. N.D.N.Y. 1073-1(b)). Mr. Hudson asserts that Local Bankruptcy Rule 1073-1(a) dictates that this adversary proceeding be transferred to Utica because Richard Corvetti, the plaintiff, resides in Hamilton County.[5] While Local Bankruptcy Rule 1073-(a) provides that all cases filed by residents of Hamilton County will

[3]This form requires the caption to identify the bankruptcy court and the case number in addition to the adversary proceeding number.

[4]To the extent Mr. Hudson seeks injunctive or declaratory relief from the court pronouncing that Mr. Corvetti does not have standing to oppose his motion based upon the Settlement, such relief would be improper in the context of Mr. Hudson's motion for recusal or intradistrict transfer because such relief requires the commencement of an adversary proceeding. *See* Fed. R. Bankr. P. 7001.

[5]Local Bankruptcy Rule 1073-1(a) provides that "cases filed by residents of Broome, Cayuga, Chenango, Cortland, Delaware, Hamilton, Herkimer, Lewis, Madison, Oneida, Onondaga, Oswego, Otsego, Tjioga and Tompkins counties will be assigned to the judge sitting in Utica..."

be assigned to the judge sitting in Utica, that Local Rule refers to the original assignment of a bankruptcy case filed in the Northern District of New York. As Mr. Hudson himself points out, both his case and Mr. Corvetti's adversary proceeding were originally filed with the United States Bankruptcy Court for the District of Maryland, Northern District. On or about March 10, 2000, Hon. E. Stephen Derby, United States Bankruptcy Court Judge for the District of Maryland, Northern District, ordered the transfer of Mr. Hudson's case and the adversary proceeding to the Northern District of New York, Albany Division. To the best of the court's knowledge, Judge Derby's decision and order were not appealed by Mr. Hudson.

In addition, Mr. Hudson argues for intradistrict transfer even if recusal is not appropriate due to the fact that the remand puts the court in the position of having to re-examine its own decision. Mr. Hudson argues that "courts have increasingly found that such transfers on remand are appropriate, even when recusal is not necessarily required." (Hudson Mem. ¶ I).

Mr. Hudson's reliance on *In re International Business Machines Corporation*, 45 F. 3d 641 (2d Cir. 1995), is misplaced as it did not involve a remand to a lower court, but the appellate court's inherent supervisory power and statutory reassignment power pursuant to 28 U.S.C. § 2106 and their availability in the exercise of mandamus jurisdiction. While in *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997), the case was reassigned in connection with a remand, it was done so by the appellate court pursuant to its supervisory power under 28 U.S.C. § 2106. The appellate court noted, however, that "[t]he power to reassign pending cases is an extraordinary one;" it is "rarely invoked." *Id.* at 1333 (citing *In re John H. McBryde*, 117 F.3d 208, 228-229 (5th Cir. 1997)). *Simonson v. General Motors Corporation*,

425 F.Supp. 574 (E.D. Pa. 1976), cited by Mr. Hudson, is also not a remand case, but involved a motion to reassign a case because of an alleged appearance of impropriety due to the court's law school intern also being employed as a legal intern by defendant's law firm. The district court held that because of the precautionary steps taken by the court, grounds for disqualification had not been established. *Id.*

Opinions held by judges as a result of what they learned in earlier proceedings are not bias or prejudice requiring recusal. *Liteky v. United States*, 510 U.S. 540, 551 (1994). It is normal and proper for a judge to sit in the same case upon remand and in successive trials involving the same party. *Id*. Accordingly, the court declines to transfer the adversary proceeding or Mr. Hudson's bankruptcy case to Utica merely because the district court has remanded the adversary proceeding, which will require the court to re-examine its August 2001 Decision and Order.

Recusal

Mr. Hudson seeks recusal of the court from the adversary proceeding and his main case pursuant to 28 U.S.C. §§ 144,[6] 455(a), 455(b)(1), and 455(b)(3). All three statutes require the court to recuse itself based upon bias or prejudice. Sections 144 and 455(b) address the problem of actual bias or prejudice and require recusal when the court harbors a personal bias or prejudice for or against one party. *See Apple v. Jewish Hospital & Medical Center*, 829 F.2d 326, 333 (2d Cir. 1987).

Under 28 U.S.C. § 144,[7] only specific allegations of personal bias or prejudice will suffice to disqualify a judge. *O'Regan v. Arbitration Forums, Inc*., 246 F.3d 975, 989 (7th Cir. 2001). A judge must review the facts included in the affidavit for their legal sufficiency and not recuse himself or herself unnecessarily. *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966). The statute has been strictly construed, so as to safeguard the judiciary from frivolous attacks. *Simonson v. General Motors Corp*., 425 F. Supp. at 578.

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[6]There is case law holding that 11 U.S.C. § 144 applies only to district court judges and not to bankruptcy court judges because bankruptcy court judges are subject to recusal only under 28 U.S.C. § 455. *See* Fed. R. Bankr.P. 5004(a); *See also In re Smith*, 317 F.3d 918 (9th Cir. 2002); *In re Erchak*, 180 B.R. 466 (N.D.W.Va. 1994); *In re Celotex Corp*., 137 B.R. 868 (Bankr. M.D. Fla. 1992). Because the impartiality of the court has been questioned, however, the court deems it appropriate to address the merits of Mr. Hudson's allegations.

[7]28 U.S.C. § 144 provides that when a party files an affidavit that the judge in the pending matter "has a personal bias or prejudice either against him or in favor of any adverse party," that judge shall proceed no further in the proceeding, and another judge shall be assigned to the proceeding. 28 U.S.C. § 144. The statute further provides that the affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and it must be accompanied by a certificate of counsel of record stating that the affidavit is made in good faith. *Id.*

Mr. Hudson does not allege any "personal bias or prejudice" on the part of the court. Instead, the motion sets forth facts Mr. Hudson asserts singularly or cumulatively leads one to reasonably question the court's impartiality. As such, the court does not believe Mr. Hudson's allegations are sufficient within the confines of 28 U.S.C. § 144 to require recusal and reassignment.[8]

Section 455(b) of Title 28, applicable to bankruptcy judges by way of Fed. R. Bankr P.5004(a), mandates recusal in certain specific circumstances where partiality is presumed. *Bayless*, 201 F.3d at 126. Section 455(b)(1) provides that a judge shall disqualify himself if he has "a personal bias or prejudice concerning a party." 28 U.S.C.§ 455(b)(1). Recusal under § 455(b)(1) "is required only if actual bias or prejudice is proved by compelling evidence." *O'Regan v. Arbitration Forums, Inc*., 246 F.3d at 988. Because Mr. Hudson has failed to allege any "personal bias of prejudice" on the part of the court, the court finds that recusal in the adversary proceeding and the underlying bankruptcy case is not required under 28 U.S.C.§ 455(b)(1).

Section 455(b)(3) requires disqualification of a judge if he "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b)(3). As the court has had only a judicial

[8]In addition to an affidavit, § 144 requires that the motion to recuse be accompanied by a certificate of counsel of record. 28 U.S.C. § 144. Since Mr. Hudson is acting *pro se*, he is unable to submit such a certificate. Although Mr. Hudson's motion to recuse based upon 28 U.S.C. §144 may be procedurally flawed, because the court found the facts included in Mr. Hudson's motion to be legally insufficient to require disqualification under § 144, it need not address the deficiencies in its form.

role in both the adversary proceeding and the underlying bankruptcy case, it fails to see the applicability of 28 U.S.C. §455(b)(3).

Section 455(a) of Title 28, applicable to bankruptcy judges by way of Fed. R. Bankr. P. 5004(a), provides "[a]ny justice, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C.§455(a). The test for recusal is an objective one which assumes that a reasonable person knows and understands all the relevant facts. *In re Drexel Burnham Lambert, Inc.*, 861 F.3d 1307, 1313 (2d Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). As articulated by the Second Circuit, the inquiry is whether "an objective disinterested observer fully informed of the underlying facts, [would] entertain sufficient doubt that justice would be done absent recusal," or alternatively, whether "a reasonable person, knowing all the facts," would question the judge's impartiality. *United States v. Yousef*, 327 F.3d 56, 169 (2d Cir. 2003)(citation omitted).

While this court's decision not to order the appellate record in the adversary proceeding be transmitted to it may be the subject of its own appeal, it does not suffice for recusal. The district court did not order a new trial or rule that the court made erroneous findings of fact. The sole issue on remand is whether an alleged settlement with the Trustee affects the court's prior denial of Mr. Hudson's discharge.

Mr. Hudson's concern that this court and the district court may be of opposite opinions with regards to the interplay between settlement and a discharge remains to be seen. It is not unusual, however, for lower courts and appellate courts to be of different opinions, hence the appellate process available to litigants.

All of the court's remarks Mr. Hudson refers to were made at judicial hearings held on November 6 and 25, 2003 in connection with Mr. Hudson's second motion on remand, which will be treated as a submitted matter, and Mr. Corvetti's motion to determine creditor's rights and seek sanctions against debtor, which the court denied, without prejudice, because the relief sought required the commencement of an adversary proceeding. (*See* Hudson Mot. ¶ 29). Mr. Hudson fails to point to any facts that show the court's alleged bias or prejudice is derived from an extrajudicial source. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Likety*, *supra* at 555(citation omitted).

As indicated by the Supreme Court:

> [O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.

Id.

The court's statements and rulings relied upon by Mr. Hudson do not demonstrate evidence of deep-seated favoritism or antagonism that would make fair judgment impossible, which is necessary to succeed on a motion for recusal based upon 28 U.S.C. § 455(a). Many of the court's remarks Mr. Hudson refers to go to this court's interpretation of the district court's instructions on remand. If Mr. Hudson disagrees with the court's ultimate decision on the remand, he may utilize the appellate process. Furthermore, a judge on the bench "should not sit as a passive observer who functions solely when called upon by the parties.

Rather, the judge should take an active role, when necessary, to ensure fairness and to conform the proceedings to the law." *Ramirez v. Elgin Pontiac GMC, Inc*., 187 F.Supp.2d 1041, 1049 (N.D. Ill. 2002)(quoting *Jones v. Page*, 76 F.3d 831, 850 (7th Cir. 1996)(citations omitted)).

Contrary to Mr. Hudson's assertion, the court denied Mr. Corvetti's motion to determine his rights (*ie*., his standing) and made no ruling that it would or would not enforce the Settlement, as relief in both instances would require the commencement of an adversary proceeding. *See* Fed. R. Bankr. P. 7001. As to the allegation that the court was encouraging Mr. Corvetti to commence another lawsuit against Mr. Hudson, the court's colloquy with Mr. Corvetti distinguishing between an adversary proceeding and a contested matter was as much for Mr. Hudson's benefit as it was for Mr. Corvetti, as Mr. Hudson also addressed Mr. Corvetti's standing and the enforceability of the Settlement in his second motion on remand.

The court finds that in light of all the facts and circumstances that are known, a reasonable person would not conclude that the court's impartiality could reasonably be questioned under 11 U.S.C. § 455(a). Accordingly, the court declines to transfer this adversary proceeding and the underlying bankruptcy case or to recuse itself from these matters.

Based upon the forging, it is hereby

ORDERED, that the motion shall be and hereby is denied.

Dated:
Albany, NY

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Honorable Robert E. Littlefield, Jr.

United States Bankruptcy Judge